



COURT FILE NUMBER: 2101 05019

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

OT  
COM  
April 26, 2021  
Justice Mah

AND IN THE MATTER OF THE COMPROMISE OR  
ARRANGEMENT OF COALSPUR MINES (OPERATIONS)  
LTD.

DOCUMENT: **BENCH BRIEF OF THE APPLICANTS**

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File Number: 1217428

## PART I - INTRODUCTION

1. This bench brief is filed in support of an application by Coalspur Mines (Operations) Ltd. (“**Coalspur**”, or the “**Applicant**”) for relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”).

2. Coalspur is in need of urgent protection under the CCAA. While Coalspur’s operations have significant value, with Phase I alone having the capacity to produce roughly 6.5 million tonnes of clean coal per year,<sup>1</sup> Coalspur’s ability to conduct its business and generate revenue and liquidity has been devastated by:

- (a) the shutdown of the mine in February 2021 as a result of a permitting issue with the AER, thereby suspending all coal production and cutting off Coalspur’s only source of revenue; and
- (b) the simultaneous crystallization of an approximately \$59.9 million USD hedge obligation to Trafigura Lte. Ltd. (“**Trafigura**”) following the rapid escalation in global coal prices in late 2020, and Trafigura’s subsequent exercise of its right to take title to, and sell, the entirety of Coalspur’s coal inventory.<sup>2</sup>

3. Coalspur urgently requires the protection of the CCAA in order to: (a) stabilize its business and facilitate a restart of the mine for the benefit of all stakeholders; and (b) provide time for it to apply for and conduct a sales and investment solicitation process, identify and assess potential transactions and review other strategic alternatives that may be available to maximize the value of Coalspur for all stakeholders.<sup>3</sup>

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<sup>1</sup> Affidavit of Michael Beyer sworn April 16, 2021 (“**Beyer Affidavit**”) at para 6.

<sup>2</sup> Beyer Affidavit at paras 9-10.

<sup>3</sup> Beyer Affidavit at paras 137-138.

## PART II - FACTS

### A. The Vista Coal Mine Project

4. Coalspur is an Alberta coal development company which owns and operates the Vista Coal Mine Project, located approximately 10 kilometers east of Hinton (the “**Project**” or the “**Vista Coal Mine Project**”).<sup>4</sup> Prior to the opening of the mine, the Vista Coal Mine Project was one of the largest undeveloped coal properties in North America. It is now one of the most significant employers in the Hinton and Edson regions of Alberta, providing full time employment to more than 300 individuals.<sup>5</sup> In a region which has been severely impacted by the suspension of operations or movement to care and maintenance of three adjacent mines between 2014 and 2019 (resulting in a 19% drop in employment opportunities in local communities around the Project), the Vista Coal Mine Project has become an integral part of the local economy.<sup>6</sup>

5. In addition to the direct employment provided by the Vista Coal Mine Project, since inception, Coalspur has invested more than \$700 million CAD in the Project - more than 67% of which has been spent on goods, materials and services provided by Canadian vendors.<sup>7</sup> Coalspur is party to 8 Impact Benefit Agreements (“**IBAs**”) with various First Nation and Métis groups, and has made substantial investments in the local communities that rely upon and are affected by the Vista Coal Mine Project.<sup>8</sup>

### B. The Permit Issue

6. Coalspur operates the Vista Coal Mine Project pursuant to, and in accordance with, numerous licenses, permits, and approvals granted by the AER.<sup>9</sup> Shortly after mine start-up in

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<sup>4</sup> Beyer Affidavit at para 4.

<sup>5</sup> Beyer Affidavit at para 4.

<sup>6</sup> Beyer Affidavit at para 37.

<sup>7</sup> Beyer Affidavit at para 41.

<sup>8</sup> Beyer Affidavit at para 40/.

<sup>9</sup> Beyer Affidavit at para 7.

2019, Coalspur determined that the composition of raw coal feed exceeded the design capacity of the Project's filter process plant and, as a result, an alternate means of processing slurry was required. In February 2020, the AER approved an application by Coalspur to repurpose a mined out pit located within the Phase 1 Project boundary as a tailings cell to store, settle and dewater fine refuse from the Project's preparation plant.<sup>10</sup> The tailings cell was expected to reach its maximum permitted level within 9 to 10 months, at which time, further tailings cells would be required to avoid Project shut down.<sup>11</sup>

7. Accordingly, in June 2020, Coalspur submitted an application to the AER for approval of an additional 8 tailings cells and advised the AER that approval of the application was required by no later than October 2020 for Phase I to remain operational.<sup>12</sup>

8. By late 2020, no approval of the application had been received from the AER and Coalspur was forced to apply on an emergency basis for a temporary permit amendment to allow for the continued flow of slurry from the preparation plant.<sup>13</sup> While the temporary amendment extended the life of the tailings cell by an additional approximately 4 weeks, the situation became increasingly urgent throughout January and, on February 1, 2021, the tailings cell reached its maximum permitted level.<sup>14</sup> Without the AER's approval of Coalspur's application for 8 additional tailings cells (the "**Permit Issue**"), Coalspur was forced to immediately suspend further processing operations at the Project. Shortly thereafter, all mining operations at the Vista Coal Mine Project were suspended and the mine was moved to care and maintenance.<sup>15</sup>

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<sup>10</sup> Beyer Affidavit at para 106.

<sup>11</sup> Beyer Affidavit at para 106.

<sup>12</sup> Beyer Affidavit at para 107.

<sup>13</sup> Beyer Affidavit at para 112.

<sup>14</sup> Beyer Affidavit at paras 113-114.

<sup>15</sup> Beyer Affidavit at paras 114 and 117.

### C. The Trafigura Hedges

9. Trafigura and Coalspur are party to an Amended and Restated Security Agreement, dated May 11, 2020 (the “**Trafigura Purchase Contract**”) pursuant to which Coalspur is obligated to sell and deliver all coal production from the Vista Coal Mine Project to Trafigura at either an index price or at a per tonnage fixed price as agreed between Trafigura and Coalspur.<sup>16</sup> The fixed price option under the Trafigura Purchase Contract is designed to provide Coalspur with a mechanism to minimize its exposure to volatile market fluctuations in the global price of coal by fixing the price of supply for a given period of time, regardless of market trends.<sup>17</sup>

10. Since the Project commenced production in early 2019, the fixed price mechanism under the Trafigura Purchase Contract has served a significant part of Coalspur’s price-risk mitigation strategy.<sup>18</sup>

11. However, commencing in August 2020, in response to various global demand, market, and other factors impacting the price of coal worldwide, the market price of coal began to spike. In August 2020, the market price of coal was approximately \$49.78 USD/tonne.<sup>19</sup> By the last week of December 2020, the market price had climbed by almost 60% to more than \$85.31 USD/tonne.<sup>20</sup>

12. This unprecedented escalation in the price of coal triggered a contractual obligation by Coalspur to post collateral of approximately \$59.9 million USD in favour of Trafigura under various fixed-price, forward coal sales transacted pursuant to the Trafigura Purchase Contract – an obligation which crystallized at the very same time that Coalspur was facing a potential shut down

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<sup>16</sup> Beyer Affidavit at para 43.

<sup>17</sup> Beyer Affidavit at para 118.

<sup>18</sup> Beyer Affidavit at para 119.

<sup>19</sup> Beyer Affidavit at para 120.

<sup>20</sup> Beyer Affidavit at para 120.

of the Project because of the foregoing Permit Issue with the AER.<sup>21</sup> Coalspur's inability to post sufficient cash or letters of credit in favour of Trafigura in respect of the out-of-the-money hedges triggered a cross default under a prepayment agreement between the parties and, by mid-January, Coalspur owed Trafigura more than \$72 million USD.<sup>22</sup>

13. Throughout early January, Trafigura and Coalspur successfully negotiated and finalized a term sheet (the "**Term Sheet**") which, subject to execution of definitive documents, permitted Coalspur to repay all indebtedness to Trafigura over a two-year period.<sup>23</sup> The Term Sheet was viewed by Coalspur as greatly beneficial to the financial and operational well-being of the company as it ensured that by extending Coalspur's payment obligation to Trafigura over a two year period, Coalspur could continue to produce coal and maintain the necessary revenue stream to operate the Project for the benefit of Coalspur and its stakeholders.<sup>24</sup>

14. However, in late January, because the AER had not yet approved Coalspur's tailings cell application, Trafigura advised Coalspur that in light of the imminent shut down of the Project and because ongoing coal shipments were necessary to ensure repayment of amounts under the Term Sheet, Trafigura was no longer prepared to proceed in accordance with the term sheet.<sup>25</sup>

15. Instead, simultaneous with shutdown of the Project, Trafigura exercised its right to take title to, and sell, the entirety of Coalspur's coal inventory.<sup>26</sup>

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<sup>21</sup> Beyer Affidavit at para 121.

<sup>22</sup> Beyer Affidavit at para 59.

<sup>23</sup> Beyer Affidavit at para 11.

<sup>24</sup> Beyer Affidavit at para 124.

<sup>25</sup> Beyer Affidavit at para 125.

<sup>26</sup> Beyer Affidavit at para 126-129.

16. As at April 14, 2021, Trafigura had sold approximately \$51.1 million USD (after accounting for deduction of all costs and expenses incurred by Trafigura) of Coalspur's coal inventory, with one vessel remaining in the preliminary stages of shipping.<sup>27</sup>

**D. Coalspur's Need for Protection under the CCAA**

17. The shutdown of the Project as a result of the Permit Issue in February at the very same time that Trafigura depleted the entirety of Coalspur's inventory and, in turn, its ability to generate revenue to fund its operations, had a sudden and devastating impact on Coalspur. Coalspur found itself with no inventory capable of monetization, little liquidity, and no ability to generate new coal production or revenue streams because of the Project shutdown. What little liquidity remained available to Coalspur was required to fund basic care and maintenance operations at the Project to protect the health and safety of all employees, safeguard the environment, and preserve the Project's assets and infrastructure.<sup>28</sup>

18. As a result of Coalspur's lack of meaningful revenue since January, Coalspur currently faces a significant amount of ageing trade payables and declining liquidity to maintain care and maintenance operations at the Vista Coal Mine Project.<sup>29</sup> Coalspur only has sufficient liquidity to allow it to maintain the Project on care and maintenance until the week of June 4, 2021.<sup>30</sup>

19. On April 8, 2021, the AER issued the required approvals for construction and operation of additional tailings cells and, on April 12, 2021, Coalspur received the necessary licenses to resume operations at the Vista Coal Mine Project.<sup>31</sup> Notwithstanding the issuance of such approvals,

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<sup>27</sup> Beyer Affidavit at para 62.

<sup>28</sup> Beyer Affidavit at para 13.

<sup>29</sup> Beyer Affidavit at para 136.

<sup>30</sup> Beyer Affidavit at para 136.

<sup>31</sup> Beyer Affidavit at para 26.

Coalspur lacks sufficient funding to restart the Project and begin producing coal because of the depletion of its coal inventory and the loss of all revenue since January 2021.<sup>32</sup>

20. While Coalspur has canvassed numerous third parties for financing sufficient to facilitate restart of the Project and initial operations until such time as the Project becomes self-funding through the sale of coal production (approximately 2 months after mine start-up), Coalspur has been unsuccessful in securing such liquidity.<sup>33</sup> Third parties have been reluctant to advance financing to a project like the Vista Coal Mine Project in the early stages of development (with all associated risks of a start-up project), in addition to general reticence within the financial industry to fund thermal coal development projects due to environmental, social and governance concerns.<sup>34</sup>

21. It is imperative that Coalspur obtain protection under the CCAA to stabilize its operations and obtain interim financing to allow the Project to restart and to fund initial operating costs. CCAA protection will enable Coalspur to undertake a restructuring for the benefit of all stakeholders including, importantly, the more than 300 employees in northern Alberta which depend on the Project for their livelihood, and the First Nation and Métis communities that have executed IBAs with Coalspur. Given a reasonable period to advance its restructuring efforts, with the protections afforded by the CCAA, Coalspur's management is optimistic that the overall value of Coalspur's business will likely be enhanced to the benefit of its stakeholders.<sup>35</sup>

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<sup>32</sup> Beyer Affidavit at para 101.

<sup>33</sup> Beyer Affidavit at paras 131-132.

<sup>34</sup> Beyer Affidavit at para 132.

<sup>35</sup> Beyer Affidavit at para 138.



### PART III - LAW AND ARGUMENT

#### A. Coalspur Meets the Criteria for CCAA Protection

22. This Court is empowered to grant CCAA protection to a “debtor company” (a company having assets or doing business in Canada) where the total claims against the debtor company exceed \$5 million. A “debtor company” is defined in section 2 of the CCAA to mean, *inter alia*, a company that is insolvent.<sup>36</sup> Whether a company is insolvent is determined by reference to the three disjunctive tests for an “insolvent person” in the *Bankruptcy and Insolvency Act*:<sup>37</sup>

... “insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

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

23. Jurisprudence establishes that the concept of insolvency under the CCAA should be given a broad and flexible meaning in order to advance the restructuring objectives of the CCAA. Pursuant to these objectives, a debtor company will be “insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.” As Farley J. noted in *Stelco*:<sup>38</sup>

I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that

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<sup>36</sup> CCAA, ss. 2 and 3 [TAB 1].

<sup>37</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s. 2(1) (“BIA”). [TAB 2]; *Re Stelco*, [2004] O.J. No. 1257 (SCJ), leave to appeal to ONCA ref’d, [2004] O.J. No. 1903, leave to appeal to SCC ref’d, [2004] S.C.C.A. No. 336 at paras 21-22 (“*Stelco*”). [TAB 3]

<sup>38</sup> *Stelco* at paras 25-26. [TAB 3]

in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on “rescues” as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

24. Coalspur meets the definition of “insolvent person” established in the BIA and the expanded definition of “insolvent” endorsed by Farley J. in *Stelco*. Coalspur has claims against it in excess of \$5 million CAD which include, but are not limited to, its indebtedness to Cline Trust Company LLC (“CTC”) in the amount of \$373,899,383.64 CAD.<sup>39</sup>

25. Moreover, Coalspur is, or imminently will be, unable to meet its obligations generally as they come due. Coalspur has been starved of revenue since early January 2021 due to the shutdown of the Project and the exercise by Trafigura of its right to take title to, and sell, the entirety of Coalspur’s coal inventory. Coalspur currently face increasing ageing payables to trade creditors in the amount of \$53,542,605.55 CAD (as at April 14, 2021).<sup>40</sup>

26. Coalspur meets the criteria for protection under the CCAA.

**B. An Initial Order Under the CCAA Should be Granted**

27. Section 11 of the CCAA empowers this Court with broad discretion to “make any order that it considers appropriate in the circumstances”, subject only to restrictions provided in the CCAA. Section 11.001 of the CCAA requires that any relief under section 11 sought during the initial stay period must be “reasonably necessary for the continued operation of the debtor company in the ordinary course of business” during the initial ten-day stay period.<sup>41</sup>

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<sup>39</sup> Beyer Affidavit at para 141.

<sup>40</sup> Beyer Affidavit at paras 94 and 141.

<sup>41</sup> CCAA, s. 11 and 11.001. [TAB 1]

28. Pursuant to section 11.02 of the CCAA, the Court may make an order staying proceedings for not more than 10 days:<sup>42</sup>

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

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

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

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

29. Section 11.02(3) of the CCAA provides that the Court may not make an order staying proceedings unless the applicant satisfies the Court that circumstances exist which make the order appropriate.<sup>43</sup>

30. An Initial Order is appropriate here. Coalspur is a viable coal producer with a strong reputation, a proven revenue stream, and a major coal project which has a decade of projected life going forward if production can be restarted.<sup>44</sup> Moreover, Coalspur's liquidity crisis was the unique result of a singular concatenation of events not likely to reoccur. Coalspur's fundamental business remains strong and likely to emerge with an enhanced value proposition from insolvency protection. This business – the operation and exploitation of the Vista Coal Mine Project – promises to provide employment for hundreds of persons in an economically vulnerable area of Alberta for years to come.

31. These are precisely the circumstances for which the restructuring objectives of the CCAA were conceived: a company facing a “sudden, unexpected liquidity crisis, brought on by the actions

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<sup>42</sup> CCAA, s. 11.02. [TAB 1]

<sup>43</sup> CCAA, s. 11.02(3). [TAB 1]

<sup>44</sup> Beyer Affidavit at para 138.

of others”.<sup>45</sup> If Coalspur has access to the “breathing space” provided by a CCAA stay, and the opportunity for a capital infusion through the restructuring process, every indication points to Coalspur emerging from CCAA protection as a viable enterprise. Conversely, without CCAA protection, Coalspur is unable to meet its obligations as they come due and will be unable to resume normal business operations. Much value would be lost, both in terms of wasted capital and lost employment opportunities, if an initial order was not granted and Coalspur was forced into liquidation.

32. Coalspur’s urgent need for CCAA protection falls squarely within the underlying policy intent of the CCAA: to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As the majority of the Supreme Court of Canada explained in *Century Services Inc. v. Canada (Attorney General)*:<sup>46</sup>

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

33. Coalspur has complied with section 11.001 of the CCAA by limiting the relief sought on this application only to that which is “reasonably necessary” for Coalspur’s continued operations during the initial ten-day stay period.<sup>47</sup>

### **C. The Monitor Should be Appointed**

34. Pursuant to section 11.7 of the CCAA, the Court is required to appoint a person to monitor the business and financial affairs of a debtor company at the same time that an initial order

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<sup>45</sup> *Re Just Energy Corp.*, 2021 ONSC 1793 (“**JustEnergy**”) at para 7. [TAB 4]

<sup>46</sup> *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 15. [TAB 5]

<sup>47</sup> CCAA, s. 11.001. [TAB 1]

is made under the CCAA.<sup>48</sup> Coalspur seeks the appointment of FTI Consulting Canada Inc. (“FTI”) as monitor in these proceedings (in such capacity, the “**Monitor**”). FTI has consented to act as Monitor of Coalspur, subject to Court approval.<sup>49</sup>

#### **D. The Administration Charge Should be Granted**

35. As noted above, FTI has consented to act as Monitor in these proceedings to provide supervision, monitoring and to generally assist Coalspur with its restructuring efforts, including the potential preparation of a CCAA plan to be put to Coalspur’s creditors pursuant to the terms of the proposed Initial Order and the statutory provisions of the CCAA.<sup>50</sup>

36. The Monitor, counsel for the Monitor, counsel for CTC, and Coalspur’s counsel will be essential to Coalspur’s restructuring efforts. They are prepared to provide or continue to provide professional services to Coalspur if they are protected by a first-ranking priority charge (the “**Administration Charge**”) over Coalspur’s assets.<sup>51</sup>

37. Section 11.52 of the CCAA gives this Court the jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts.<sup>52</sup> The proposed Initial Order creates a first-ranking Administration Charge up to a maximum of \$250,000 over the Property of the Coalspur to secure the fees and disbursements of the Monitor, its counsel, counsel for CTC, and Coalspur’s counsel.<sup>53</sup> Coalspur believes that this Administration Charge is fair and reasonable given the size and complexity of Coalspur’s business and will provide the level of

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<sup>48</sup> CCAA, s. 11.7. [TAB 1]

<sup>49</sup> Beyer Affidavit at para 146.

<sup>50</sup> Beyer Affidavit at para 147.

<sup>51</sup> Beyer Affidavit at para 148.

<sup>52</sup> CCAA, s. 11.52. [TAB 1]

<sup>53</sup> Beyer Affidavit at paras 148-149.

appropriate protection for the payment of Coalspur's, the Monitor's and CTC's essential professional services during the initial ten (10) day stay period.

38. The Administration Charge is appropriately sized to reflect the beneficiaries' needs during the initial ten-day stay period. Coalspur intends to apply for an increase of the Administration Charge to \$500,000 CAD at the comeback application.<sup>54</sup>

39. In addition to the Administration Charge, Coalspur expects to apply for a Directors' and Officers' Charge at the hearing of the comeback application. As discussed further below, Coalspur also intends to apply for an Interim Financing Charge as soon as such financing is secured and finalized.<sup>55</sup>

#### **E. DIP Financing Should be Approved when Sought**

40. While Coalspur has not sought approval of interim financing and a DIP Charge at this time, it is diligently working to finalize such financing.<sup>56</sup> Coalspur is hopeful that it will be in a position to seek approval of interim financing in an amount sufficient for the continued operation of Coalspur in the ordinary course of business (including restart and operation of the Vista Coal Mine Project, the sole and ordinary business of Coalspur) at the hearing of its Originating Application for relief under the CCAA.

41. In the event that Coalspur is in a position to apply for such relief, it: (a) only intends to seek approval of interim financing draws in an amount sufficient to fund Coalspur's ordinary course of business (including restart and operation of the Project) during the initial 10-day period; and (b) will file an Amended Originating Application and a supplemental affidavit in support of

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<sup>54</sup> Beyer Affidavit at para 149.

<sup>55</sup> Beyer Affidavit at para 150.

<sup>56</sup> Beyer Affidavit at para 145.

such relief. Accordingly, Coalspur provides the below discussion regarding the jurisdiction and appropriateness of this Court granting interim financing at the initial application in anticipation of such Amended Originating Application.

42. Section 11.2 of the CCAA gives the Court the statutory authority to grant a DIP financing charge. The Court may also make an order, on notice to secured creditors who are likely to be affected by the security, granting a priority charge to the DIP provider over the debtor's property. The security or charge may not secure a pre-filing obligation.<sup>57</sup>

43. Under the recent CCAA amendments, when an application for interim financing is made at the same time as an initial application, the applicant must satisfy the court that the terms of the loan are "limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period [i.e. the Initial Stay Period]."<sup>58</sup> These recent amendments substantially codify principles that have previously been expressed in CCAA case law.<sup>59</sup>

44. The recent amendments do not preclude DIP financing and a related DIP charge from being approved during the Initial Stay Period, as long as such amounts are required in order to "keep the lights on" during this time period. Several CCAA courts have granted applications for interim financing at the time of the initial order since this amendment came into force.<sup>60</sup>

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<sup>57</sup> CCAA, s. 11.2(1). [TAB 1]

<sup>58</sup> CCAA, s. 11.2(5). [TAB 1]

<sup>59</sup> See, for example, *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para 24. [TAB 6]

<sup>60</sup> See for example *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234, at paras 73 to 90 [TAB 7]; *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586, at para 2 [TAB 8]; *JustEnergy*, at paras 7 and 71. [TAB 4]

45. Section 11.2(4) of the CCAA lists the factors to be considered by the Court in deciding whether to approve DIP financing and grant a DIP financing charge. These factors favour the requested relief.

46. Coalspur's sole source of revenue is the Vista Coal Mine Project. Due to the severe and sudden financial challenges faced by Coalspur with shutdown of the Project in February 2021 and the simultaneous depletion of the entirety of its coal inventory, Coalspur has been unable to operate in the ordinary course of its business since February 1, 2021 (the date processing operations at the Project were suspended).

47. Coalspur has now received the necessary approvals and licenses from the AER to restart the Project, commence coal production and, in turn, begin generating revenue in the normal course of business for the benefit of the company and its stakeholders. However, Coalspur urgently requires access to financing in order to restart the mine, resume such ordinary course business operations, and restructure its business. Absent such financing, Coalspur will be forced to maintain the Project on care and maintenance.

48. DIP financing will be ordered where the benefits of financing to all stakeholders outweigh the potential prejudice to some creditors.<sup>61</sup> Here, it is in the interest of all creditors and other stakeholders that Coalspur restart operations at the Project as soon as possible. Unless Coalspur recommences operations in the normal course of business, the company is nothing more than a "melting ice cube". It will maintain care and maintenance operations at the Project until the weeks of June 4, 2021, at which time it will simply run out of funds. It is to the benefit of all that operations resume and revenue generation recommence.

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<sup>61</sup> *Re AbitibiBowater Inc*, 2009 QCCS 6453 at para 16. [TAB 9]



49. Coalspur is diligently working to finalize interim financing and is in the late stages of negotiation with a related party for a DIP financing commitment (the “**DIP Facility**”). The DIP Facility is proposed to be secured by a Court-ordered priority charge (the “**DIP Lenders Charge**”) over Coalspur’s property, which will have priority over all other security interests, charges and liens, except the Administration Charge and, if granted at the comeback application, the Directors’ and Officers’ Charge. It will not secure any pre-filing amounts.

50. The funds available under the DIP Facility will be used to meet Coalspur’s funding requirements during the CCAA proceedings, in accordance with amended cash-flow statements incorporating restart and operation of the Project (which, as noted above, will be appended to a supplemental affidavit to be filed by Coalspur in the event it is in a position to seek the relief outlined in this section). Coalspur, with the assistance of the Monitor, has sized the DIP Facility to address Coalspur’s immediate and urgent liquidity needs over the first ten days of this proceeding. Approval of subsequent draws under the DIP Facility necessary to finance Coalspur’s operations following the initial stay period will be sought at the hearing of the comeback application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19<sup>th</sup> day of April, 2021**



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Counsel for the Applicants

**TABLE OF AUTHORITIES**

<b>TAB</b>	<b>AUTHORITY</b>
1.	<i>Companies' Creditors Arrangement Act</i> , RSC 1986, c C-36
2.	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3
3.	<i>Re Stelco</i> , [2004] O.J. No. 1257 (SCJ), leave to appeal to ONCA ref'd, [2004] O.J. No. 1903, leave to appeal to SCC ref'd, [2004] S.C.C.A. No. 336
4.	<i>Re Just Energy Corp.</i> , 2021 ONSC 179
5.	<i>Century Services Inc. v. Canada (Attorney General)</i> , 2010 SCC 60
6.	<i>Re Royal Oak Mines Inc. (1999)</i> , 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List])
7.	<i>Miniso International Hong Kong Limited v. Migu Investments Inc.</i> , 2019 BCSC 1234
8.	<i>Re Mountain Equipment Co-Operative</i> , 2020 BCSC 1586
9.	<i>Re AbitibiBowater Inc.</i> , 2009 QCCS 6453

# **TAB 1**



CANADA

CONSOLIDATION

CODIFICATION

## Companies' Creditors Arrangement Act

## Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

Current to April 5, 2021

À jour au 5 avril 2021

Last amended on November 1, 2019

Dernière modification le 1 novembre 2019



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

L.R.C., 1985, ch. C-36

## An Act to facilitate compromises and arrangements between companies and their creditors

## Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

### Short Title

### Titre abrégé

#### Short title

**1** This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

#### Titre abrégé

**1** *Loi sur les arrangements avec les créanciers des compagnies*.

S.R., ch. C-25, art. 1.

### Interpretation

### Définitions et application

#### Definitions

**2 (1)** In this Act,

***aircraft objects*** [Repealed, 2012, c. 31, s. 419]

***bargaining agent*** means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

***bond*** includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

***cash-flow statement***, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

***claim*** means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

***collective agreement***, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

#### Définitions

**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.

***accord de transfert de titres pour obtention de crédit***

Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

***actionnaire*** S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

***administrateur*** S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

***agent négociateur*** Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

***biens aéronautiques*** [Abrogée, 2012, ch. 31, art. 419]

domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

### Meaning of *related and dealing at arm's length*

**(2)** For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89.

### Application

**3 (1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

### Affiliated companies

**(2)** For the purposes of this Act,

**(a)** companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

**(b)** two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

**a)** Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

**a.1)** dans la province d'Ontario, la Cour supérieure de justice;

**b)** dans la province de Québec, la Cour supérieure;

**c)** dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

**c.1)** dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

**d)** au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

**valeurs nettes dues à la date de résiliation** La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

### Définition de *personnes liées*

**(2)** Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2<sup>e</sup> suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3, art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37; 2018, ch. 10, art. 89.

### Application

**3 (1)** La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

### Application

**(2)** Pour l'application de la présente loi :

**a)** appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

**b)** sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

### 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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

### Relief reasonably necessary

**11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

### Rights of suppliers

**11.01** No order made under section 11 or 11.02 has the effect of

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

2005, c. 47, s. 128.

### Stays, etc. — initial application

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

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

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

### Pouvoir général du tribunal

**11** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

### Redressements normalement nécessaires

**11.001** L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

### Droits des fournisseurs

**11.01** L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

- a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;
- b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

### Suspension : demande initiale

**11.02 (1)** Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

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

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

#### Stays, etc. — other than initial application

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

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

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

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

#### Burden of proof on application

**(3)** The court shall not make the order unless

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

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

#### Restriction

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

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

#### Stays — directors

**11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

**b)** surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

**c)** interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

#### Suspension : demandes autres qu'initiales

**(2)** Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

**a)** suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

**b)** surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

**c)** interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

#### Preuve

**(3)** Le tribunal ne rend l'ordonnance que si :

**a)** le demandeur le convainc que la mesure est opportune;

**b)** dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

#### Restriction

**(4)** L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

#### Suspension — administrateurs

**11.03 (1)** L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.



before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

### Exception

**(3)** On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

**(a)** a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

**(b)** it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

### Declaration — enforcement of a payment

**(4)** If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

**11.11** [Repealed, 2005, c. 47, s. 128]

### Interim financing

**11.2 (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, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

### Priority — secured creditors

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

### Priority — other orders

**(3)** The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the

organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

### Exception

**(3)** Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

**a)** il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

**b)** l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

### Déclaration : organisme agissant à titre de créancier

**(4)** En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

**11.11** [Abrogé, 2005, ch. 47, art. 128]

### Financement temporaire

**11.2 (1)** Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

### Priorité — créanciers garantis

**(2)** Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

### Priorité — autres ordonnances

**(3)** Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà

consent of the person in whose favour the previous order was made.

### Factors to be considered

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

- (a)** the period during which the company is expected to be subject to proceedings under this Act;
- (b)** how the company's business and financial affairs are to be managed during the proceedings;
- (c)** whether the company's management has the confidence of its major creditors;
- (d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e)** the nature and value of the company's property;
- (f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g)** the monitor's report referred to in paragraph 23(1)(b), if any.

### Additional factor – initial application

**(5)** When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

### Assignment of agreements

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

### Exceptions

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

rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

### Facteurs à prendre en considération

**(4)** Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;
- b)** la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c)** la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d)** la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;
- e)** la nature et la valeur des biens de la compagnie;
- f)** la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;
- g)** le rapport du contrôleur visé à l'alinéa 23(1)b).

### Facteur additionnel : demande initiale

**(5)** Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

### Cessions

**11.3 (1)** Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

### Exceptions

**(2)** Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la

### **Negligence, misconduct or fault**

**(4)** The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

### **Court may order security or charge to cover certain costs**

**11.52 (1)** 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 a 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.

### **Priority**

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

### **Bankruptcy and Insolvency Act matters**

**11.6** Notwithstanding the *Bankruptcy and Insolvency Act*,

- (a)** proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
- (b)** an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

### **Négligence, inconduite ou faute**

**(4)** Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

### **Biens grevés d'une charge ou sûreté pour couvrir certains frais**

**11.52 (1)** Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

- a)** les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;
- b)** ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;
- c)** ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

### **Priorité**

**(2)** Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

### **Lien avec la Loi sur la faillite et l'insolvabilité**

**11.6** Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

- a)** les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;
- b)** le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

### Court to appoint monitor

**11.7 (1)** When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

### Restrictions on who may be monitor

**(2)** Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

**(a)** if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

**(b)** if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

### Court may replace monitor

**(3)** On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

1997, c. 12, s. 124; 2005, c. 47, s. 129.

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

### Nomination du contrôleur

**11.7 (1)** Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

### Personnes qui ne peuvent agir à titre de contrôleur

**(2)** Sauf avec l'autorisation du tribunal et aux conditions qu'il peut fixer, ne peut être nommé pour agir à titre de contrôleur le syndic :

**a)** qui est ou, au cours des deux années précédentes, a été :

(i) administrateur, dirigeant ou employé de la compagnie,

(ii) lié à la compagnie ou à l'un de ses administrateurs ou dirigeants,

(iii) vérificateur, comptable ou conseiller juridique de la compagnie, ou employé ou associé de l'un ou l'autre;

**b)** qui est :

(i) le fondé de pouvoir aux termes d'un acte constitutif d'hypothèque — au sens du *Code civil du Québec* — émanant de la compagnie ou d'une personne liée à celle-ci ou le fiduciaire aux termes d'un acte de fiducie émanant de la compagnie ou d'une personne liée à celle-ci,

(ii) lié au fondé de pouvoir ou au fiduciaire visé au sous-alinéa (i).

### Remplacement du contrôleur

**(3)** Sur demande d'un créancier de la compagnie, le tribunal peut, s'il l'estime indiqué dans les circonstances, remplacer le contrôleur en nommant un autre syndic, au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité*, pour agir à ce titre à l'égard des affaires financières et autres de la compagnie.

1997, ch. 12, art. 124; 2005, ch. 47, art. 129.

# **TAB 2**



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to April 5, 2021

À jour au 5 avril 2021

Last amended on November 1, 2019

Dernière modification le 1 novembre 2019

**income trust** means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

**insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

**legal counsel** means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

**locality of a debtor** means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

**Minister** means the Minister of Industry; (*ministre*)

**net termination value** means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

**official receiver** means an officer appointed under subsection 12(2); (*séquestre officiel*)

(b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

(c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

**localité d'un débiteur** [Abrogée, 2005, ch. 47, art. 2(F)]

**ministre** Le ministre de l'Industrie. (*Minister*)

**moment de la faillite** S'agissant d'une personne, le moment :

- a) soit du prononcé de l'ordonnance de faillite la visant;
- b) soit du dépôt d'une cession de biens la visant;
- c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

**opération sous-évaluée** Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

**ouverture de la faillite** Relativement à une personne, le premier en date des événements suivants à survenir :

- a) le dépôt d'une cession de biens la visant;
- b) le dépôt d'une proposition la visant;
- c) le dépôt d'un avis d'intention par elle;
- d) le dépôt de la première requête en faillite :
  - (i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),
  - (ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;
- e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;
- f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

**personne**

# TAB 3



**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [Re Just Energy Corp.](#) | 2021 ONSC 1793, 2021 CarswellOnt 3724 | (Ont. S.C.J. [Commercial List], Mar 9, 2021)

2004 CarswellOnt 1211  
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH  
RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004

Judgment: March 22, 2004

Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants  
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America  
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America  
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants  
Kevin J. Zych for Informal Committee of Stelco Bondholders  
David R. Byers for CIT  
Kevin McElcheran for GE  
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries  
Lewis Gottheil for CAW Canada and its Local 523  
Virginie Gauthier for Fleet  
H. Whiteley for CIBC  
Gail Rubenstein for FSCO  
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

**Headnote**

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act  
Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 —  
Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not  
"debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps  
involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated  
that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S  
Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further

outside funding — S Inc. had negative equity of \$647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

#### Table of Authorities

##### Cases considered by *Farley J.*:

- A Debtor (No. 64 of 1992), Re* (1993), [1993] 1 W.L.R. 264 (Eng. Ch. Div.) — considered
- Anvil Range Mining Corp., Re* (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered
- Bank of Montreal v. I.M. Krisp Foods Ltd.* (1996), [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33, 148 Sask. R. 135, 134 W.A.C. 135, 6 C.P.C. (4th) 90, 1996 CarswellSask 581 (Sask. C.A.) — considered
- Barsi v. Farcas* (1923), [1924] 1 W.W.R. 707, 2 C.B.R. 299, 18 Sask. L.R. 158, [1924] 1 D.L.R. 1154, 1923 CarswellSask 227 (Sask. C.A.) — referred to
- Bell ExpressVu Ltd. Partnership v. Rex* (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered
- Challmie, Re* (1976), 22 C.B.R. (N.S.) 78, 1976 CarswellBC 63 (B.C. S.C.) — considered
- Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) — considered
- Consolidated Seed Exports Ltd., Re* (1986), 69 B.C.L.R. 273, 62 C.B.R. (N.S.) 156, 1986 CarswellBC 481 (B.C. S.C.) — considered
- Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered
- Davidson v. Douglas* (1868), 15 Gr. 347, 1868 CarswellOnt 167 (Ont. Ch.) — considered
- Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.) — referred to
- Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 1999 CarswellOnt 2213, 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) — considered
- Gagnier, Re* (1950), 30 C.B.R. 74, 1950 CarswellOnt 101 (Ont. S.C.) — considered
- Gardner v. Newton* (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered
- Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered
- Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bkcty.) — considered
- King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) — considered
- Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered
- Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 92 N.S.R. (2d) 283, 75 C.B.R. (N.S.) 317, 45 B.L.R. 14, 237 A.P.R. 283, 1989 CarswellNS 27 (N.S. T.D.) — considered
- Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)*) 101 Nfld. & P.E.I.R. 73, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)*) 321 A.P.R. 73, 1992 CarswellPEI 13 (P.E.I. C.A.) — referred to
- MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29, 1982 CarswellOnt 170 (Ont. Bkcty.) — considered
- New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — referred to
- Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered
- Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]) — considered
- Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 2003 CarswellOnt 5210, 46 C.B.R. (4th) 313, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.*) 180 O.A.C. 158 (Ont. C.A.) — considered
- Optical Recording Laboratories Inc., Re* (1990), 2 C.B.R. (3d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, (sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.*) 1 O.R. (3d) 131, 1990 CarswellOnt 143 (Ont. C.A.) — referred to
- Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209, 1979 CarswellQue 76 (C.S. Que.) — referred to

*PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609, 49 C.P.R. (3d) 456, 64 O.A.C. 274, 15 O.R. (3d) 730, 10 B.L.R. (2d) 109, 1993 CarswellOnt 149 (Ont. C.A.) — considered

*PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 49 C.P.R. (3d) ix, 10 B.L.R. (2d) 244 (note), 104 D.L.R. (4th) vii, 68 O.A.C. 21 (note), 164 N.R. 78 (note), 16 O.R. (3d) xvi (S.C.C.) — referred to

*R. v. Proulx* (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

*Sklar-Pepler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — considered

*Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7, 21 C.B.R. (3d) 25, 1993 CarswellOnt 219 (Ont. Gen. Div.) — considered

*TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92, 1986 CarswellOnt 203 (Ont. S.C.) — referred to

*Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157, 1986 CarswellBC 499 (B.C. S.C.) — referred to

*Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) — referred to

*633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72, 73 O.R. (2d) 774, 1990 CarswellOnt 181 (Ont. S.C.) — considered

**Statutes considered:**

*Bankruptcy Act*, R.S.C. 1970, c. B-3

Generally — referred to

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

Generally — referred to

s. 2(1) "insolvent person" — referred to

s. 2(1) "insolvent person" (a) — considered

s. 2(1) "insolvent person" (b) — considered

s. 2(1) "insolvent person" (c) — considered

s. 43(7) — referred to

s. 121(1) — referred to

s. 121(2) — referred to

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

Generally — referred to

s. 2 "debtor company" — referred to

s. 2 "debtor company" (a) — considered

s. 2 "debtor company" (b) — considered

s. 2 "debtor company" (c) — considered

s. 2 "debtor company" (d) — considered

s. 12 — referred to

s. 12(1) "claim" — referred to

*Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11

Generally — referred to

**Words and phrases considered:**

**debtor company**

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

**Farley J.:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bkcty.) where at p. 45 I observed:

The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bkcty.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no

material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the last gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throes.

14 It seems to me that the phrase "death throes" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least \$5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of \$5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised reorganization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .

To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1) . . .

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

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

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant



would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:

- (a) identification of the debtor's stakeholders and their interests;
- (b) arranging for a process of meaningful communication;
- (c) dealing with immediate relationship issues arising from a CCAA filing;
- (d) sharing information about the issues giving rise to the debtor's need to restructure;
- (e) developing restructuring alternatives; and
- (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to pre-filing liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

With respect to the Business Plan, the average spot market sales price per ton was \$514, and the average contract business sales price per ton was \$599. The Forecast reflects an average spot market sales price per ton of \$575, and average contract business sales price per ton of \$611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that \$145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of \$350 million had increased from \$241 million on November 30, 2003 to \$293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of \$75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis

with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of \$80 million now to a projected loss of \$192 million and cash has gone from a positive \$209 million to a negative \$114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.

37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of [CCAA](#) protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a [CCAA](#) proceeding. See my comments above regarding the [CCAA](#) in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the [BIA](#) tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see [Anvil Range Mining Corp.](#), *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. (1993)*, 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing \$74 million investment. In stating his opinion MacGirr defined solvency as:

- (a) the ability to meet liabilities as they fall due; and
- (b) that assets exceed liabilities.

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a

company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the \$313 - \$363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3<sup>rd</sup> ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and its text *Creditor-Debtor Law in Canada*, 2<sup>nd</sup> ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 [S. 121\(1\) and \(2\) of the BIA](#), which are incorporated by reference in [s. 12 of the CCAA](#), provide in respect to provable claims:

S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton (1916)*, [29 D.L.R. 276](#) (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992)*, *Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re (1950)*, [30 C.B.R. 74](#) (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

Mr. MacAdam argues also that the \$4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.

There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:

A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.

Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different

results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re (1986), 63 C.B.R. (N.S.) 157* (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re (1986), 62 C.B.R. (N.S.) 156* (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10<sup>th</sup> December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .

The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."

71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over \$600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be



generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as \$804.2 million. From that, he deducted the loss for December 2003 - January 2004 of \$17 million to arrive at an equity position of \$787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) \$294 million of future income tax recourse which would need taxable income in the future to realize; (b) \$57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the capitalized deferred debt issue expense of \$3.2 million which is being written off over time and therefore, truly is a "nothing". This totals \$354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be \$433 million.

66 On a windup basis, there would be a pension deficiency of \$1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of \$656 million. If the \$1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of \$198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as \$909.3 million but only \$684 million has been accrued and booked on the financial statements so that there has to be an increased provision of \$225.3 million. These off balance sheet adjustments total \$1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of (\$433 million minus \$1080 million) or *negative* \$647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the \$773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that \$773 million. Lastly, the Union indicated that there should be a \$155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for

that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

*Motion dismissed.*

## APPENDIX

# **TAB 4**

2021 ONSC 1793

Ontario Superior Court of Justice [Commercial List]

Re Just Energy Corp.

2021 CarswellOnt 3724, 2021 ONSC 1793

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants)

Koehnen J.

Heard: March 9, 2021

Judgment: March 9, 2021

Docket: CV-21-00658423-00CL

Counsel: Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt, Justine Erickson, for Applicants

Robert Thornton, Rebecca Kennedy, Rachel Bengino, Puya Fesharaki, Paul Bishop, Jim Robinson, for Proposed Monitor  
Scott Bomhof, for Term Loan Lenders

Heather Meredith, James D. Gage, for Credit Facility Lenders

Ryan Jacobs, Jane Dietrich, Michael Wunder, for DIP Lender

Howard Gorman, for Shell

Robert Kennedy, Kenneth Kraft, for BP

Paul Bishop, Jim Robinson — Proposed Monitor

Brian Schartz, Mary Kogut Brawley (US counsel), for Applicants

Chad Nichols, David Botter (U.S. counsel), for DIP Lender

Kelli Norfleet (U.S. counsel), for BP

Subject: Civil Practice and Procedure; Insolvency

**Headnote**

Bankruptcy and insolvency

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*4519922 Canada Inc., Re* (2015), 2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List])

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Chapter 15

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

Generally

s. 2 "insolvent person"

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44

Generally

s. 192

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

Generally

s. 2(1) "debtor company" (a)

s. 3(1)

s. 11

s. 11.1(1) [en. 1997, c. 12, s. 124]

s. 11.1(2) [en. 1997, c. 12, s. 124]

s. 11.1(3) [en. 1997, c. 12, s. 124]

s. 11.2(1) [en. 2005, c. 47, s. 128]

s. 11.2(4) [en. 2005, c. 47, s. 128]

s. 11.2(5) [en. 2005, c. 47, s. 128]

s. 21

s. 34(1)

s. 34(7)

s. 34(8)

s. 34(9)

s. 45(2)

**Koehnen J.:**

**Overview**

1 The applicant, Just Energy Group Inc. ("Just Energy") seeks protection under *the Companies' Creditors Arrangement Act*, (the "*CCAA*")<sup>1</sup> by way of an initial order. Just Energy is the ultimate parent of the Just Energy group of companies and limited partnerships.

2 Just Energy buys electricity and natural gas from power generators and re-sells it to consumer and commercial customers, usually under long term, fixed price contracts.

3 Unusually intense winter storms in Texas led to a breakdown of equipment used to generate and transmit electricity. This led Texas regulators to impose radical and immediate price increases for the power Just Energy buys. The amounts the regulator imposes must be paid within 2 days, failing which Just Energy could lose its licence and have its customers distributed among other distributors.

4 Those price increases have imposed a serious, temporary liquidity crisis upon Just Energy and others in its position. That liquidity crisis prompts the *CCAA* application. It appears that the price increases may have been imposed by a computer program that misunderstood the data it received as indicating a shortage of power that could be corrected by price increases. Price increase could not lead to more power being generated because the energy shortage was caused by the freezing and consequent breakdown of generating and transmission equipment. Price increases could not remedy that.

5 Just Energy is appealing the price increases and is seeking rebates from the Texas regulator. That process has not been completed.

6 The issue before me today is whether to grant *CCAA* protection for an initial period of 10 days. It is complicated by the fact that Just Energy also seeks a stay of regulatory action in Canada and the United States and seeks what at first blush, is an unusually large amount of debtor in possession financing (the "DIP") of \$125 million for the initial 10 day period.

7 For the reasons set out below, I grant the stay and the DIP. It strikes me that the circumstances facing Just Energy are precisely the sort for which the *CCAA* is appropriate: a sudden, unexpected liquidity crisis, brought on by the action of others, which actions may still be rescinded. Without a stay, Just Energy faces almost certain bankruptcy with a loss of approximately 1,000 jobs and the possibility that a good part of the debt it owes will not be repaid. Those catastrophic consequences may be avoidable if Just Energy succeeds in its appeals of the Texas price increases and if all players are given adequate time to find solutions in a more orderly fashion than the weather crisis allowed them to.

8 A number of critical parties were given notice of today's hearing. Just Energy had consulted widely with them before the hearing. These parties included secured creditors, banks, unsecured term lenders and essential suppliers. Some, including banks and some of the term lenders wish to "reserve their rights" to the comeback hearing. The DIP lender, and two important suppliers (Shell and BP) expressed concern about the reservation of rights. While those who are "reserving their rights" are of course free to do so, as a practical matter, they will be hard-pressed to undo rights that I am affording today in the initial order when the recipients of those rights will be relying on them to their detriment over the next 10 days and when the parties "reserving their rights" have not opposed the relief I am granting.

### **I Background to the Liquidity Crisis**

9 Just Energy Group Inc. ("Just Energy") is incorporated under the *Canada Business Corporations Act*. Its shares are publicly traded on the Toronto Stock Exchange and the New York Stock Exchange. Its registered office is in Toronto, Ontario. Just Energy is primarily a holding company that directly or indirectly owns the other companies in the Just Energy Group, including operating subsidiaries.

10 At the risk of oversimplifying, it sells energy to customers under long-term fixed-price contracts and then purchases energy in the market to fulfil those contracts. It has over 950,000 customers, for the most part in Canada and the United States, approximately 979 full-time employees and debts estimated at \$1.25 billion.

11 In recent years Just Energy has suffered challenges that it has sought to remedy by way of a recapitalization through a plan of arrangement under [section 192 of the CBCA](#) which was approved by this court on September 2, 2020.

12 Just Energy's largest market in the United States is in the state of Texas.

13 Just Energy faces a sudden and unexpected liquidity crisis as a result of an extreme winter storm that hit Texas on February 12, 2021. The storm caused a surge in demand for electrical power. In response, natural gas prices jumped from US \$3.00 to over US \$150/mmBTU on February 12.

14 The demand for power was exacerbated by the fact that much of the Texas electrical grid began to shut down because it was not equipped to deal with cold weather. As a result, critical components necessary for the generation and transmission of electricity froze thereby increasing demand even further on the limited resources that remained available. By the early morning hours of February 15, 2021, the stress on the electrical grid was so great that it came within minutes of a catastrophic failure.

15 In response, the Electric Reliability Council of Texas ("ERCOT") which is responsible for managing the Texas electrical grid ordered transmission operators to implement deep cuts in the form of rotating outages to avoid a complete collapse of the grid.

16 In an apparent effort to stimulate more power production, ERCOT's regulator, the Texas Public Utility Commission ("PUCT") increased the real-time settlement price of power from approximately US \$1,200 per megawatt hour to US \$9,000 per megawatt hour. It appears that this price was set by a computer program that was supposed to adjust prices to help match supply and demand. The increase in price to \$9,000 per megawatt hour did not, however, increase supply because supply was

blocked by frozen equipment. The price remained at \$9,000 MWh for four days. The real time settlement price did not reach \$9,000 even for a single 15 minute interval in all of 2020.

17 In addition, Just Energy pays ERCOT a fee referred to as the Reliability Deployment Ancillary Service Imbalance Revenue Neutrality. It ranges between U.S. \$0 to U.S. \$23,500 per day. Between June 2015 and February 16, 2021, Just Energy paid approximately \$504,000 in respect of this charge. For February 17, 18 and 19, 2021, the aggregate charge was over U.S. \$53 million.

18 ERCOT and PUCT have issued additional invoices of US \$55 billion to wholesale energy purchasers as a result of the storm. Just Energy's share of that is approximately \$250 million.

19 These additional fees pose a severe liquidity challenge for Just Energy because it is required to pay them within two days of being imposed. Although Just Energy has a means to dispute ERCOT's invoices, it must pay them before it can initiate the dispute resolution process. ERCOT has already barred two electricity sellers from the Texas power market for failing to make timely payments arising out of the storm.

20 There is considerable controversy surrounding these fees. PUCT and ERCOT have been subject to severe criticism for their actions. The chair of PUCT and several of ERCOT's board members have resigned. The board of ERCOT terminated the employment of its CEO.

21 Others in the Texas electrical market have also suffered. The largest power generation and transmission cooperative in Texas, Brazos Electric Power Cooperative, filed for Chapter 11 bankruptcy protection on March 1, 2021.

22 Although Just Energy hedges for weather risks, its hedging and pricing models did not, however, take into account the extraordinary power demands caused by the storm and the unprecedented fees that ERCOT and PUCT imposed during and after the storm. By way of example, Just Energy's weather hedges contemplate a 50% increase in power usage above average consumption for the month of February. During the storm, usage was 200% above the previous week.

23 As a result of the additional payments it has had to make to date because of the storm, Just Energy's liquidity facilities are down to approximately \$2.9 million. By the end of day on March 9, 2021 it will have to pay ERCOT an additional US \$96.24 million.

24 On March 22, 2021 Just Energy expects to have to pay \$250,000,000 to counterparties for purchases at inflated prices during the storm and its aftermath. Sudden and unexpected obligations of that magnitude have a cascading effect on Just Energy's financial stability.

25 In response to the dramatically increased charges by ERCOT, companies that have issued surety bonds in Just Energy's favour have demanded \$30 million in additional collateral of which \$10 million remains outstanding. Just Energy was obligated to provide additional collateral because the bonding companies had threatened to cancel their surety bonds if Just Energy did not do so. The cancellation of the bonds may have resulted in the revocation of licenses necessary for the Just Energy group to carry on business in certain jurisdictions.

26 On March 8, 2021, the Just Energy group received another invoice from ERCOT for US \$30.92 million, of which U.S. \$23.89 million will be due by March 10, 2021.

27 While Just Energy had sufficient liquidity to pay the obligations that it expected, it does not have enough liquidity to pay the additional fees charged by ERCOT, PUCT and creditors who have demanded more stringent terms in response to the ERCOT and PUCT fees. If Just Energy does not pay the fees to ERCOT, the latter can simply transfer all of the Just Energy Group's customers in Texas to another service provider. That would be devastating to Just Energy's business.

28 In addition to the foregoing financial stresses, at least three provincial regulators have expressed concern about Just Energy's viability. Two regulators made inquiries as a result of media reports arising from Just Energy's disclosure about its



storm related financial challenges. The third inquiry was prompted by a formal petition by another market participant who seeks to prevent the Just Energy operating entity in Manitoba from selling to new customers.

## II. General Principles

29 At a high level, this is precisely the sort of situation that the *CCAA* is designed for.

30 The policy underlying the *CCAA* is that the best commercial outcomes are achieved when stays of proceedings provide debtors with breathing space during which solvency is restored or a reorganization of liabilities is explored. The *CCAA* offers a flexible mechanism to make it more responsive to the commercial needs of complex reorganizations. The overriding object is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating the business.<sup>2</sup>

31 This will be a complex restructuring. It involves balancing the interests of various types of debt including secured debt, unsecured term loans, working capital provided by service providers, trade debt to commodities providers, ongoing obligations to customers, just shy of 1000 employees all overlaid with varying regulatory requirements of several different Canadian provinces and American states.

32 Today's application invites me to make a number of rulings on a variety of discretionary issues. The Supreme Court of Canada provided guidance about whether and how to exercise that discretionary authority in *Century Services Inc. v. Canada (Attorney General)*<sup>3</sup> It described the guiding principles as follows:

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

33 Three principles emerge from this passage: good faith, diligence and appropriateness. There is no suggestion that Just Energy is not proceeding in good faith or with diligence. I will return to the issue of appropriateness in my review of the individual forms of relief.

34 Today I am being asked for a 10 day stay of proceedings, including a stay of proceedings by regulatory authorities. Such relief is appropriate in the circumstances of this case.

35 To have Just Energy fail would cause severe hardship to 979 employees and their families and cause losses of up to \$1.25 billion for creditors all because

- (i) Just Energy is being forced to pay unprecedented fees that ERCOT and PUCT imposed,
- (ii) which fees Just Energy is challenging,
- (iii) which fees are highly controversial,
- (iv) and which fees were imposed in circumstances where ERCOT's and PUCT's overall management of the crisis has led to the departure of their CEOs and the resignation of several of their board members.

36 In granting the relief I ask myself, as the Supreme Court of Canada did in *Century Services* whether granting a stay will usefully further efforts to achieve the remedial purpose of the *CCAA*. If I apply that principle to the circumstances before me

today, the question becomes whether a 10 day stay will avoid the social and economic losses resulting from the liquidation of Just Energy and give participants a chance to achieve common ground while treating all stakeholders as advantageously and fairly as the circumstances permit.

37 I am satisfied that it does. This is precisely the sort of situation that demands breathing space for all actors involved, including regulators, to begin to sort things out in a calmer, more rational, orderly fashion than has been possible to date.

38 I underscore that in making these comments I am not intending to criticize the Texas regulators. Whether there is anything to be criticized in their conduct or whether their imposition of dramatically higher fees is appropriate will be for another day and another forum. I frame the issue in this way only to demonstrate that there is a genuine issue about the circumstances giving rise to Just Energy's liquidity crisis and a genuine issue about how best to sort out that crisis. Working out those issues in a manner that is as advantageous and fair to all stakeholders as the circumstances permit requires the calm deliberation and reflection that a *CCAA* stay will afford.

### III. Specific Issues

39 This application requires me to address the following specific issues:

- A. Is Ontario the Centre of Main Interest?
- B. Does Just Energy meet the insolvency requirements of the *CCAA*?
- C. Should the DIP be approved?
- D. Should the regulatory actions be stayed?
- E. Should suppliers' charges and pre-filing payments be authorized?
- F. Should set off rights be stayed?
- G. Should administrative and directors and officers charges be granted?
- H. Should noncorporate entities be captured by the stay?
- I. Should third-quarter bonuses be paid?
- J. Should a sealing order be granted?

#### *A. Is Ontario the Centre of Main Interest?*

40 Just Energy has operations primarily in Canada and the United States. It has advised that it intends to commence a recognition proceeding under chapter 15 of the US Bankruptcy Code in Texas. This will ensure that actions taken in relation to US entities and US property or by US regulators are overseen by the US courts.

41 The presence of significant business activities in the United States and the intention to commence a chapter 15 proceeding, engages the principle of the Centre of Main Interest or COMI.

42 [Section 45 \(2\) of the CCAA](#) provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its centre of main interest.

43 The registered office of Just Energy is located in Toronto.

44 Other evidentiary factors can displace the presumption of the registered office being the COMI. These include the location of the debtor's headquarters or head office functions, location of the debtor's management and the location that significant creditors recognize as being the centre of the company's operations.<sup>4</sup>

45 Here, the parent company, Just Energy Group Inc. is a [CBCA](#) corporation. Although it has offices in Mississauga and Houston, its registered office is in Toronto. Its common shares are listed on the Toronto Stock Exchange and the New York Stock Exchange. Just Energy is primarily a holding company although it is also the primary debtor or guarantor on substantially all of the obligations of its subsidiaries, including licenses granted by regulators to members of the Just Energy group. Just Energy has a number of subsidiaries throughout Canada, the United States and India. It has 333 Employees in Canada, 381 in the United States and 265 in India.

46 The following additional factors point to Canada as the COMI:

- a. During the recent [CCAA](#) plan of arrangement which was recognized under Chapter 15 of the US Bankruptcy Code, Canada was recognized as the COMI for the Just Energy group.
- b. The operations of the Just Energy group are directed in part from its head office in Toronto. In particular, decisions relating to the Just Energy's primary business (buying, selling and hedging energy) are primarily made in Canada.
- c. All other members of the Just Energy group report to Just Energy.
- d. Just Energy Corp. (a Canadian subsidiary) acts as a centralized entity providing operational and administrative functions for the Just Energy group as a whole. These functions are performed by Canadian Just Energy employees and include, among other things:
  - i. most enterprise-wide IT services;
  - ii. enterprise-wide support for finance functions, including working capital management, credit management (including credit checks for customers), payment processing, financial reconciliations, managing business expenses, insurance, and taxation;
  - iii. oversight for the legal, regulatory, and compliance functions across the entire Just Energy Group;
  - iv. certain enterprise-wide HR functions, such as designing in-house learning and development programs;
  - v. financial planning and analysis services, including customer enrollment, billing, customer service, and load forecasting;
  - vi. supply planning services, including creating demand models which predict the amount of energy that each entity needs to purchase from suppliers and determining the proper distributor and pipeline necessary to get the gas to the end-consumer; and
  - vii. internal audit services.

47 In the foregoing circumstances I am satisfied Canada is the appropriate COMI.

***B. Does Just Energy Meet the Insolvency Requirements?***

48 There is no doubt that Just Energy meets the threshold required by [s. 3\(1\) of the CCAA](#) that it be a company with liabilities in excess of \$5,000,000.

49 A company must be "insolvent" to obtain protection under the *CCAA*.<sup>5</sup> Although the *CCAA* does not define "insolvent," the definition of insolvent under the *Bankruptcy and Insolvency Act* ("BIA")<sup>6</sup> is usually referred to meet this criteria.<sup>7</sup> Section 2 of the BIA defines "insolvent person" as meaning (i) one who is unable to meet his obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course or

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

50 In addition, Ontario courts have also held that a financially troubled Corporation that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring" should also be considered to be insolvent for purposes of seeking *CCAA* protection.<sup>8</sup>

51 I am satisfied from the affidavit of Michael Carter sworn March 9, 2021 that the liabilities of Just Energy exceed the value of its assets, that it will imminently cease to be able to meet its obligations as they become due, and will run out of liquidity in very short order.

### ***C. Should a Priming DIP be Approved?***

52 Section 11.2(1) of the *CCAA* authorizes the court to approve debtor-in-possession financing (the "DIP") that primes existing debt.

53 However, section 11.2 (5) provides that, on an initial application:

(5) .... no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

54 In other words, I have no jurisdiction to authorize a priming DIP except for that amount of debt and on those terms as are required to see the debtor through the next 10 days.

55 The object is to put those measures in place that are necessary to avoid an immediate liquidation and thereby improve the ability of all players to participate in a more orderly resolution of the company's affairs.<sup>9</sup> The objective is to preserve the status quo the company for those 10 days but to go no further.<sup>10</sup>

56 As Morawetz J. (as he then was) pointed out in para. 27 of *Lydian International Limited*,<sup>11</sup> a 10 day stay allows a number of other steps to occur including notification of parties who could not be consulted before the initial application as well as further consultations with key stakeholders.

57 This is a material limitation on the court's jurisdiction on an initial application. It is a recent amendment introduced by Parliament which restricts the powers the court had previously. Before the amendment, initial applications were granted for a period of 30 days. That length of time often required more substantial DIPS which had the potential to prejudice other creditors without giving those creditors a meaningful opportunity to make submissions to the court. The 10 day rule is designed to correct that issue. I take that as a direct message from Parliament that is meant to be enforced seriously.

58 Even before the amendment limiting initial orders to 10 days, the policy of courts was to limit DIP financing in initial orders to what was required to meet the company's "urgent needs over the sorting out period."<sup>12</sup> As Farley J. Noted in *Re Royal Oak Mines Inc.*

... the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.<sup>13</sup>

59 Several *CCAA* courts have approved interim financing as part of the initial order since the 10 day rule came into effect.<sup>14</sup>

60 The distinguishing factor in this case is that even the 10 day DIP that Just Energy requests is large. It seeks a DIP of \$125,000,000 almost all of which will be drawn in the initial 10 day period. Interest accrues at 13% annually. There is a 1% commitment fee and 1% origination fee.

61 Section 11.2(4) of the *CCAA* lists some of the factors the Court should consider when deciding whether to approve DIP financing. These include:

- (a) The period during which the Applicants are expected to be subject to the *CCAA* proceeding;
- (b) How the company's business and financial affairs are to be managed during the proceedings;
- (c) Whether the company's management has the confidence of its major creditors;
- (d) Whether the loan would enhance the prospects of a viable compromise or arrangement;
- (e) The nature and value of the company's property;
- (f) Whether any creditor would be materially prejudiced as a result of the DIP charge; and
- (g) The Monitor's pre-filing report (if any).

62 In *Re AbitibiBowater Inc.*,<sup>15</sup> Gascon J.S.C., as he then was, described the analysis as having the court satisfy itself that the benefits of DIP financing to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.

63 Although the amount of the DIP for the initial 10 day stay is high, it is nevertheless necessary to "keep the lights on." Just Energy is required to pay ERCOT US \$96.24 million by the end of today (March 9, 2021) or risk losing its licences. It will have to pay a further \$54 million by March 14, 2021. Texas represents approximately 47% of Just Energy's margin. Without its Texas licenses, Just Energy would likely collapse.

64 Just Energy's secured creditors do not oppose the DIP. Although they wish to "reserve their rights" on the comeback hearing, I take that to mean that they may wish to make arguments about the existence or the terms of the DIP from the comeback hearing onward. As noted earlier, they would be hard-pressed to challenge any priority given to the DIP for advances during the 10 day period the absence of any opposition today.

65 The DIP lender is a consortium of Just Energy's largest unsecured lenders. For unsecured lenders to offer a DIP of that size to cover a 10 day stay suggests that they believe their prospects for recovery on their unsecured loan are better with a significant 10 day DIP than without.

66 The loan clearly enhances the prospects of a viable compromise or arrangement. Without the loan, Just Energy cannot continue. Regulators will quickly take steps to suspended licenses. Even with the stay of regulatory proceedings, it would be difficult to allow Just Energy to continue to operate if it has no working capital and no means of purchasing power to sell to customers.

67 Just Energy's business is capital-intensive. It requires the expenditure of large amounts of money to buy power and the subsequent receipt of large amounts from the sale of power. That requires substantial liquidity.

68 In addition, the regulated nature of Just Energy's business can lead to unforeseen liquidity demands that may need to be satisfied to ensure the Applicants' ability to operate as a going concern. The added charges by PUCT and ERCOT are prime examples of that. Those charges must be paid within as short a period as 2 business days. While those charges may ultimately be reversed through the dispute resolution process and while additional collateral that has been required may ultimately be released,

those steps will take time to work out. Even if the charges are not reversed, it may well be possible to absorb those price shocks if given the time. Financing Just Energy at least through an interim period allows for greater insight into those possibilities.

69 I am also mindful of the need to keep essential suppliers and regulators comfortable. Even though I am staying provincial regulatory proceedings, I do that knowing that I am treading on public policy territory that Parliament and provincial legislatures have chosen to ascribe to specialized bodies with specialized knowledge. A larger 10 day DIP decreases the risk that I am harming the public policy objectives they have been mandated to pursue than would a smaller DIP.

70 The Monitor points out that, after netting out cash receipts and expenditures, approximately \$33,000,000 of the DIP will remain at the end of day 10. One could see that as grounds to pare back the DIP by an equivalent amount I do not think it would be appropriate to do. As noted, the Just Energy business is unpredictable. It requires large amount of liquidity and liquidity buffers to take into account unexpected charges from regulators. The regulators who impose those charges do so to protect other interests. As a result, they cannot simply be dismissed. It strikes me that providing a business of this sort with a buffer is appropriate. The Monitor recommends allowing the buffer to continue. None of the other stakeholders object.

71 In the foregoing circumstances, I am satisfied that the DIP should be approved as requested.

#### ***D. Should Regulatory Actions be Stayed?***

72 Just Energy is subject to a wide variety of provincial and state regulators in Canada and the United States. By way of example, in Canada five different provincial regulators have issued licenses to 16 different Just Energy entities allowing them to sell gas and electricity. Power cannot be sold to new customers or delivered to existing customers without these licenses.

73 Concerns about a licensee's solvency can lead provincial regulators to suspend or cancel licenses or impose more onerous terms on license holders. Such steps can include prohibitions on sales to new customers, termination of the ability to sell to existing customers and the forced transfer of customers to other suppliers. This would cause a licensee to instantly lose revenue streams and threaten their long-term viability. Regulators have the power to impose such terms in extremely short order.

74 The filing of this *CCAA* application could lead to such adverse steps by regulators.

75 As part of the proposed Initial Order, the Applicants seek to stay provincial and foreign regulators from, among other things, terminating the licenses granted to any Just Energy entity.

76 With the benefit of the DIP Facility, the Applicants intend to continue paying amounts owing to their contractual counterparties (primarily utilities) in the ordinary course. Just Energy is concerned that even if it continues making such payments, regulators may still try to terminate its licenses or impose other conditions.

77 In my view it is appropriate to stay the conduct of provincial regulators in Canada.

78 Section 11.1 of the *CCAA* provides:

11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

79 More plainly put, the *CCAA* automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

80 In the circumstances of this case, it is, in my view, appropriate to stay the exercise of other regulatory powers against Just Energy at least for the interim 10 day period.

81 As noted earlier, Just Energy's liquidity crisis arises because of controversial steps taken by PUCT and ERCOT which steps Just Energy is in the process of challenging.

82 It would appear to me to be unjust to take regulatory steps that might shut down entire business when the financial concerns that prompt those steps may turn out to be unjustified if PUCT and ERCOT adjust some or all of the price increases they imposed during the storm. Even if PUCT and ERCOT are unable or unwilling to adjust their price increases, it may be appropriate for regulators to consider whether Just Energy should be shut down because of a temporary liquidity crisis and whether Just Energy should be given a window of opportunity to work out its liquidity crunch. That will obviously need to be measured against the objectives the regulator was created to further. It strikes me, however, that the circumstances of this case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford.

83 One of the primary goals of regulators is to ensure that providers of electrical power are paid and that customers receive electrical power on competitive business terms. A stay does not offend these policy objectives. The goal of the stay and the financing associated with it is to be able to continue to pay providers of power to Just Energy and to continue to service Just Energy customers according to their existing contracts. The DIP financing and the charge in favour of essential suppliers will ensure that this remains the case.

84 [Section 11.1 \(3\) of the CCAA](#) allows the court to stay action by regulators on notice to the regulator. Regulators have not been given notice of today's hearing. I am nevertheless inclined to grant the relief sought.

85 Providing notice would have potentially allowed regulators to cancel or suspend Just Energy's licenses before the hearing occurred. If such suspensions or cancellations were ultimately set aside, they would still have caused substantial disruption to the marketplace as a whole and to Just Energy in particular. Just one of the many regulators to whom Just Energy is subject could cause material disruption.

86 Cancellation or suspension of licenses would, for example, mean that upstream suppliers of gas and electricity to Just Energy would have their contracts terminated. Any new power supplier to whom Just Energy's customers would be transferred would have their own source of power supply. That would create more market disruption than would a stay.

87 In this light, the granting a 10 day stay against regulatory conduct is consistent with the remedial purpose of the *CCAA* which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just Energy's licenses would not avoid social and economic losses but amplify them by extending them beyond Just Energy to its upstream suppliers.

88 I am also mindful of the admonition of the Supreme Court of Canada in *Century Services* to the effect that general language in the *CCAA* should not be read as being restricted by the availability of more specific orders. Although the *CCAA* contains specific provisions relating to regulatory stays which require notice to the regulator, the general power to make such orders as are appropriate should not, in my view, be restricted by the notice requirement when the relief sought relates only to

a 10 day temporary stay, when providing notice could undermine the entire scheme of the *CCAA* and when there are adequate financing mechanisms in place to ensure that the regulators' policy objectives are not undermined during the 10 day period.

89 A foreign regulator is not a "regulatory body" within the plain meaning of section 11.1(1) of the *CCAA*. As such, foreign regulators do not benefit from the same exemption from the stay as a Canadian regulator. A foreign regulator is therefore presumptively subject to the Stay, with respect to matters that fall within the jurisdiction of the Canadian *CCAA* Court. Canadian courts have held that a foreign regulator is precluded by the stay from taking steps in Canada in relation to matters that are within the *CCAA* court's jurisdiction.<sup>16</sup>

90 This result is consistent with the language of the model *CCAA* order which stays, among other things, all rights and remedies of any "governmental body or agency"

91 Whether and to what extent the stay should apply to American regulators will be for an American court to determine. To give effect to that stay in the United States, Just Energy intends to commence chapter 15 proceedings immediately for such a determination.

#### ***E. Should Supplier Charges and Prefiling Payments be Authorized?***

92 Just Energy seeks a charge in favour of what it has referred to as commodity suppliers and ISO Service Providers. Commodity suppliers are those who provide gas and electricity to Just Energy. ISO Service Providers are often commodity suppliers as well but also provide additional services to Just Energy such as working capital and credit support. By way of example, as noted earlier, ERCOT sends invoices to service providers like Just Energy. Those invoices must be paid within two days. In certain cases, Just Energy uses and ISO Service Provider to act as the front facing entity to the regulator. In those cases, ERCOT sends its invoice to the ISO Service Provider who is obliged to pay within two days. The ISO Service Provider then looks to Just Energy for payment but gives Just Energy extended time to pay, say for example 30 days. In effect, the ISO Service Provider is providing Just Energy with working capital and liquidity.

93 Just Energy has received advice to the effect that these arrangements amount to Eligible Financial Contracts under the *CCAA*. This poses a challenge because Eligible Financial Contracts are not subject to the prohibition on the exercise of termination rights under the *CCAA*.<sup>17</sup> Since the parties to Eligible Financial Contracts cannot be prevented from terminating, Just Energy is of the view that counterparties to those contracts must be given incentives to continue to provide power supply and financial services. The proposed incentive takes the form of a charge in favour of those counterparties that continue to provide commodities or services to Just Energy.

94 Shell and BP, the two largest commodity and ISO Service Providers, have already entered into such arrangements. The proposed order would allow any other commodity provider or ISO Service Provider to enter into a similar arrangement with Just Energy and benefit from a similar charge.

95 No one has challenged that analysis for today's purposes and no one opposes the proposed charges. Given the possibility of mischief in the absence of such charges and given that the relief today is sought for only 10 days, in my view it would be preferable to offer the protection of the charges as requested.

96 I note that in certain circumstances, the court can compel commodity and service providers to continue supplying a *CCAA* debtor. I am, however, somewhat reluctant to use those provisions given that the suppliers and service providers in question are part of a highly regulated, interwoven industry. Compelling a supplier in such an industry to continue to provide supply or services may well infringe on the regulators' objective of maintaining a financially sound electrical market. Given the urgency with which the application arose, it is preferable to provide financial incentives to such parties and not risk imperiling the financial stability of other regulated actors by forcing them to supply.

97 This court has already observed in the past that the availability of critical supplier provisions under the *CCAA* does not oust the court's jurisdiction under section 11 to make any other order it considers appropriate.<sup>18</sup>



98 The proposed charges would rank either *pari passu* with the DIP or immediately below it, depending on the nature of the transaction. Although Just Energy's secured creditors were present at today's hearing, they did not object to the proposed charges.

99 Certain pre-filing obligations such as tax arrears could result in directors of Just Energy being held personally liable. The company seeks authorization to make pre-filing payments with that sort of critical character that are integral to its ability to operate. In the absence of any objection, that relief is granted.

***F. Should Set off Rights to Be Stayed?***

100 As part of the stay, Just Energy seeks an order precluding financial institutions from exercising any "sweep" remedies under their arrangements with Just Energy.

101 The concern is that the financial institutions would empty Just Energy's accounts by reason of a claim to a right of set off. Exercise of such rights would effectively undermine any reorganization by depriving Just Energy of working capital and thereby impairing its business.

102 Although s. 21 of the CCAA preserves rights of set-off, the Court may defer the exercise of those rights. Section 21 does not exempt set-off rights from the stay. This differs from other provisions of the CCAA, which provide that certain rights are immune from the stay.<sup>19</sup> As *Savage J.A.* of the British Columbia Court of Appeal observed, the broad discretion accorded to the CCAA Court to make orders in furtherance of the objectives of the statute must, as a matter of logic, extend to set-off.<sup>20</sup>

103 Allowing banks to exercise a self-help remedy of sweeping the accounts by claiming set-off would in effect give them a preferred position over other creditors and deprive Just Energy of working capital. That would be contrary to the remedial purpose of the CCAA because it would ultimately shut down Just Energy and allow the banks to advantage themselves to the detriment of others in the process.

104 Just Energy had consulted widely with various stakeholder groups had before today's hearing. Those included the banks with sweep rights, at least some of whom were represented at today's hearing and did not object.

105 In the foregoing circumstances it is appropriate to at least temporarily stay the exercise of any rights of set-off by the banks.

***G. Should Administrative and D & O Charges be Granted?***

106 The Applicants propose that an Administration Charge for the first ten days be set at \$2.2 million.

107 The largest expenditures in the administration charge involve the retainer of counsel in Canada and the United States for Just Energy and the retainer of the Monitor and its counsel.

108 In addition, the company seeks a financial advisor charge of \$1.8 million to retain BMO Nesbitt Burns as a financial advisor to assist in exploring potential alternative transactions.

109 The directors and officers charge sought is in the amount of \$30 million.

110 The Monitor estimates that director liabilities in the United States for sales taxes, wages, source deductions and accrued vacation come to approximately \$13.1 million. Director and officer exposure in Canada may be as high as \$5.8 million.

111 While insurance with an aggregate limit of \$38.5 million is in place, the complexity of the overall enterprise creates the risk that it might not provide sufficient coverage against the potential liability that the directors and officers could incur in relation to this CCAA proceeding.

112 In determining whether to approve administration charges, the Court will consider: (a) the size and complexity of the businesses under CCAA protection; (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 is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor.<sup>21</sup>

113 The Just Energy business is large and complex. The proposed beneficiaries are essential to the success of the *CCAA*. No *CCAA* proceeding can advance without a Monitor or counsel. The addition of a financial advisor would appear to be a prudent step given the complexity of the business. Monetizing or restructuring all or portions of the Just Energy business is substantially more complicated than a sale of hard assets. It would appear to make good sense to have a financial advisor involved. The Monitor agrees to the appointment of a financial advisor. I infer from the Monitor's agreement that Nesbitt Burns will bring to the table a skill set or attributes that the Monitor either does not have or cannot exercise given its role as Monitor.

#### ***H. Should Noncorporate Entities Be Captured by The Stay?***

114 Many of the gas and electricity licences pursuant to which the Just Energy group conducts business in Canada are granted to limited partnerships.

115 On its face, the *CCAA* applies to corporations, not partnerships.<sup>22</sup>

116 Where, however, the operations of partnerships are integral and closely related to the operations of the *CCAA* debtor, it is well-established that the Court has jurisdiction to extend the protection of the stay to partnerships in order to ensure that the purposes of the *CCAA* can be achieved. Relief of that sort has been granted on several occasions.<sup>23</sup>

117 Here, it would be illusory to grant a stay in favour of the Just Energy corporate entities but not extend its benefit to the partnership entities. That would defeat the entire purpose of the exercise. As a result, it is appropriate to extend *CCAA* protection to the Just Energy partnership entities.

#### ***I. Should Third Quarter Bonuses be Paid?***

118 The applicant seeks approval from the initial order for payment of third Quarter bonuses for fiscal 2021 on April 2, 2021. The bonuses were approved by the Compensation Committee on February 9, 2021 after it was reported that the third quarter base EBITDA result was \$55.785 million compared to a target of \$42 million.

119 The Compensation Committee approved and asked the Board to approve a third-quarter bonus pool in the amount of \$3.23 million. The Board approved the bonus on February 10, 2021.

120 I am disinclined to approve the bonus payment on an initial order. The relief on the initial order is limited to the amount to keep the company afloat for 10 days. The bonus does not fit into that category. Even on the applicant's view of events, the bonuses are not payable until April 2, 2021. That is well after the comeback date.

121 In addition, the Monitor has not yet had an opportunity to review and comment on the employee bonus and intends to do so in a further report to the court.

122 Whether bonuses should or should not be paid will depend on a variety of factors that are not in the evidence before me. By way of example, I would want a better understanding of whether the beneficiaries of the bonuses are also intended beneficiaries of the key employee retention plan that Just Energy will be asking for on the comeback date. In addition, I will want a better sense of who the recipients of the bonuses are. If they are relatively modest income earners for whom the bonus is a key source of income, such as, for example, retail sales people, I would probably be inclined to pay the bonuses without question. If, however, they are high income earners, the intended beneficiaries of the KERF, or if they are executives who make decisions about risk allocation, what Just Energy should insure against, to what extent it should hedge against weather risks and so on, I would want a more granular understanding about why the bonuses should be paid.

#### ***J. Should a Sealing order be Granted?***

123 Just Energy requests a sealing order in relation to the BMO Engagement Letter and the summary of the KERP, both of which are attached as confidential exhibits to the affidavit of Michael Carter sworn March 9, 2021.

124 I am satisfied that the applicants have met the test established by the Supreme Court of [Canada in Sierra Club of Canada v Canada \(Minister of Finance\)](#)<sup>24</sup> The materials contain commercially sensitive information and/or personal information (in the case of the KERP). The order is necessary to prevent a serious risk to an important personal or commercial interest and the benefits of a sealing order outweigh the rights of others to a fair determination of the issues. No one advanced any need to see the information that is proposed to be sealed nor can I see any need for anyone to access such information in order to assert their rights fully within this proceeding.

### Disposition

125 In view of the foregoing, I granted an initial order in the form requested with the exception of authorization for bonus payments which will be addressed at the comeback hearing.

126 The order will in effect provide that:

- (a) Ontario is the Centre of Main Interest for the [CCAA](#) proceeding.
- (b) Just Energy meets the insolvency requirements of the [CCAA](#).
- (c) The proposed DIP financing is approved.
- (d) Any regulatory actions should be stayed.
- (e) Commodity suppliers and ISO Service Providers who sign qualified service agreements will benefit from a charge.
- (f) Set off rights of banks which may allow them to sweep accounts will be stayed.
- (g) The administrative, financial advisor and directors and officers charges are granted.
- (h) Noncorporate entities will be captured by the stay.
- (i) A sealing order will be granted.

127 The comeback date for the continuation of any [CCAA](#) relief is set for 10 AM on Friday, March 19, 2021.

### Footnotes

- 1 R.C.C. 1985, c. c-36, as amended
- 2 [Century Services Inc. v. Canada \(Attorney General\)](#), 2010 SCC 60 at paras. 14-15.
- 3 [Century Services Inc. v. Canada \(Attorney General\)](#), 2010 SCC 60 (CanLII), [2010] 3 SCR 379
- 4 [Re Massachusetts Elephant & Castle Group](#) 2011 ONSC 4201
- 5 [CCAA s. 2\(1\)\(a\)](#) definition of a debtor company.
- 6 R. S. C. 1985, c. B-3
- 7 [Laurentian University of Sudbury](#) 2021 ONSC 659
- 8 [Laurentian University](#) 2021 ONSC 659 at para. 32; [Stelco Inc., Re](#), 2004 CanLII 24933 at para. 26.

- 9 [Re Lydian International Limited](#), 2019 ONSC 7473 at para. 25.
- 10 [Lydian](#) at para. 26
- 11 2019 ONSC 7473.
- 12 [Re Royal Oak Mines Inc. \(1999\)](#), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.
- 13 [Re Royal Oak Mines Inc. \(1999\)](#), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.
- 14 [Re Clover Leaf Holdings Company](#), 2019 ONSC 6966 at para. 21; [Miniso International Hong Kong Limited v. Migu Investments Inc.](#), 2019 BCSC 1234, at para. 90; [Re Mountain Equipment Co-Operative](#), 2020 BCSC 1586, at para. 2.
- 15 [Re AbitibiBowater Inc.](#), 2009 QCCS 6453 at para 16.
- 16 [Nortel Networks Corp.](#), [Re](#), 2010 ONSC 1304 at para. 41 and 42.
- 17 CCAA s. 34 (1), (7), (8) and (9).
- 18 [Re CanWest Publishing Inc.](#), 2010 ONSC 222.
- 19 [North American Tungsten Corp. \(Re\)](#), 2015 BCSC 1382 at para. 28; leave to appeal to BCCA refused, 2015 BCCA 390 [[Tungsten \(Leave\)](#)], leave to appeal decision affirmed by Review Panel of the BCCA.
- 20 [Tungsten \(Leave\)](#), above at para. 12-16; see also [Air Canada \(Re\)](#), 2003 CarswellOnt 4016 at para. 25.
- 21 [Canwest 2010](#), at para 54. [Target](#), at paras 74 and 75; [Lydian](#), paras 43 to 54; [Laurentian](#), at paras. 48 to 59.
- 22 CCAA, s. 2, definition of "Debtor company."
- 23 See, for example, [Re Lehndorff General Partner Ltd. \(1993\)](#), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at para. 21; [Re Target Canada Co.](#), 2015 ONSC 303 at paras 42 and 43; [4519922 Canada Inc.](#), [Re](#), 2015 ONSC 124 at para. 37.
- 24 [Sierra Club of Canada v Canada \(Minister of Finance\)](#), 2002 SCC 41; see also [Target](#) above at paras 28-30; [Laurentian University](#), above at paras. 60 to 64.

# **TAB 5**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Arrangement de MPECO Construction inc.](#) | 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 C.B.R. (6th) 87 | (Que. Bkcty., Feb 4, 2019)

2010 SCC 60  
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

**Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)**

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

Heard: May 11, 2010

Judgment: December 16, 2010

Docket: 33239

Proceedings: reversing [Ted Leroy Trucking Ltd., Re \(2009\)](#), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing [Ted Leroy Trucking Ltd., Re \(2008\)](#), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant  
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

**Headnote**

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un

terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

**Held:** The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly



provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

**Arrêt:** Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner

naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la préséance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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APPEAL by creditor from judgment reported at [2009 CarswellBC 1195](#), [2009 BCCA 205](#), [\[2009\] G.S.T.C. 79](#), [98 B.C.L.R. \(4th\) 242](#), [\[2009\] 12 W.W.R. 684](#), [270 B.C.A.C. 167](#), [454 W.A.C. 167](#), [2009 G.T.C. 2020 \(Eng.\) \(B.C. C.A.\)](#), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.:***

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

court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

## 1. Facts and Decisions of the Courts Below

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

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

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

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

## 2. Issues



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

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

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

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

### 3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

#### 3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

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

under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

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

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

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

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

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

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

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

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

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

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

### 3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

**222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

**18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

**37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

**18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

**18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to *S.C. 2000, c. 30*, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed

by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA s. 222(3)* having impliedly repealed *CCAA s. 18.3(1)* because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

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

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

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

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

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

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

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



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

(*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, per Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, per Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]), 2003 CanLII 49366, at para. 13, per Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, per Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under

the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

### 3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

## 4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring):***

**I**

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under [s. 11 of the \*Companies' Creditors Arrangement Act\*, R.S.C. 1985, c. C-36 \("CCAA"\)](#). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account ([2008 BCSC 1805](#), [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the [CCAA and the \*Excise Tax Act\*, R.S.C. 1985, c. E-15 \("ETA"\)](#).

93 In upholding deemed trusts created by the [ETA](#) notwithstanding insolvency proceedings, [Ottawa Senators Hockey Club Corp. \(Re\) \(2005\)](#), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between [s. 18.3\(1\) \(now s. 37\(1\)\) of the CCAA](#) and [s. 222 of the ETA](#) as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

**II**

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a [CCAA or \*Bankruptcy and Insolvency Act\*, R.S.C. 1985, c. B-3 \("BIA"\)](#) provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of [s. 222 of the ETA](#).

98 The first is the [Income Tax Act](#), R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where [s. 227\(4\)](#) *creates* a deemed trust:

**227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

**(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in [s. 18.3 of the CCAA](#):

**18.3 (1)** Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or [subsection 86\(2\)](#) or [\(2.1\) of the \*Employment Insurance Act\*](#)...

101 The operation of the *ITA* deemed trust is also confirmed in [s. 67 of the BIA](#):

**67 (2)** Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or [subsection 86\(2\)](#) or [\(2.1\) of the \*Employment Insurance Act\*](#)...

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the [CCAA](#) and the [BIA](#) regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, [R.S.C. 1985, c. C-8 \("CPP"\)](#). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, [S.C. 1996, c. 23 \("EIA"\)](#), creates a deemed trust in favour of the Crown: see [ss. 86\(2\)](#) and [\(2.1\)](#).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in [s. 18.3\(2\) the CCAA](#) and in [s. 67\(3\) the BIA](#). In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in

either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

**222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

**(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

### III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

**Abella J. (dissenting):**

114 The central issue in this appeal is whether *s. 222 of the Excise Tax Act, R.S.C. 1985, c. E-15 ("ETA")*, and specifically *s. 222(3)*, gives priority during *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA")*, proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under *s. 11 of the CCAA* is circumscribed accordingly.

115 *Section 11<sup>1</sup> of the CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under *s. 11*, it is necessary to first determine the priority issue. *Section 222(3)*, the provision of the *ETA* at issue in this case, states:

**222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, *s. 18.3(1)*, prevailed, and that the deeming provisions in *s. 222 of the ETA* were, accordingly, inapplicable during *CCAA* proceedings. *Section 18.3(1)* states:

**18.3 (1)** ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re) (2005)*, 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), *s. 222(3) of the ETA* is in "clear conflict" with *s. 18.3(1) of the CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, *s. 222(3) of the ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA")*.



118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysse J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*,

it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,<sup>2</sup> s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37.(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the *CCAA*, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the *CCAA*.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

*Appeal allowed.*

*Pourvoi accueilli.*

## Appendix

### *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)*

**11. (1) Powers of court** — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

**(3) Initial application court orders** — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

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

(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 or proceeding with any other action, suit or proceeding against the company.

**(4) Other than initial application court orders** — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

(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 or proceeding with any other action, suit or proceeding against the company.

...

**(6) Burden of proof on application** — The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**11.4 (1) Her Majesty affected** — An order made under [section 11](#) may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

- (i) the expiration of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or arrangement,
- (iv) the default by the company on any term of a compromise or arrangement, or
- (v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

**(2) When order ceases to be in effect** — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

- (i) subsection 224(1.2) of the *Income Tax Act*,
- (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
- (iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

- (i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

**(3) Operation of similar legislation** — An order made under [section 11](#), other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

**18.3 (1) Deemed trusts** — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

**(2) Exceptions** — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or [subsection 86\(2\)](#) or [\(2.1\) of the \*Employment Insurance Act\*](#) (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

**18.4 (1) Status of Crown claims** — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

**(3) Operation of similar legislation** — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

...

**20. [Act to be applied jointly with other Acts]** — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

*Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)*

**11. General power of court** — 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.

...

**11.02 (1) Stays, etc. — initial application** — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

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

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

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

**(2) Stays, etc. — other than initial application** — 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.

**(3) Burden of proof on application** — 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.

...

**11.09 (1) Stay — Her Majesty** — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,



(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

**(2) When order ceases to be in effect** — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

**(3) Operation of similar legislation** — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as [subsection 23\(2\)](#) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

**37. (1) Deemed trusts** — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

**(2) Exceptions** — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or [subsection 86\(2\)](#) or [\(2.1\) of the Employment Insurance Act](#) (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in [subsection 23\(3\)](#) or [\(4\)](#) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)***

**222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

**(1.1) Amounts collected before bankruptcy** — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

**(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)***

**67. (1) Property of bankrupt** — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

**(2) Deemed trusts** — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

**(3) Exceptions** — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or [subsection 86\(2\)](#) or [\(2.1\) of the Employment Insurance Act](#) (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in [subsection 23\(3\)](#) or [\(4\)](#) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

**86. (1) Status of Crown claims** — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in [section 87](#) called a "workers' compensation body", rank as unsecured claims.

...

**(3) Exceptions** — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as [subsection 23\(2\)](#) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

#### Footnotes

- 1 [Section 11](#) was amended, effective September 18, 2009, and now states:  
**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.
- 2 The amendments did not come into force until September 18, 2009.

# TAB 6

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [8440522 Canada Inc., Re](#) | 2013 ONSC 6167, 2013 CarswellOnt 13921, 233 A.C.W.S. (3d) 286, 8 C.B.R. (6th) 86 | (Ont. S.C.J. [Commercial List], Oct 4, 2013)

1999 CarswellOnt 625  
Ontario Court of Justice, General Division [Commercial List]

Royal Oak Mines Inc., Re

1999 CarswellOnt 625, [1999] O.J. No. 709, 6 C.B.R. (4th) 314, 96 O.T.C. 272

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

In the Matter of the Courts of Justice Act, R.S.O., 1990, C. C-43, as amended

In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines Inc., and others

Blair J.

Judgment: March 10, 1999

Docket: 99-CL-003278

Counsel: *David E. Baird, Q.C.*, and *Mario J. Forte*, for Applicants.

*Peter H. Griffin*, for Trilon Financial Corporation and Northgate Exploration Limited.

*Ronald N. Robertson, Q.C.*, for Unofficial Senior Subordinated Noteholders' Committee.

*Sean Dunphy*, for Bankers Trust and Macquarrie Limited.

*Hilary Clarke*, for Bank of Nova Scotia.

Subject: Insolvency; Corporate and Commercial

**Headnote**

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by court — Miscellaneous issues

Debtor company applied for initial order pursuant to Companies' Creditors Arrangement Act — Relief sought included debtor-in-possession financing super-priority, stay of proceedings, and permission to conduct certain operations and take certain restructuring steps — Relief sought also included power to borrow and charge property, to impose charge as liability protection in favour of directors, to not pay creditors, permission to file plan of arrangement, appointment of monitor and inclusion of general terms, including come back clauses — Debtor was supported by two senior secured lenders and by unofficial creditors' committee of senior secured subordinated noteholders — Group of hedge lenders opposed scope and extent of relief as being broad and overreaching — Other creditors received short notice or no notice of application — Application granted — Initial order approved but in more limited scope than requested — Relief sought extended beyond bounds of procedural fairness — Language of order not to read like trust indenture but to be clear, simple and readily understandable — Initial order to contain declaration that applicant had standing to apply, authorization to file plan of compromise, appointment of monitor and its duties and to contain comeback clause — Initial order to put in place stay provisions and operating, financing and restructuring terms reasonably necessary for continued operation of debtor during brief but realistic sorting-out period on urgent basis — Proliferation of advisory committees and extension of broad protection to directors are better left for orders other than initial order — Comeback clauses not to be used to provide answer to overreaching initial orders — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), (4).

**Table of Authorities**

**Cases considered by *Blair J.*:**

*Bank of America Canada v. Willann Investments Ltd.* (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.) — referred to  
*Canadian Asbestos Services Ltd. v. Bank of Montreal*, 16 C.B.R. (3d) 114, [1992] G.S.T.C. 15, 11 O.R. (3d) 353, 93 D.T.C. 5001, 5 C.L.R. (2d) 54, [1993] 1 C.T.C. 48, 5 T.C.T. 4328 (Ont. Gen. Div.) — referred to  
*Canadian Asbestos Services Ltd. v. Bank of Montreal*, 13 O.R. (3d) 291, 10 C.L.R. (2d) 204, [1993] G.S.T.C. 23, 1 G.T.C. 6169 (Ont. Gen. Div.) — referred to  
*Dylex Ltd., Re* (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.) — referred to  
*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — referred to  
*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — referred to  
*Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (B.C. S.C.) — referred to

**Statutes considered:**

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

Generally — considered

s. 3(1) — referred to

s. 11 [rep. & sub. 1997, c. 12, s. 124] — considered

s. 11(3) [rep. & sub. 1997, c. 12, s. 124] — considered

s. 11(3)(a)-11(3)(c) [en. 1997, c. 12, s. 124] — considered

s. 11(4) [en. 1997, c. 12, s. 124] — considered

APPLICATION by debtor company for initial order pursuant to s. 11 of *Companies' Creditors Arrangement Act*.

**Blair J.:**

1 These reasons are an expanded version of an endorsement made at the time of the granting of an Initial Order in favour of the Applicants under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, on February 15, 1999. At the time, I indicated that I would release additional reasons with respect to certain of the issues raised on the Initial Application at a later date. In doing so, I propose to incorporate significant portions of the earlier handwritten endorsement.

2 Royal Oak Mines Inc. ("Royal Oak"), and a series of related corporations, applied for the protection of the Court afforded by the *Companies' Creditors Arrangement Act* (the "CCAA") while they endeavour to negotiate a restructuring of their debt with their creditors. Royal Oak is a publicly traded mining company of considerable import in the mining industry. It currently operates four gold and copper mines (two in the Timmins area of Ontario, one in Yellowknife in the North West Territories, and one (the Kemess mine) in the interior of British Columbia). The Company employs approximately 960 people (about 300 in Ontario, 280 in the North West Territories, 348 in British Columbia, 27 at its corporate headquarters in Seattle, and 5 in the Province of Newfoundland).

3 Royal Oak is supported in this CCAA Application by Trilon Financial Corporation and Northgate Exploration Limited, the senior secured lenders who are owed approximately \$180 million, and by the unofficial creditors' committee of the Senior Secured Subordinated Noteholders who are owed about \$264 million. A group of three other lenders, known in the jargon of the industry as the "Hedge Lenders", and who have advanced approximately \$50 million to Royal Oak, stands between the former two groups, in terms of priority. The three Hedge Lenders — Bankers Trust, Macquarrie Limited of Australia, and Bank of Nova Scotia — did not strenuously oppose the granting of an Initial CCAA Order in principle; however, they questioned the scope and extent of some of the relief sought, arguing that it was unnecessarily broad and "overreaching", particularly where they had only been given short notice of the Application and where some creditors had been given none.



4 There are construction lien claimants in the Province of British Columbia, they point out, who have lien claims against the Kemess Mine totalling about \$18 million, and whose claims are admittedly prior to those of *any* other secured creditor in relation to that asset. Yet the lien claimants were not given notice of these proceedings. In addition, Export Development Corporation has a claim for about \$19.5 million and had not been given notice.

5 Falling world prices for gold and copper, environmental concerns with their attendant costs, and construction and start-up costs relating to the Kemess Mine in particular, have led to Royal Oak's current financial crunch. It is insolvent. I was quite satisfied on the evidence in Ms. Witte's affidavit, and on the other materials filed, that the Applicants met the statutory requirements for the granting of an Initial Order under [section 11 of the CCAA](#), and that it was appropriate and just in the circumstances for the Court to grant the protection sought on an Initial Order basis, while the Applicants attempt to restructure their affairs and to elicit the approval and support of their creditors to such a restructuring. Accordingly, an Initial Order was granted on February 15, 1999. There have been certain adjustments and variations made to that Order since then.

6 In view of some of the important concerns raised by Mr. Dunphy and Ms. Clarke on behalf of the Hedge Lenders about the details and reach of the Order sought, however, I indicated that the Court was not prepared to approve it in its entirety at this stage. The Initial Order as granted was therefore somewhat more limited in scope than that requested. Somewhat more expanded reasons than those set out in the handwritten endorsement made at the time were to follow. These are those reasons.

### Initial CCAA Orders

7 [Section 11 of the CCAA](#) is the provision of the Act embodying the broad and flexible statutory power invested in the court to "grant its protection" to an applicant by imposing a stay of proceedings against the applicant company, subject to terms, while the company attempts to negotiate a restructuring of its debt with its creditors. It is well established that the provisions of the Act are remedial in nature, and that they should be given a broad and liberal interpretation in order to facilitate compromises and arrangements between companies and their creditors, and to keep companies in business where that end can reasonably be achieved: see, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.), per Doherty J.A.; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31; "Reorganizations Under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947) 25 Can. Bar Rev. 587 at p. 593 referred to with approval by Thackray J. in *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) at p. 173.

8 In the utilization of the [CCAA](#) for this broad purpose a practice has developed whereby the application is "pre-packaged" to a significant extent before relief is sought from the Court. That is, the debtor company seeks to obtain the consent and support of its major creditors to a [CCAA](#) process, and to its major terms and conditions, before the application is launched. This has been my experience in the course of supervising more than a few such proceedings. The practice is a healthy and effective one in my view, and is to be commended and encouraged. Nonetheless, it has led in some ways to the problem which is the subject of these reasons.

9 The problem centers around the growing complexity of the Initial Orders sought under s. 11(3) of the Act, and the increasing tendency to attempt to incorporate into such orders provisions to meet every eventuality that might conceivably arise during the course of the [CCAA](#) process. Included in this latter category is the matter of debtor-in-possession ("DIP") financing, calling — as it frequently does — for a "super priority" position over all other secured lending then in place.

10 Initial Orders under the [CCAA](#) are almost invariably sought on short notice to many of the creditors and, not infrequently, without any notice to others. I note as well that the Court is also asked in most cases to respond on short notice and with little advance opportunity to examine the materials filed in support of the application. This is because the materials, for very practical reasons, are not usually ready for filing until just before the filing is made. I make these observations not to be critical in any way, but simply to point out the realities of the context in which the application for the Initial Order is usually determined.

11 This case falls into both the "short notice" and "no notice" categories. The Hedge Lenders, at least, received only very short notice of the Application on February 15<sup>th</sup>. Neither the Kemess Lien Claimants in British Columbia nor Export Development

Corporation were given any notice. Yet the Court was asked to grant super priority funding, which would rank ahead of even the Lien Claimants (who have admitted priority over everyone), without their knowledge or consent, and which would rank ahead of the Hedge Lenders who had not yet had a reasonable opportunity to consider their position or (given an American holiday) for their counsel to obtain meaningful instructions. The Initial Order which was originally sought in the proceeding consisted of 58 paragraphs of highly complex and sophisticated language. It was 28 pages in length. In addition, it had an 11 page Term Sheet annexed as a Schedule to it. It dealt with,

- (a) the stay of proceedings (7 paragraphs, 4 <sup>1</sup>/<sub>2</sub>; pages);
- (b) permitted operations by the Applicants during the CCAA period (4 paragraphs, 3 <sup>1</sup>/<sub>2</sub>; pages);
- (c) restructuring steps permitted (8 paragraphs, 3 pages);
- (d) the power to borrow and the charging of property (15 paragraphs, 5 pages);
- (e) a charge to be imposed as a liability protection in favour of directors (2 elaborate paragraphs, spanning 4 pages);
- (f) non-payment of creditors (one paragraph, <sup>1</sup>/<sub>3</sub> page);
- (g) permission to file a plan of arrangement (2 paragraphs, <sup>1</sup>/<sub>3</sub> pages);
- (h) appointment and duties of the Monitor (9 paragraphs, 5 pages); and,
- (i) general terms, including the "come back" clauses (6 paragraphs, 1 <sup>1</sup>/<sub>2</sub>; pages).

12 What is at issue here is not the principle of the Court granting relief of the foregoing nature in CCAA proceedings. That principle is well enough imbedded in the broad jurisdiction referred to earlier in these reasons. In particular, it is not the tenet of DIP financing itself, or super priority financing, which were being questioned. There is sufficient authority for present purposes to justify the granting of such relief in principle: see, *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 11 O.R. (3d) 353 (Ont. Gen. Div.), (Chadwick J.) at pp. 359-361, supplemental reasons and leave to appeal granted (1993), 13 O.R. (3d) 291 (Ont. Gen. Div.); *Bank of America Canada v. Willann Investments Ltd.* (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.), (Austin J); *Dylex Ltd., Re* (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.), (Houlden J.A.). It was the granting of such relief on the broad terms sought here, and the wisdom of that growing practice — without the benefit of interested persons having the opportunity to review such terms and, if so advised, to comment favourably or neutrally or unfavourably, on them — which was called into question.

13 There is justification in the call for caution, in my view. The scope and the parameters of the relief to be granted at the Initial Order stage — in conjunction with the dynamics of no notice, short notice, and the initial statutory stay period provided for in subsection 11(3) of the Act — require some consideration.

14 I have alluded to the highly complex and sophisticated nature of the Initial Order which was originally sought in this proceeding. The statutory source from which this emanation grew, however, is relatively simple and straightforward. Subsection 11(3) of the CCAA — which is the foundation of the Court's "protective" jurisdiction — states:

11(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
- (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 or proceeding with any other action, suit or proceeding against the company.

15 Conceptually, then, the applicant is provided with the protections of a stay, a restraining order and a prohibition order for a period "not exceeding 30 days" in order to give it time to muster support for and justify the relief granted in the Initial Order, all interested persons by then having received reasonable notice and having had a reasonable opportunity to consider their respective positions. The difficulties created by *ex parte* and short notice proceedings are thereby attenuated.

16 Subsection 11(4) of the Act provides for the making of additional orders in the CCAA process. The Court is granted identical powers to those set out in paragraphs (a) through (c) of subsection 11(3), except that there is no limit on the time period during which a subsection 11(4) order may remain in effect. The only other difference between the two subsections is that in respect of an Initial order under subsection 11(3) the onus on the applicant is to show that it is appropriate in the circumstances for the order to issue, whereas in respect of an order under subsection 11(4) there is an additional requirement to show that the applicant "has acted, and is acting, in good faith and with due diligence" in the CCAA process.

17 The Initial Order sought in this case was not unlike those sought -- and, indeed, those which have been granted -- in numerous other CCAA applications. While the relief granted is always a matter for the exercise of judicial discretion, based upon the statutory and inherent jurisdiction of the Court, it seems to me that considerable relief now sought at the Initial Order stage extends beyond what can appropriately be accommodated within the bounds of procedural fairness. It was at least partially for that reason that I declined to grant the Initial Order relief sought at the outset of this proceeding.

18 Upon reflection, it seems to me that the following considerations might usefully be kept in mind by those preparing for an Initial Order application, and by the Court in granting such an order.

19 First, recognition must be given to the reality that CCAA applications for the most part involve substantial corporations with large indebtedness and often complex debtor-creditor structures. Indeed, the threshold for applying for relief under the CCAA is a debt burden of at least \$5 million<sup>1</sup>. Thus, I do not mean to suggest by anything said in these reasons that either the process itself or the corporate/commercial/financial issues which must be addressed and resolved, are simple or easily articulated. Therein lies a challenge, however.

20 CCAA orders will of necessity involve a certain complexity. Nevertheless, at least a nod in the direction of plainer language would be helpful to those having to review the draft on short notice, or to react to the order in quick fashion after it has been made on no notice. It would also be helpful to the Court, which — as I have noted — is not infrequently asked to give its approval and grant the order with very little advance opportunity for review or consideration. The language of orders should be clear and as simple and readily understandable to creditors and others affected by them as possible in the circumstances. They should not read like trust indentures. These comments are relevant to all orders, but to Initial CCAA Orders in particular.

21 The Initial Order will, of course, contain the necessary declaration that the applicant is a company to which the CCAA applies, the authorization to file a plan of compromise and arrangement, the appointment of the monitor and its duties, and such things as the "comeback" clause. In other respects, however, what the Initial Order should seek to accomplish, in my view, is to put in place the necessary stay provisions and such further operating, financing and restructuring terms as are reasonably necessary for the continued operation of the debtor company during a brief but realistic period of time, on an urgency basis. During such a period, the ongoing operations of the company will be assured, while at the same time the major affected stakeholders are able to consider their respective positions and prepare to respond.

22 Having sought only the reasonably essential minimum relief required for purposes of the Initial Order, the applicant then has the discretion as to when to ask for more extensive relief. It may well be helpful, though, if the nature of the more extensive relief to be sought is signalled in the Initial application, so that interested and affected persons will know what is in the offing in that regard.

23 Subsection 11(3) of the Act does not stipulate that the Initial Order shall be granted for a period of 30 days. It provides that the Court in its discretion may grant an order for a period *not exceeding* 30 days. Each case must be approached on the basis of its own circumstances, and an agreement in advance on the part of all affected secured creditors, at least, may create an entirely different situation. In the absence of such agreement, though, the preferable practice on applications under subsection 11(3) is to keep the Initial Order as simple and straightforward as possible, and the relief sought confined to what is essential for the continued operations of the company during a brief "sorting-out" period of the type referred to above. Further issues can then be addressed, and subsequent orders made, if appropriate, under the rubric of the subsection 11(4) jurisdiction.

24 It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances — as opposed, for instance, to a receivership or bankruptcy — and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

25 For similar reasons, things like the proliferation of advisory committees and the attendant professional costs accompanying them, and the extension of broad protection to directors, are better left for orders other than the Initial order.

26 I conclude these observations with a word about the "comeback clause". The Initial Order as granted in this case contained the usual provision which is known by that description. It states:

THIS COURT ORDERS that, notwithstanding any other provision of this Order, the Applicants may apply at any time to this Court to seek any further relief, *and any interested Person may apply to this Court to vary or rescind this Order or seek other relief* on seven days' notice to the Applicants, the Monitor, the CCAA Lender and to any other Person likely to be affected by the Order sought or on such other notice, if any, as this Court may order. (emphasis added)

27 The Initial Order also contained the usual clause permitting the Applicants or the Monitor to apply for directions in relation to the discharge of the Monitor's powers and duties or in relation to the proper execution of the Initial Order. This right is not afforded to others.

28 The comeback provisions are available to sort out issues as they arise during the course of the restructuring. However, they do not provide an answer to overreaching Initial Orders, in my view. There is an inherent disadvantage to a person having to rely on those provisions. By the time such a motion is brought the CCAA process has often taken on a momentum of its own, and even if no formal "onus" is placed on the affected person in such a position, there may well be a practical one if the relief sought goes against the established momentum. On major security issues, in particular, which arise at the Initial Order stage, the occasions where a creditor is required to rely upon the comeback clause should be minimized.

29 These reasons are intended to compliment and to elaborate upon those set out in the brief endorsement made at the time the Initial Order was granted on February 15, 1999, in favour of the Royal Oak Applicants, but in a form more limited than that sought.

*Application granted.*

#### Footnotes

1 CCAA, subsection 3(1).

End of Document

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# TAB 7

**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [Re Just Energy Corp.](#) | 2021 ONSC 1793, 2021 CarswellOnt 3724 | (Ont. S.C.J. [Commercial List], Mar 9, 2021)

2019 BCSC 1234  
British Columbia Supreme Court

Miniso International Hong Kong Limited v. Migu Investments Inc.

2019 CarswellBC 2208, 2019 BCSC 1234, 308 A.C.W.S. (3d) 465, 71 C.B.R. (6th) 250

**MINISO INTERNATIONAL HONG KONG LIMITED, MINISO INTERNATIONAL (GUANGZHOU) CO. LIMITED, MINISO LIFESTYLE CANADA INC., MIHK MANAGEMENT INC., MINISO TRADING CANADA INC., MINISO CORPORATION and GUANGDONG SAIMAN INVESTMENT CO. LIMITED (Petitioners) and MIGU INVESTMENTS INC., MINISO CANADA INVESTMENTS INC., MINISO (CANADA) STORE INC., MINISO (CANADA) STORE ONE INC., MINISO (CANADA) STORE TWO INC., MINISO (CANADA) STORE THREE INC., MINISO (CANADA) STORE FOUR INC., MINISO (CANADA) STORE FIVE INC., MINISO (CANADA) STORE SIX INC., MINISO (CANADA) STORE SEVEN INC., MINISO (CANADA) STORE EIGHT INC., MINISO (CANADA) STORE NINE INC., MINISO (CANADA) STORE TEN INC., MINISO (CANADA) STORE ELEVEN INC., MINISO (CANADA) STORE TWELVE INC., MINISO (CANADA) STORE THIRTEEN INC., MINISO (CANADA) STORE FOURTEEN INC., MINISO (CANADA) STORE FIFTEEN INC., MINISO (CANADA) STORE SIXTEEN INC., MINISO (CANADA) STORE SEVENTEEN INC., MINISO (CANADA) STORE EIGHTEEN INC., MINISO (CANADA) STORE NINETEEN INC., MINISO (CANADA) STORE TWENTY INC., MINISO (CANADA) STORE TWENTY-ONE INC. and MINISO (CANADA) STORE TWENTY-TWO INC. (Respondents)**

Fitzpatrick J.

Heard: July 12, 2019

Judgment: July 12, 2019

Written reasons: July 29, 2019

Docket: Vancouver S197744

Counsel: K.M. Jackson, G.P. Nesbitt, for Petitioners

V.L. Tickle, D.R. Shouldice, for Respondents

Subject: Insolvency

#### Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous  
Petitioners, secured creditors, were owners of "M" Japanese lifestyle product brand — Respondent debtor companies were Canadian owners and operators who has licensed to use of M brand in Canada, and they also purchased products from creditors for resale in Canada — Creditors advanced US\$2.4 million demand loan to debtors, and debtors received substantial amount of M products valued at approximately \$17.5 million which were not paid for — Creditors demanded payment of amounts owing under demand loan, earlier account receivable and amounts owing for further supply of M products — Total indebtedness owing by debtors to creditors was approximately \$35.5 million, creditors terminated debtors' right to sell and market M brand in Canada

and it would not deliver further products — Creditors brought proceedings pursuant to Companies' Creditors Arrangement Act (CCAA) — Petition granted — Debtor companies were each "company" existing under laws of Canada or province, claims against them exceeded \$5 million, and debtors were unable to meet their liabilities as they came due and were insolvent and "debtor company" within meaning of CCAA — CCAA expressly granted standing to creditors to commence proceedings in respect of debtor company — Debtors could not proceed with their business operations without ongoing support of creditors — Stakeholders required relief sought in initial order on urgent basis in order to allow debtors to continue operating their business, and initial order was best option toward preserving debtors' enterprise value for benefit of stakeholders — It was appropriate to grant stay that temporarily enjoined debtors' creditors from proceeding with claims against them — Proposed monitor was appropriate and was appointed — Factors set out in s. 11.2(4) of CCAA supported approval of \$2 million interim financing and granting of charge to secure amounts advanced — Intention was to develop and prepare restructuring transaction, and it was clear that financing was required to continue operations which would allow debtors to maintain value of enterprise while they pursued restructuring — Interim financing would be used only by debtors in accordance with direct supervision of monitor — Restructuring charges including maximum \$1 million administration charge and maximum \$1 million directors' and officers' charge were necessary, appropriate, fair and reasonable — Restructuring charges were ranked in priority with administration charge first, interim financing charge second, and directors' and officers' charge last.

#### Table of Authorities

##### Cases considered by *Fitzpatrick J.*:

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201 (Ont. S.C.J. [Commercial List]) — referred to

*Canwest Publishing Inc. / Publications Canwest Inc., Re* (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — considered

*Cinram International Inc., Re* (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

*Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147, 1991 CarswellOnt 182 (Ont. Gen. Div.) — referred to

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

*Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

*Royal Oak Mines Inc., Re* (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — considered

*Stelco Inc., Re* (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List]) — referred to

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*Stelco Inc., Re* (2004), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, 338 N.R. 196 (note) (S.C.C.) — referred to

*Ted Leroy Trucking Ltd., Re* (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered

*Timminco Ltd., Re* (2012), 2012 ONSC 506, 2012 CarswellOnt 1263, 95 C.C.P.B. 48, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

##### Statutes considered:

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

s. 2 "debtor" — considered

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

Generally — referred to

s. 2(1) "debtor company" — considered



s. 3(1) — referred to

ss. 4-5 — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51(3) [en. 2005, c. 47, s. 128] — referred to

s. 11.51(4) [en. 2005, c. 47, s. 128] — referred to

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

PETITION by secured creditors seeking relief under *Companies' Creditors Arrangement Act*.

***Fitzpatrick J.:***

## **INTRODUCTION**

1 The petitioners bring these proceedings pursuant to the *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36* (the "*CCAA*"). Unlike the usual circumstance where the debtor companies commence the proceedings, the petitioners are the secured creditors of the respondent debtor companies, resulting in a creditor-driven *CCAA* proceeding.

2 The petitioners, collectively described as the "Miniso Group", are the owners of the "Miniso" Japanese lifestyle product brand. The Miniso Group manufactures products and operates a number of Miniso stores in Asia where those products are sold. The Miniso Group licenses the "Miniso" name for use in other parts of the world and sells products to those entities.

3 The respondent debtor companies, collectively described as the "Migu Group", are the Canadian owners and operators who have licensed the use of the "Miniso" brand in Canada. The Migu Group also purchases products from the Miniso Group for resale here in Canada.

4 On July 12, 2019, I granted an initial order in this matter (the "Initial Order") with reasons to follow. These are those reasons.

## **BACKGROUND FACTS**

5 The evidence at the hearing consisted of the Affidavit #1 of Qihua Chen, an employee of one entity within the Miniso Group, sworn July 11, 2019.

6 The Miniso Group manufacture lifestyle products under the "Miniso" brand name and distribute those products, under licence, to retail outlets selling "Miniso" branded inventory to the public.

7 The Miniso Group, through a related entity, Miniso Hong Kong Limited, holds all applicable trademarks related to the "Miniso" brand (respectively, the "Miniso Trademarks" and the "Miniso Brand"), including in Canada.

8 The Migu Group are a group of corporations formed primarily to sell "Miniso" branded products in Canada under a licensing agreement with the Miniso Group.

9 The respondent Migu Investments Inc. ("Migu") is the parent company. It owns 100% of the respondents Miniso Canada Investments Inc. ("MC Investments") and Miniso (Canada) Store Inc. ("MC Store").

10 The controlling mind of the Migu Group is Tao Xu, a resident of Toronto, Ontario. Mr. Xu owns the only issued and outstanding common voting share of Migu. The only other shares of Migu are non-voting and non-participating preferred shares.

11 In 2017, the Migu Group acquired the right to use the Miniso Brand in Canada pursuant to various licensing and cooperation agreements with members of the Miniso Group. In addition, on October 7, 2016, various entities entered into a framework cooperation agreement. That agreement provided that the Miniso Group would contribute Miniso Brand products including, without limitation, inventory and standardized Miniso store fixtures (the "Miniso Products") equivalent in value to 20,000,000 RMB and that certain investments would be made to set up a company or companies to operate under the Miniso Brand in Canada.

12 The terms of these agreements, as later amended, included that:

- a) The Miniso Group agreed to supply Miniso Products to the Canadian operations for sale in various stores in exchange for payment; and
- b) The Canadian operations were to be conducted under the Miniso Group's standard master license agreement, which would allow the Miniso Group to control the use of the Miniso Brand (of which the Miniso Products are a part), throughout the Canadian operations.

13 Starting in 2017, the Migu Group (through MC Investments) began incorporating various subsidiaries. MC Investments owns and controls each of the other named respondent subsidiaries (the "Subsidiaries"). Although the corporate structure is somewhat unclear at this time, these Subsidiaries, either alone or through partnerships or joint ventures, have opened or are in the process of opening retail stores throughout Canada that sell Miniso Brand products (the "Outlet Stores"). Some of the Subsidiaries own more than one Outlet Store and some were incorporated in anticipation of opening additional Outlet Stores.

14 As part of the arrangements, an entity related to the Miniso Group granted to Migu (on behalf of the Migu Group) the right to use and sell Miniso Products and display the Miniso Trademarks in Canada pursuant to a trademark licence agreement dated June 1, 2018 (the "Licence Agreement"). The Licence Agreement contained the following material terms, among others:

- a) The Migu Group was only permitted to sell Miniso Products via the Outlet Stores, unless otherwise agreed to by the Miniso Group;
- b) The Migu Group was permitted to grant sub-licenses to sub-licensees at its discretion subject to, among others, the condition that each sub-license would require each sub-licensee to be bound by the terms of the Licence Agreement; and
- c) The Miniso Group could terminate the Licence Agreement in the event that Migu became insolvent or committed an act of bankruptcy.

15 The Migu Group, through the Subsidiaries, have opened, or are in the process of opening a number of Outlet Stores across Canada (78 estimated at the time of the hearing). The Outlet Stores are located in British Columbia, Alberta, Ontario and Quebec. All Outlet Stores operate out of leased premises. There are two Miniso branded retail locations operating in Nova Scotia in which the Migu Group has an interest, but which are not operated by the Migu Group. The Migu Group also leases several warehouses, distribution centres and offices in various locations. The Migu Group's head office is located in Richmond, B.C.

16 In some cases, the Migu Group contracted with individual investors (the "Investors") to open Outlet Stores partnered with one of the Subsidiaries. It is believed that, in most instances, MC Investments (on behalf of the Migu Group) and an Investor would enter into two agreements to document their arrangement, as follows:

a) An "Investment and Cooperation Agreement", whereby MC Investments and the Investor would agree that, in exchange for the Investor's investment, MC Investments would incorporate a company (one of the Subsidiaries) to operate and manage an Outlet Store selling Miniso branded products. As part of this, MC Investments would grant to the Subsidiary a sublicense permitting it to sell Miniso branded products and to use the Miniso Trademarks under the Miniso Brand; and

b) A "Limited Partnership Agreement", whereby the Investor and MC Investments would act as limited partners and the Subsidiary (through which the Outlet Store would operate) would act as general partner.

17 The parties refer to these arrangements together as the "Joint Venture Store Agreements".

18 In cases where MC Investments entered into a Limited Partnership Agreement with respect to an Outlet Store, the Subsidiary which operated such Outlet Store either acted as general partner to the partnership formed by the Limited Partnership Agreement, or incorporated a general partner in which it held a 51% ownership interest (the "JV Store Affiliates"), with the remaining 49% being owned by the applicable Investors.

19 The Miniso Group understands that each of the Outlet Stores holds a separate bank account through the applicable Subsidiary that operates that Store (collectively, the "Deposit Accounts"), the majority of which are held at TD Canada Trust, which are used for the receipt of cash sales and credit card sales at the Outlet Stores. In addition, the Miniso Group understand that MC Investments holds a master Canadian-dollar account (the "Master Account") and that, historically, the Deposit Accounts were manually swept on a regular basis, at the Migu Group's discretion, into the Master Account.

20 The employees are all employed by MC Investments. The Migu Group currently directly employ approximately 700 people on a part-time or full-time basis. There is no union and collective bargaining agreement in place.

#### **EVENTS LEADING TO INSOLVENCY**

21 For some years now, the Miniso Group has shipped and delivered a substantial amount of Miniso Products to the Migu Group. The Miniso Group is the primary supplier of product and inventory to the Migu Group, such that it is estimated that Miniso Product accounts for 80-90% of all merchandise sold in the Outlet Stores. During that time period and until 2018, the Miniso Group shipped and sold approximately \$30 million of Miniso Products to the Migu Group, which was then distributed to the Subsidiaries for sale in the Outlet Stores.

22 In December 2017, Miniso International Hong Kong Limited, on behalf of the Miniso Group, advanced a US\$2.4 million demand loan to MC Investments (on behalf of the Migu Group) to fund the Migu Group's working capital requirements.

23 In October 2018, the Migu Group also received a substantial amount of Miniso Products valued at approximately \$17.5 million. The Miniso Group was not paid for this shipment.

24 In the fall of 2018, the Miniso Group and the Migu Group had a dispute about the demand loan and account receivable. This led to the Miniso Group making demand on the Migu Group for payment. Later still, in mid-December 2018, the Miniso Group filed an application in this Court for a bankruptcy order against the Migu Group.

25 In January 2019, the dispute was resolved when the parties entered into a forbearance agreement. The forbearance agreement provided that:

a) The Migu Group acknowledged and agreed that the demand loan and inventory receivable was due and owing to the Miniso Group;

b) By January 21, 2019, or as otherwise agreed, the parties agreed to negotiate an agreement by which the Miniso Group would acquire all of the assets of the Migu Group relating to its Canadian operations; and

c) The Miniso Group agreed to forbear for a period of time from taking steps to collect the demand loan and the account receivable. In addition, in the meantime, the Miniso Group agreed to continue to supply Miniso Products to the Migu Group, with the purchase price to be added to the outstanding indebtedness. Title to the Miniso Products remained with the Miniso Group until payment in full was made for them.

26 On January 4, 2019, as a condition to the Miniso Group's forbearance:

a) The Migu Group granted to the Miniso Group a general security agreement securing the past and future obligations owing to the Miniso Group;

b) Mr. Xu postponed the security held by him against the Migu Group to the security in favour of the Miniso Group; and

c) The Migu Group entered into a temporary licence agreement for the use of the Miniso Brand during the period of the forbearance.

27 On March 5, 2019, the Migu Group provided a further general security agreement to the Miniso Group as security for its obligations to the Miniso Group. Mr. Xu, MC Store and MC Investments also executed priority agreements in favour of the Miniso Group.

28 On February 23, 2019, various entities entered into an asset purchase agreement by which the Migu Group agreed to sell its Canadian operations Miniso Lifestyle Canada Inc. ("Miniso Lifestyle") or a designated purchaser (the "APA"). The APA provided that:

a) The Migu Group appointed Miniso Lifestyle to operate and manage the Canadian operations until the earlier of the closing of the sale under the APA or termination of the APA;

b) The Miniso Group would continue to supply the Miniso Products to MC Investments; and

c) Grant Thornton LLP would be engaged as auditor to conduct an audit of the Canadian operations of the Migu Group to determine the amount of net capital invested by the Migu Group, including Mr. Xu, for the purpose of determining the purchase price payable under the APA.

29 In addition, on March 5, 2019, the Miniso Group provided financial support to the Migu Group pending a closing or termination of the APA. Miniso Lifestyle advanced \$1.5 million to the Migu Group to be used to fund its Canadian operations. In addition, Miniso Lifestyle deposited \$1.5 million in escrow pending the closing of the transaction contemplated in the APA or the termination of the APA.

30 After completing its due diligence, the Miniso Group did not waive the conditions in the APA. Accordingly, effective June 30, 2019, the APA expired.

31 On June 25, 2019, the Miniso Group's counsel demanded payment of the amounts owing under the demand loan, the earlier account receivable and the amounts owing for the further supply of Miniso Products after January 2019. On July 3, 2019, the Miniso Group's counsel demanded the return of the deposit that had been placed in escrow and payment of the March 2019 loan.

## **CURRENT STATUS**

32 As of July 3, 2019, the total indebtedness owing from the Migu Group to the Miniso Group was approximately \$35.5 million.

33 The Miniso Group is the primary secured creditor of the Migu Group's assets, under two general security agreements (except in Quebec where no security is held). There are other minor secured interests registered by certain equipment financiers and landlords. Mr. Xu still holds security against the assets, which is subordinated to the Miniso Group.

34 The Migu Group is current in respect of its obligations to pay employee wages and related remittances. However, it is possible that some or all employees are owed accrued and unused vacation pay. The Migu Group does not have a pension plan for their employees.

35 It is uncertain if the Migu Group's provincial sales tax remittances are current.

36 As noted, all of the premises from which the Migu Group operates across Canada are leased. The Migu Group currently remits monthly rents of approximately \$1.79 million. Some of the July rental payments (for 20 stores) have been paid; however, rent for the remainder of the premises, totalling approximately \$1.16 million, has not been paid.

37 The Migu Group owes approximately \$2 million in other accrued and unpaid unsecured liabilities, including to suppliers and service providers. It is anticipated that the Migu Group will honour outstanding gift card and credit notes during these *CCAA* proceedings and honour existing warranty and return policies.

38 The Migu Group's consolidated assets, as at May 31, 2019, had a book value of approximately \$53.3 million.

39 The Migu Group's value is almost entirely derived from their ability to sell and market Miniso Products under the Miniso Brand in Canada through the various agreements with the Miniso Group and importantly, their licence agreements with the Miniso Group. As of this date, the Miniso Group has terminated the Migu Group's right to sell and market the Miniso Brand in Canada and the Miniso Group will not deliver further product, save on terms acceptable to the Miniso Group. As such, the Migu Group is no longer able to market and sell the Miniso Brand. In addition, the Miniso Product in the possession of the Migu Group is the property of the Miniso Group until it is paid for.

40 The result is obvious - the Migu Group cannot operate their business and generate revenue without the cooperation and support of the Miniso Group.

## **CCAA ISSUES**

41 I will briefly discuss the various issues that arose on this application for the Initial Order.

### ***Statutory Requirements***

42 The *CCAA* applies in respect of a "debtor company" or "affiliated debtor companies" where the total amount of claims against the debtor or its affiliates exceeds \$5 million: *CCAA*, s. 3(1). "Debtor company" is defined in s. 2 of the *CCAA* to include any company that is bankrupt or insolvent.

43 I am satisfied that each of the companies within the Migu Group is a "company" existing under the laws of Canada or one of the provinces and that the claims against them exceed \$5 million.

44 Further, I am satisfied that the Migu Group, either individually or collectively, are unable to meet their liabilities as they come due and are therefore insolvent, and thus each is a "debtor company" within the meaning of the *CCAA*: see *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2; *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]) at paras. 21-22; leave to appeal ref'd, [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. ref'd [2004] S.C.C.A. No. 336 (S.C.C.).

45 The *CCAA* expressly grants standing to creditors, such as the Miniso Group, to commence proceedings in respect of a debtor company: *CCAA*, ss. 4-5; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Ont. S.C.J. [Commercial List]) at para. 34.

### ***Objectives of the CCAA***

46 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court provided a detailed analysis of the purpose and policy behind the *CCAA*. Of particular note were the Court's comments that:

a) the purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets (para. 15); and

b) the *CCAA*'s distinguishing feature is a grant of broad and flexible authority to the supervising court to use its discretion to make the order necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The courts have used its *CCAA* jurisdiction in increasingly creative and flexible ways (para. 19).

47 The commencement of *CCAA* proceedings is a proper exercise of creditors' rights where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario: *Citibank Canada v. Chase Manhattan Bank of Canada*, [1991] O.J. No. 944 (Ont. Gen. Div.) at para. 49; *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]) at paras. 33 and 40.

48 The imperatives facing both the Miniso Group and the Migu Group here are stark.

49 Without the cooperation of the Miniso Group, including access to immediate interim financing from the Miniso Group, the Migu Group will be unable to meet their liabilities as they become due and it will not be able to continue their operations and preserve their assets. The Migu Group is facing numerous claims from creditors other than the Miniso Group.

50 In addition, the Migu Group's ability to repay the indebtedness owed to the Miniso Group will be severely compromised in the event of a receivership and liquidation.

51 Simply put, the Migu Group cannot proceed with its business operations without the ongoing support of the Miniso Group.

52 There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain enterprise value for the benefit of all stakeholders, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.

53 I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here.

54 In addition, I was satisfied that the stakeholders require the relief sought in the Initial Order on an urgent basis in order to allow the Migu Group to continue operating their business. The need for cash was immediate and without access to interim financing and the stay of proceedings, the Migu Group was not be able to preserve the value of their business or even ensure the coordinated realization of their assets. As such, the Initial Order was the best option toward preserving the Migu Group's enterprise value for the benefit of their stakeholders.

55 After considering all of the circumstances, I am satisfied that these *CCAA* proceedings can assist in preserving value for the stakeholders, until a longer term solution is found.

### ***The Stay of Proceedings***

56 In addressing the granting of a stay of proceeding in an initial order under the *CCAA*, Justice Farley in *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) stated:

[5] ... a judge has the discretion under the *CCAA* to make [an] order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...

[6] ... It has been held that the intention of the [CCAA](#) is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain the approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed ...

7 One of the purposes of the [CCAA](#) is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The [CCAA](#) facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors ...

57 I was satisfied that it was appropriate to exercise my discretion under [s. 11.02\(1\) of the CCAA](#) to grant a stay that temporarily enjoins the Migu Group's creditors from proceeding with claims against the debtor companies. This stay of proceedings will prevent any creditor from gaining any advantage that might otherwise be obtained. It will also facilitate the ongoing operations of the Migu Group's business to preserve value and provide the Group with the necessary breathing room to carry out a restructuring or organized sales process.

58 The Miniso Group sought a stay not only against the Migu Group, but also with respect to other entities that are not parties to this proceeding, namely the JV Store Affiliates. The JV Store Affiliates are the general partner companies or partnerships formed to operate the Outlet Stores.

59 The Court has broad jurisdiction under [s. 11.02\(1\) of the CCAA](#) to impose stays of proceedings where it is just and reasonable to do so, including with respect to third party non-applicants.

60 In *Cinram International Inc., Re*, [2012 ONSC 3767](#) (Ont. S.C.J. [Commercial List]), the court discussed circumstances that could justify extending the stay to third party non-applicants:

[64] The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

- a. where it is important to the reorganization process;
- b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the [CCAA](#) (such as partnerships that are not "companies" under the [CCAA](#));
- c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and
- d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

61 As noted in *Cinram International Inc.*, there is specific authority to grant a stay of proceedings against entities within a limited partnership context, where the business operations of the debtor companies are intertwined within that corporate/partnership structure: *Lehdorff General Partner Ltd.* at paras. 12, 16-21; *Canwest Publishing Inc. / Publications Canwest Inc., Re*, [2010 ONSC 222](#) (Ont. S.C.J. [Commercial List]) at paras. 33-34.

62 I found that it was just and appropriate to extend the stay in these proceedings to include the JV Store Affiliates in the circumstances. The business operations of the Outlet Stores are intertwined with the JV Store Affiliates. There is also some intertwining of the financial obligations of the Migu Group and that of the JV Store Affiliates.

63 The draft Initial Order sought a stay for 10 days until July 22, 2019. It appears that the length of the stay was set at 10 days in light of the uncertainty with respect to amendments proposed to the [CCAA](#) by the *Budget Implementation Act, 2019*, No. 1 Part 4 ("Bill C-97") tabled in Parliament in March 2019.

64 With respect to initial applications under the *CCAA*, ss. 136-138 of Division 5 (Enhancing Retirement Security) of Bill C-97 contains an important amendment. Section 137 includes an amendment to s. 11.02(1), as follows:

**Stays, etc. — initial application**

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

[Emphasis added.]

65 Bill C-97 received Royal Assent on June 21, 2019. However, s. 152 of Bill C-97 provides that the amendments to the *CCAA* come into force on a day to be fixed by order of the Governor in Council. As best the parties have discerned, no such order in Council has yet been pronounced.

66 The intent behind the new s. 11.02(1) is clear. It limits the exercise of discretion by the Court in determining the length of any stay such that the maximum amount of any stay will be 10 days, as opposed to the previous 30-day limit.

67 In any regard, I was satisfied that the relief sought here for a 10-day stay was appropriate. At this time, only the Miniso Group has been involved in this process. All parties recognize that many other stakeholders' interests are at play here. Those persons are entitled to notice as soon as possible so that they can appear and be heard in respect of the relief granted in the Initial Order and in terms of any relief that might be granted in this proceeding in the future.

68 I therefore exercised my discretion and concluded that the 10-day stay was appropriate in the circumstances.

***The Monitor***

69 The Miniso Group proposed that Alvarez & Marsal Canada Inc. ("A&M") act as the monitor. As I will discuss below, the relief sought would vest A&M with powers greater than is usually found in a *CCAA* proceeding, giving the monitor more oversight and power to direct the business operations of the Migu Group over the course of the restructuring.

70 In the usual fashion, A&M filed a Pre-Filing Report as the proposed monitor dated July 12, 2019.

71 A&M indicated that it has no conflicts that would prevent it from acting as a monitor in this proceeding: *CCAA* s. 11.7(2). A&M have consented to act as monitor and to provide supervision and monitoring during the proceedings. In addition, in accordance with the Initial Order, A&M agreed to manage the Migu Group's business during these proceedings, including by engaging Miniso Lifestyle under a management services agreement, until the implementation of a restructuring transaction.

72 I was satisfied that A&M is an appropriate entity to be appointed as monitor in these proceedings (the "Monitor").

***Interim Financing***

73 The Miniso Group sought an order to approve interim financing for the Migu Group in order to allow the Migu Group to meet its obligations over the stay period granted under the Initial Order. In consultation with the Monitor, the Miniso Group agreed to advance up to \$2 million to the Migu Group under an interim credit facility agreement to allow the Migu Group to pay their ongoing business and restructuring expenses.

74 As is typically the case, it was a condition of any advance under the interim financing that the lender be granted a priority Court-ordered charge on all the assets, rights, undertakings and properties of the Migu Group as security for amounts advanced, to rank after the proposed administration charge discussed below.

75 Section 11.2(1) of the *CCAA* vests the Court with jurisdiction to grant an interim debtor-in-possession a financing charge in priority to the claim of any secured creditor of the debtor company, on notice to secured creditors who are likely to be affected



by the security or charge. Section 11.2(4) of the *CCAA* sets out the non-exhaustive factors that the Court may consider before granting such a charge:

- (a) the period during which the company is expected to be subject to proceedings under the *CCAA*;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report, if any.

76 Bill C-97 is also relevant to this aspect of the relief sought in respect of the interim financing.

77 Section 136 of Bill C-97 provides for a new s. 11.001. This new section introduces, within the context of s. 11 orders generally, a restriction on the Court's discretion to not only order what is "appropriate" under s. 11, but also only what is "reasonably necessary for the continued operations of the debtor company in the ordinary course" during the relevant stay period:

#### **Relief reasonably necessary**

**11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[Emphasis added.]

78 Specific amendments in respect of interim financing are also found in Bill C-97 and dovetail the above restriction in s. 11.001 as to what is "reasonably necessary". Section 138 of Bill C-97 provides for the addition of a new s. 11.2(5) of the *CCAA*, as follows:

#### **Additional factor — initial application**

**(5)** When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[Emphasis added.]

79 Accordingly, the intent of Parliament under the new s. 11.2(5) is to curtail the discretion of the Court to grant interim financing in the stay period under an initial order (i.e. up to 10 days) to only what is "reasonably necessary" during that stay period.

80 This provision is not inconsistent with the current approach of Canadian courts when exercising its discretion under s. 11.2 of the *CCAA*. Indeed, the provisions of the new s. 11.2(5) are echoed in Justice Farley's comments in *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]):

[24] It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances — as opposed, for instance, to a receivership or bankruptcy — and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

[Emphasis added.]

81 A consideration of the proposal for interim financing here is very much informed by the considerable uncertainty about what financial resources are available to the Migu Group at this time.

82 The Monitor reports that the opening cash position of the Migu Group is approximately \$1.4 million as of July 12, 2019. However, certain creditors have recently filed an action against the Migu Group and, on July 9, 2019, obtained a garnishing order for \$1,040,772.50 as against MC Investments' Master Account at TD Canada Trust. It is therefore possible that TD Canada Trust has paid that amount or some of that amount into court or, at least, frozen the balance in Master Account. If that has happened, then the balance on hand is no longer available for the Migu Group's needs.

83 The cash flow indicates that payroll of approximately \$700,000 was to be due the week after the Initial Order was granted. In addition, rental payments of approximately \$800,000 were necessary in the immediate future. The cash flow projections assume ongoing sales, but that amount is also uncertain.

84 The Monitor supported the granting of the interim financing, in light of the needs of the Migu Group required during the restructuring and in light of the uncertainty about current financial resources.

85 I was satisfied that the s. 11.2(4) factors supported the approval of the \$2 million interim financing and the granting of a charge to secure the amounts advanced.

86 I accepted the submissions of the Miniso Group, supported by the Monitor, that the intention is to develop and prepare a restructuring transaction, including a restructuring and a sale of some part of the Migu Group's Canadian operations, as soon as practicable. It is obvious that financing is required to continue operations. With this financing, the Migu Group is able to continue to operate the Outlet Stores, with continued employment of their store-level employees and ongoing payment of rents, while they work with the Monitor and the Miniso Group to formulate a plan. The interim financing is therefore necessary to permit the Migu Group to maintain the value of the enterprise while they pursue a restructuring.

87 In addition, I was provided some assurance that the interim financing will be used only by the Migu Group in accordance with the direct supervision of the Monitor. The Monitor's powers include the monitoring, review and direction regarding the Migu Group's receipts and disbursements.

88 I also approached the matter of interim financing in the spirit of the new s. 11.2(5) of the CCAA. I was satisfied that, in these unique and uncertain circumstances, the \$2 million of interim financing was potentially reasonably necessary to address the needs of the Migu Group until the comeback hearing 10 days later on July 22, 2019.

89 In addition, in order to reflect the Court's clear intention in that respect, the Initial Order was amended to limit the Migu Group's use of the \$2 million interim financing by provided that:

50. ... until the Comeback Hearing, borrowings are limited to the minimum amount required to cover all expenses reasonably incurred by the Debtors in carrying on the Business in the ordinary course.

90 I also concluded that the interim financing was on commercially reasonable terms: allowing for draws of \$250,000; no standby fee; interest rate of 10% per annum; and, no prepayment penalty.

### ***Restructuring Charges***

91 The Miniso Group sought an administration charge over the Migu Group's assets, properties, and undertakings up to the maximum amount of \$1 million to secure payment of the fees and disbursements of the Monitor, and its and the Migu Group's legal counsel, incurred in connection with services rendered both before and after the commencement of these *CCAA* proceedings. The administration charge sought is to rank in priority to all other encumbrances, including all other court-ordered charges.

92 [Section 11.52 of the \*CCAA\*](#) expressly provides the Court with the power to grant a charge in respect of professional fees and disbursements on notice to affected secured creditors.

93 Administration charges are a usual feature of *CCAA* initial orders. As stated in *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para. 66, unless professional advisor fees are protected by way of a charge, the objectives of the *CCAA* would be frustrated as professionals would be unlikely to risk offering services without any assurance of ultimately being paid. Failing to provide protection for professional fees will "result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings".

94 The basis for an administration charge is well made out here, particularly given the Miniso Group's substantial and first ranking charge over the Migu Group's assets.

95 In *Canwest Publishing Inc.* at para. 54, the court refers to certain factors that could be considered in determining the amount of an administration charge:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is 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.

96 I was satisfied that a \$1 million limit for the administration charge was appropriate. The amount of the administration charge was determined in consultation with the Monitor. I concluded that this amount was fair and reasonable in light of the number of stakeholders, the size and complexity of the Migu Group's business and the scope and complexity of the proposed restructuring.

97 The Miniso Group was also seeking a directors' and officers' charge (the "D&O Charge") over the Migu Group's assets, properties and undertakings to indemnify the directors and officers in respect of liabilities they may incur as directors and officers during these proceedings, up to a maximum of \$1 million.

98 Pursuant to [s. 11.51\(1\) of the \*CCAA\*](#), the Court has jurisdiction to grant a charge to secure a directors' and officers' indemnification on a priority basis on notice to the affected secured creditors. The charge must relate to any obligations or liabilities that may be incurred after the commencement of proceedings. The court must be satisfied with the amount of the

charge, that insurance is not otherwise available (s. 11.51(3)) and that the charge will not provide coverage for wilful misconduct or gross negligence (s. 11.51(4)): *Canwest Publishing Inc.* at paras. 56-57.

99 Here, the extent to which the directors and officers of the Migu Group may be exposed is unknown to a large degree. The Miniso Group has been advised that the directors and officers of the Migu Group do not have any directors' and officers' liability insurance in place. In consultation with the Migu Group, the Monitor has recommended that the D&O Charge be limited to \$1 million.

100 I concluded that the D&O Charge was necessary and appropriate in the circumstances. The D&O Charge will ensure that the directors and officers of the Migu Group continue in their current capacities in the context of these *CCAA* proceedings. I am advised that the directors and officers of the Migu Group are prepared to continue in their roles during these proceedings.

101 I also accepted the Miniso Group's proposal that the various restructuring charges granted rank in priority, as follows:

- a) Firstly, the administration charge (maximum \$1 million);
- b) Secondly, the interim financing charge (maximum \$2 million, plus interest, costs, fees and disbursements); and
- c) Thirdly, the D&O Charge (maximum \$1 million).

### ***Restructuring***

102 At this preliminary stage, the germ of the restructuring plan has been formulated by the Miniso Group and generally provides:

- a) There will be a consensual realization process toward ensuring the preservation of the Migu Group's Canadian operations;
- b) Miniso Lifestyle will manage the Canadian operations on behalf of the Migu Group during the *CCAA* proceedings in accordance with the management services agreement;
- c) The Migu Group will not have any further communications with landlords, creditors or other stakeholders, except as approved by the Miniso Group;
- d) The Monitor will consult with the Miniso Group and, with respect to certain premises, the Migu Group, regarding which real property leases are to be terminated. Some leases are personally guaranteed by entities who want to be consulted before any disclaimer. Sales at Outlet Stores would continue during the 30-day disclaimer period and retail employees would be incentivized to continue their employment during that time;
- e) A&M will have enhanced powers as Monitor to manage the Canadian operations and negotiate and implement a transaction, in consultation with the Migu Group; and
- f) By that anticipated transaction, the Miniso Group would acquire certain assets of the Migu Group comprising some or all of the Canadian operations so as to allow continued operation of certain of the Outlet Stores.

103 The stay under the Initial Order will remain in place until July 22, 2019. By that time, the numerous other stakeholders will have been served and they will have time to enable them to consider the impact of these *CCAA* proceedings and their position, if any, in response to it.

104 At the comeback hearing, the Court and all other stakeholders will have updated information as to the status of the Migu Group. In the meantime, the stay will be in place to allow the Monitor to operate the business and maintain the *status quo* while it works with the Miniso Group and Migu Group to develop a restructuring plan. The best estimate at the time of the hearing was that such a plan may be ready to present to the creditors within a few months.

## CONCLUSION

105 At the conclusion of the hearing, I granted the Initial Order, as proposed, with certain amendments that arose from a consideration of certain issues during the course of the hearing.

*Petition granted.*

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# TAB 8

**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [1077 Holdings Co-Operative \(Re\)](#) | 2021 BCSC 42, 2021 CarswellBC 895 | (B.C. S.C., Jan 12, 2021)

2020 BCSC 1586  
British Columbia Supreme Court

Mountain Equipment Co-Operative (Re)

2020 CarswellBC 2639, 2020 BCSC 1586, 324 A.C.W.S. (3d) 467, 83 C.B.R. (6th) 272

**In the Matter of the COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, C. C-36, as amended**

AND In the Matter of MOUNTAIN EQUIPMENT CO-OPERATIVE and 1314625 ONTARIO LIMITED (Petitioners)

Fitzpatrick J.

Heard: September 28-30, October 1, 2020

Judgment: October 2, 2020

Written reasons: October 28, 2020

Docket: Vancouver S209201

Counsel: H. Gorman, Q.C., S. Boucher, for Petitioners, Mountain Equipment Co-Operative and 1314625 Ontario Limited

H.L. Williams, J. Enns, for Monitor, Alvarez & Marsal Canada Inc.

J. Sandrelli, V. Cross, for Royal Bank of Canada, as Administrative Agent and Collateral Agent under Credit Agreement

D. Chochla, K. Jackson, for Kingswood Capital Management LP, Kingswood Capital Opportunities Fund I, LP, Kingswood Capital Opportunities Fund IA, LP and 1264686 B.C. Ltd.

C. Ramsay, K. Mak, P. Cho, N. Carlson, for Plateau Village Properties Inc.

K. McEwan, Q.C., C. Smith, R. Atkins, W. Stransky, for Midtown Plaza Inc.

L. Galessiere, for RioCan Real Estate Investment Trust Company

B. Wiffen, for Crestpoint Real Estate Investments Ltd., as authorized asset manager of 0965311 B.C. Ltd.

F. Viau, for Les Galeries de la Capitale Holdings Inc. and manager Oxford Properties Group

K. Hashmi, for First Capital Holdings (Alta) Corp. and First Capital (Ontario) Corp.

H. Meredith, for Concert Properties Limited

C. Gusikowski, P. Reardon, for Kevin Harding, spokesperson for steering committee for "SaveMEC" campaign

E. Bridgewater, for BC Co-op Association and Cooperatives and Mutuals Canada

Subject: Civil Practice and Procedure; Insolvency

**Headnote**

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

Debtor cooperative obtained relief pursuant to Companies' Creditors Arrangement Act — At comeback hearing, debtor brought application to continue relief granted in initial order, with approval to access entire amount of interim financing, approval of key employee retention program, and approval of sale of assets — Application granted — No creditor or stakeholder objected to interim financing sought — Debtor's financial circumstances continued to be very challenging, even in short term — Key employee retention plan was reasonable and necessary in the circumstances — Stay extended, to which no creditor objected — Purchaser's offer was clearly most advantageous one, both in terms of price, continuity of business operations, retention of stores, retention of employees and assumed liabilities — No conflict with monitor's affiliate previously providing consulting services — Asset purchase bid was competitive process, conducted in fair and reasonable manner and adequately canvassing market for options available — It was acceptable that many restructuring steps took place before process was officially entered

into — Short delay sought by certain objectors not granted, as chance objectors coming up with option within two weeks to stave off lenders, and secure necessary funding was unlikely and would create prejudice — Freedom of association under s. 2(d) of Canadian Charter of Rights and Freedoms not violated as Charter does not protect against organization incurring losses and finding itself in insolvent circumstances, even if organization is cooperative — Disclaimer of leases did not allow for delay of sale, as landlords were unlikely to be in any better position after delay of two weeks and there was no need for further document production — Debtor could not force buyer to take up its leases, and buyer was unlikely to do so — Dire financial circumstances would hardly have supported business decision to start up stores governed by leases.

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- Aralez Pharmaceuticals Inc. (Re)* (2018), 2018 ONSC 6980, 2018 CarswellOnt 19784, 65 C.B.R. (6th) 149 (Ont. S.C.J. [Commercial List]) — considered
- Can-Pacific Farms Inc., Re* (2012), 2012 BCSC 760, 2012 CarswellBC 1528, 94 C.B.R. (5th) 152 (B.C. S.C. [In Chambers]) — referred to
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- Miniso International Hong Kong Limited v. Migu Investments Inc.* (2019), 2019 BCSC 1234, 2019 CarswellBC 2208, 71 C.B.R. (6th) 250 (B.C. S.C.) — referred to
- Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)* (2015), 2015 SCC 1, 2015 CSC 1, 2015 CarswellOnt 210, 2015 CarswellOnt 211, 380 D.L.R. (4th) 1, 249 L.A.C. (4th) 1, 2015 C.L.L.C. 220-010, 466 N.R. 199, 328 O.A.C. 1, (sub nom. *Mounted Police Association of Ontario v. Canada (Attorney General)*) [2015] 1 S.C.R. 3, 325 C.R.R. (2d) 300, 129 O.R. (3d) 559 (note) (S.C.C.) — referred to
- Nelson Education Ltd., Re* (2015), 2015 ONSC 3580, 2015 CarswellOnt 8313, 26 C.B.R. (6th) 161 (Ont. S.C.J. [Commercial List]) — distinguished
- Nelson Education Ltd., Re* (2015), 2015 ONSC 5557, 2015 CarswellOnt 13576, 29 C.B.R. (6th) 140 (Ont. S.C.J. [Commercial List]) — referred to
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- Radford v. MacMillan* (2017), 2017 BCSC 1168, 2017 CarswellBC 1864 (B.C. S.C.) — considered
- Radford v. MacMillan* (2018), 2018 BCCA 335, 2018 CarswellBC 2399, 427 D.L.R. (4th) 277 (B.C. C.A.) — referred to
- Reference re Public Service Employee Relations Act (Alberta)* (1987), 87 C.L.L.C. 14,021, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, (sub nom. *Reference re Compulsory Arbitration*) 74 N.R. 99, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 78 A.R. 1, (sub nom. *A.U.P.E. v. Alberta (Attorney General)*) 28 C.R.R. 305, [1987] D.L.Q. 225, 1987 CarswellAlta 580, 1987 CarswellAlta 705 (S.C.C.) — referred to
- Sanjel Corp., Re* (2016), 2016 ABQB 257, 2016 CarswellAlta 900, 36 C.B.R. (6th) 239 (Alta. Q.B.) — considered
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- United Used Auto & Truck Parts Ltd., Re* (1999), 1999 CarswellBC 2673, 12 C.B.R. (4th) 144, 22 B.C.T.C. 268 (B.C. S.C. [In Chambers]) — referred to
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Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

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

s. 32(1) — considered

s. 36 — considered

s. 36(1) — considered

s. 36(3) — considered

s. 36(3)(b) — considered

*Cooperative Association Act*, S.B.C. 1999, c. 28

Generally — referred to

s. 71(2) — considered

s. 156 — considered

APPLICATION by debtor to continue relief granted in initial insolvency order, approve access to interim financing, approve key employee retention program, and approve sale of assets.

***Fitzpatrick J.:***

**INTRODUCTION**

1 On September 14, 2020, the petitioners, Mountain Equipment Co-operative and its wholly owned subsidiary, 1314625 Ontario Limited ("131"), sought and obtained relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). I will refer to the petitioners jointly by the first petitioner's well-known acronym, "MEC".

2 On September 14, 2020, I granted an Initial Order in favour of MEC that included a stay until September 24, 2020, although that was later extended to the time of this comeback hearing. I also approved an interim financing facility to a total of \$100 million (the "Interim Financing"), although draws were then limited to \$15 million, consistent with the test set out in s. 11.2(5) of the *CCAA*. I appointed Alvarez & Marsal Canada Inc. ("A&M") as the Monitor. Finally, I approved charges usually granted in these proceedings: an Administration Charge (\$1 million), a D&O Charge (\$4.5 million) and an Interim Financing Charge (\$102 million).

3 At this comeback hearing, MEC seeks an Amended and Restated Initial Order (ARIO) to continue the relief granted in the Initial Order, with approval to access the entire amount under the Interim Financing. In addition, MEC seeks approval of a Key Employee Retention Program (KERP) and a related charge. Finally, MEC seeks an order approving a sale of substantially all of its assets, pursuant to a Sale Approval and Vesting Order (SAVO).

4 Since September 14, 2020, formidable opposition has formed in response to MEC's application for approval to sell its assets under the SAVO.

5 Many parties now seek an adjournment of MEC's application for the SAVO, objecting to any sale at this time for various reasons. Those parties include two landlords, Plateau Village Properties Inc. ("Plateau") and Midtown Plaza Inc. ("Midtown"), and Kevin Harding, spokesperson for the steering committee for the "SaveMEC" campaign. Mr. Harding also seeks an order appointing his law firm as representative counsel for certain members of MEC, with an accompanying charge for their expenses.

6 MEC contends that it is critical that the sale occur without delay. MEC opposes all of the relief sought by the objecting parties.

7 On October 1, 2020, I concluded the comeback hearing. On October 2, 2020, I granted the orders sought by MEC, including the SAVO, and dismissed the relief sought by the objecting parties, with reasons to follow. These are my reasons.

## BACKGROUND

8 MEC is a co-operative association incorporated under the *Cooperative Association Act, S.B.C. 1999, c. 28* (the "*Co-op Act*").

9 In 1971, almost 50 years ago, MEC was formed from the passion of many Vancouverites who loved to spend time outdoors and appreciated having the right equipment and gear to do so. Since then, MEC has become an iconic retailer of outdoor activity equipment and clothing, serving the needs of the public who share that passion for the outdoors. MEC sells many well-known brands and also has its own very successful private label for many products.

10 MEC's ownership is unique. MEC currently has approximately 5.8 million members, each having paid a \$5 lifetime membership fee for the right to shop at MEC and participate in its governance as a co-operative member. Counsel advises that the breadth of MEC's membership in Canada is significant, representing some 22% of the Canadian working population.

11 131 owns a parcel of land that comprises the parking lot at the site of MEC's Ottawa Store. 131's assets are not significant in the overall circumstances. Similarly, MEC also owns an interest in a limited partnership which has nominal value.

12 MEC has a significant history of community involvement. Since 1987, MEC has contributed approximately \$44 million to organizations focused on conservation and outdoor recreation.

13 MEC's head office is located at leased premises in Vancouver, BC. MEC operates online and also, operates 22 retail locations across Canada in BC, Alberta, Manitoba, Ontario, Quebec and Nova Scotia. MEC leases its eastern distribution centre in Brampton, Ontario and most (16) of its store operations. MEC owns six store locations and its western distribution centre in Surrey, BC.

14 As of September 7, 2020, MEC has approximately 1,516 employees: 1,143 active employees, 176 laid off employees, 118 employees on the Canada Emergency Wage Subsidy program and 79 employees on unpaid leave.

15 MEC's board of directors (the "Board") has eight directors. As of September 10, 2020, MEC's senior management consists of seven officers. Philippe Arrata is MEC's Chief Executive Officer who has provided most of the sworn evidence on behalf of MEC in this proceeding.

16 In 2015, MEC embarked on a significant growth plan. That plan resulted in six new stores and two new relocated stores in Vancouver and Toronto, a new head office, a new eastern distribution centre as well as significant investments in online retail resources. MEC has commitments for two additional new stores (Calgary North West and Saskatoon) that have not yet opened, which is a point of controversy on this application. Over the ensuing years, this growth plan was successful from a market expansion and sales perspective, but it also resulted in a higher fixed cost structure and increased debt levels.

17 In August 2017, MEC, as borrower, and 131, as guarantor, entered into a credit agreement with the Royal Bank of Canada (RBC), as agent, and RBC, Canadian Imperial Bank of Commerce and the Toronto-Dominion Bank (collectively, the Lenders") for a senior secured asset-based revolving credit facility (the "Credit Facility").

18 The Credit Facility initially allowed MEC to borrow up to a maximum of \$130 million with a maturity date of August 3, 2020. Through various amendments implemented over 2020, that borrowing maximum was reduced to its present level, \$100 million. The Lenders hold first priority security over all of MEC's assets.

19 The results of MEC's growth strategy led to challenging fiscal circumstances. Since 2015, MEC's operating losses were approximately \$80 million, offset to some extent by real estate transactions that realized capital gains. Even so, the net loss for the year ending February 23, 2020 was approximately \$22.7 million, largely arising from increased costs, certain under-performing stores and liquidity strains.

20 MEC's assets consist primarily of: owned and leased real property; equipment; inventory; accounts receivable; and intangible assets including certain trademarks on trade names, membership lists and goodwill. As of February 2020, MEC's recorded a book value of approximately \$389 million in current and long-term assets.

21 MEC's liabilities are comprised primarily of: amounts owed to suppliers; governments and employees; amounts owed to the Lenders under the Credit Facility; gift cards and provision for sales returns; lease obligations; and deferred lease liabilities. MEC's current and long-term liabilities, as reported in its February 2020 Financial Statements, totalled approximately \$229.6 million.

## **EVENTS LEADING TO CCAA PROCEEDINGS**

22 In early 2020, MEC took steps to address its financial difficulties. MEC's Board brought in a new management team to focus on cost reduction and a return to profitability.

23 On February 10, 2020, MEC engaged Alvarez and Marsal Canada Securities ULC ("A&M Securities") as a financial advisor to assist in a review of strategic alternatives, provide assistance to obtain and negotiate new financing. A&M Securities is an entity affiliated with A&M, the Monitor.

24 In March 2020, the Board struck a special committee, comprised of three Board members (the "Special Committee"). The mandate of the Special Committee was to make recommendations to MEC's Board on strategic alternatives, including (a) transactions with a view to sell all or substantially all or any portion of MEC's assets (or a merger, amalgamation or some other strategic alliance involving MEC); (b) pursuit of organic growth; (c) recapitalization, restructuring or reorganization; or (d) any other strategic alternative in the best interests of MEC.

25 The efforts of the new management team, the Special Committee and A&M Securities led eventually to the implementation of a Sales and Investment Solicitation Process (SISP) that resulted in the proposed sale that MEC now seeks to have court approved.

26 Under its initial mandate, A&M Securities made efforts toward identifying a satisfactory refinancing, including: establishing a data room; contacting a number of lenders; and, entering into a number of Non-Disclosure Agreements (NDAs) with lenders. However, MEC and A&M Securities' efforts to find a solution to MEC's very difficult financial difficulties were hampered by the COVID-19 pandemic that hit Canada in March 2020. As one might expect, the pandemic had a significant and negative impact on the retail sector generally and on MEC's already struggling operations. All of MEC's stores closed as of March 18, 2020.

27 As the Monitor notes, MEC's insolvency arose from an unsustainable 25 "bricks and mortar" store operating model, the "disastrous" impact from the pandemic on sales and cash flow and inadequate financing capacity to sustain ongoing losses and provide working capital.

28 Although A&M Securities received a number of term sheets for a refinancing, none of them provided for a complete refinancing of MEC's debt that solved its serious financial challenges.

29 On June 1, 2020, as permitted by the BC Registrar for all cooperative associations, MEC announced that its Annual General Meeting (AGM) (originally scheduled for June 23, 2020) would be postponed by up to six months due to the impact of COVID-19 and to allow MEC to focus on the urgent financial challenges impacting its business. The AGM is scheduled for December 10, 2020.

30 On June 10, 2020, with the support of the Lenders, MEC expanded A&M Securities' engagement to explore whether there were other potential viable refinancing options and to initiate a SISP. The Special Committee established guiding commercial principles in the design of the SISP to: provide maximum value to the broad stakeholder group; preserve the maximum number of store locations and jobs; and ensure that, if possible, the buyer preserved MEC's purpose, values and outreach programs.

31 Again, A&M Securities followed the usual path in this effort, including establishing a data room, identifying potential interested purchasers, distributing an initial "teaser" letter to 158 parties and entering into confidentiality agreements with 39 interested parties. A&M Securities requested non-binding Letters of Intent (LOIs).

32 By July 15, 2020, A&M Securities had received nine LOIs and reviewed and conducted due diligence on each of them. On July 16, 2020, A&M Securities presented the LOIs to the Special Committee for its consideration and later provided its recommendations with respect to having bidders move into "Phase 2" of the SISP process. On July 24, 2020, MEC's Board considered the Special Committee's recommendation with respect to the LOIs.

33 On August 6, 2020, Phase 2 of the SISP process began with five recommended bidders who had submitted LOIs. The Phase 2 process established a final bid deadline of August 28, 2020. Four bids were received by that deadline, as were later reviewed by A&M Securities and the Special Committee.

34 On September 4, 2020, MEC's Board, with the input of their advisors, identified Kingswood Capital Management LP ("Kingswood"), a US based private investment firm, as the successful bidder and negotiations began to finalize a purchase and sale agreement.

35 As with many retailers, by mid-September 2020, the impact of the pandemic, which only exacerbated MEC's pre-existing difficulties, remained very relevant. In the months leading to September 2020, MEC realized a considerable increase in online sales, however, it still experienced a substantial reduction in sales compared to last year for that period (\$98 million). By mid-September 2020, MEC has re-opened many of its stores, however, five remain closed because of the pandemic. The stores that had re-opened were operating at a reduced sales volume.

36 As of September 4, 2020, and primarily due to the pandemic, MEC owed approximately \$4.6 million in rent deferrals or arrears in respect of its leases, and MEC had agreed to rent deferral plans with some of its landlords to repay these arrears by late 2021. Further, MEC had significant past due amounts owed to merchandise suppliers and other vendors.

37 As of September 11, 2020, MEC owed approximately \$74 million under the Credit Facility, leaving approximately \$19 million available under the borrowing base. At that time, MEC was unable to repay the Credit Facility by the maturity date of September 30, 2020.

38 All of these factors, together with MEC's ongoing lease, contractual and trade creditor obligations, led MEC to decide that it had no alternative but to seek a formal restructuring of its affairs in court proceedings and seek to conclude the Kingswood sale in those proceedings.

39 On September 11, 2020, MEC and Kingswood entered into an asset purchase and sale agreement (the "Sale Agreement"). Under the Sale Agreement, Kingswood, through a Canadian-based subsidiary, agreed to purchase substantially all of MEC's assets. The Sale Agreement is conditional on MEC obtaining court approval through this *CCAA* proceeding.

40 By the date of the filing (September 14, 2020), RBC had formally notified MEC of defaults under the Credit Facility. Despite MEC's challenging financial affairs, the Lenders confirmed their support for MEC in this *CCAA* proceeding and they continue to support MEC in terms of the relief presently sought.

#### **GERM OF THE PLAN**

41 When I granted the Initial Order, MEC had outlined a restructuring plan. During the course of these proceedings, MEC indicated its intention to:

- a) Immediately stabilize its cash flows and operations;
- b) Develop a strategy that would address its liquidity issues and generate sufficient revenue to sustain operations through the *CCAA* process, including by streamlining operations;
- c) Apply for the SAVO to approve the transaction with Kingswood, which would allow repayment to the Lenders and also allow MEC's business to emerge as a better capitalized operation with as little disruption as practicable; and
- d) Establish and complete a claims process toward formulating a plan of compromise and arrangement for presentation to its creditors. The intention is to fund a plan from the proceeds arising from the Kingswood sale.

#### **FUTHER CCAA RELIEF SOUGHT**

42 As stated above, MEC seeks to continue the relief sought in the Initial Order, with additional relief relating to: full approval of draws under the Interim Financing, approval of a KERF, extending the stay to November 3, 2020 and granting the SAVO.

43 MEC's application is supported by the Monitor's First Report dated September 24, 2020 (the "First Report").

#### ***Interim Financing***

44 At the commencement of these proceedings, MEC indicated that it required the Interim Financing to support its operations and restructuring efforts. It was and is very apparent that MEC needs the Interim Financing for those purposes.

45 MEC secured a financing commitment from the Lenders pursuant to a restructuring support agreement dated September 11, 2020 (the "Restructuring Support Agreement"). It was a condition of the Lenders' support under the Restructuring Support Agreement that they obtain a court-ordered security interest, lien and charge over all of MEC's assets. One of the key financial terms of the Interim Financing was that it was subject to a calculation of borrowing availability, with a maximum principal amount of \$100 million under the combined Credit Facility and the Interim Financing, funded in progressive advances on an as-needed basis.

46 Pursuant to the Initial Order, I approved the Interim Financing, with draws limited to \$15 million to the time of the comeback hearing, and approved the Interim Financing Charge. During the course of this hearing, I increased the draw limit to \$23 million.

47 Firstly, I was satisfied that the Interim Financing Charge complied with [s. 11.2\(1\) of the CCAA](#) in that it did not secure any of MEC's pre-filing obligations to the Lenders, as prohibited by that provision.

48 The Interim Financing agreements are amendments to the Credit Facility, pursuant to which the Lenders will provide further liquidity to MEC despite any defaults under the Credit Facility. It is an express term of the Interim Financing that advances made under the Interim Financing cannot be used to satisfy pre-filing obligations under the Credit Facility or any other pre-filing debt. In addition, the Interim Financing Charge does not secure any of MEC's pre-filing obligations and includes a "carve out" to ensure that other secured creditors (such as those with Purchase Money Security Interests (PMSIs)) are not primed by the Charge.

49 While the terms of the Interim Financing provide that post-filing receipts collected by MEC will be applied to pay down MEC's pre-filing debt under the Credit Facility, I agreed with MEC that mechanisms in interim financing agreements by which pre-filing obligations are paid from proceeds derived by post-filing operations do not contravene [s. 11.2\(1\) of the CCAA](#).

50 In *Performance Sports Group Ltd., Re*, [2016 ONSC 6800](#) (Ont. S.C.J. [Commercial List]), Justice Newbould concluded that a similarly crafted interim lending facility did not offend [s. 11.2\(1\)](#):

[22] [Section 11.2\(1\) of the CCAA](#) provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

51 Similar conclusions were reached in *Comark Inc., Re*, [2015 ONSC 2010](#) (Ont. S.C.J.) at paras. 17-29. Regional Senior Justice Morawetz (as he then was) accepted that the proposed interim financing facility would not result in a greater level of secured debt than was contemplated under the pre-filing facilities and would not prime PMSIs. Effectively, the court found that, since the proposed charge would increase while the pre-filing facility would be paid down by the use of the debtor's cash generated from its business, the proposed charge only secured post-filing advances made under the interim facility in compliance with [s. 11.2\(1\) of the CCAA](#).

52 In May 2020, Justice Romaine reached the same conclusion in a recent [CCAA](#) proceeding involving ENTREC Corporation (Alta QB, Calgary Judicial Centre; File No. 2001 06423).

53 Secondly, I was satisfied that a consideration of the factors set out in [s. 11.2\(4\) of the CCAA](#) supported that the Interim Financing (then with limited draws) was appropriate. Those factors are:

- a) the period during which the company is expected to be subject to proceedings under this Act;
- b) how the company's business and financial affairs are to be managed during the proceedings;
- c) whether the company's management has the confidence of its major creditors;

- d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- e) the nature and value of the company's property;
- f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- g) the monitor's report referred to in paragraph 23(1)(b), if any.

54 The governing factors at the time of the granting of the Initial Order were:

- a) MEC anticipated that it would seek an extension of the stay of proceedings at the comeback hearing for a further amount of time to allow it to complete the sale process without having to seek a further extension;
- b) MEC's business and financial affairs were to be managed by MEC's Board and key management employees in consultation with the (then) proposed Monitor;
- c) MEC had the confidence of the Lenders, its senior secured creditors and the proposed Interim Lenders. The Lenders supported the approval of the Interim Financing and the granting of the Interim Financing Charge;
- d) Without the Interim Financing, MEC was not able to fund its operations and continue its restructuring efforts, and the value of its assets would have diminished as a result. In fact, the Credit Facility matured on September 30, 2020;
- e) I was satisfied that no secured creditor would be materially prejudiced by the Interim Financing Charge, as the charge includes the carve out and preserved the pre-filing status *quo*; and
- f) The proposed Monitor supported the approval of the Interim Financing and granting of the Interim Financing Charge.

55 Finally, in light of [s. 11.2\(5\) of the CCAA](#), I was satisfied that the terms of the financing were limited to those reasonably necessary for MEC's continued operations in the ordinary course of business during the period to the comeback hearing. In addition, I was satisfied that the terms of the Interim Financing were consistent with ordinary commercial transactions of this nature, as also confirmed by the proposed Monitor. See *Miniso International Hong Kong Limited v. Migu Investments Inc.*, [2019 BCSC 1234](#) (B.C. S.C.) at paras 79-90.

56 The Interim Financing provides for a maturity date that is the earlier of a) November 30, 2020; b) the completion of a "Transaction" in relation to all or substantially all of MEC's assets, and sufficient to repay the Lenders in full, and is approved by the Court; and c) at the Lenders' option, the occurrence of any Event of Default (other than the commencement of the [CCAA](#) proceedings).

57 MEC now seeks approval of the Interim Financing generally, which would allow it to request subsequent advances up to the \$100 million limit until the next extension period on November 3, 2020.

58 No creditor or stakeholder objects to the Interim Financing sought by MEC.

59 The Cash Flow Forecast prepared in mid-September 2020 readily supported that MEC is in urgent need of interim funding during the restructuring. In the First Report, the Monitor noted that the Lenders had already advanced \$9.4 million under the Interim Facility and confirmed that the full amount of the funding under the Interim Financing was required. No other source of financing was available; the Credit Facility expired on September 30, 2020. No creditor will be prejudiced, let alone materially prejudiced, by this funding.

60 MEC's financial circumstances continue to be very challenging, even in the short term. Ongoing weekly losses of approximately \$1.1-1.6 million are being incurred. In October 2020 alone, MEC projects losses of over \$15 million.

61 Having considered all of the factors in [s. 11.2\(4\) of the CCAA](#), I have no hesitation concluding that approval of the full amount of the Interim Financing is appropriate. Without the Interim Financing, MEC is unable to continue its operations, a result that would have disastrous consequences to the larger stakeholder group, whether or not the SAVO is granted.

### ***The KERP***

62 MEC seeks approval of a KERP. To secure obligations under the proposed KERP, MEC also seeks the granting of a third-priority court-ordered charge on MEC's assets in priority to all other charges, other than the Administration Charge and the D&O Charge (the "KERP Charge").

63 MEC asserts that the KERP is necessary to allow it to maintain its business operations, complete the restructuring, including completing the sale to Kingswood and preserve asset value. MEC says that, without a KERP, its efforts would be seriously compromised.

64 In July and September 2020, MEC's Board approved retention agreements (the "Retention Agreements") for eight key senior managers for total compensation of \$778,000. The Retention Agreements were filed under seal in these proceedings, as summarized in Appendix E to the First Report.

65 The Retention Agreements include provision for payment of compensation upon the earlier of certain dates, including a sale of all or substantially all of MEC's assets (or the merger, amalgamation or consolidation of MEC with another entity), the employee's termination without cause or, by certain dates in December 2020, depending on the employee. It is not certain that all executives offered Retention Agreements will remain with MEC through to conclusion of the restructuring.

66 The Court may exercise its discretion under its general statutory jurisdiction under [s. 11 of the CCAA](#) to approve a KERP and grant a KERP Charge: *U.S. Steel Canada Inc., Re*, [2014 ONSC 6145](#) (Ont. S.C.J.) at para. 27.

67 Courts across Canada have approved key employee incentive plans in numerous [CCAA](#) proceedings: for example, *Nortel Networks Corp., Re*, [\[2009\] O.J. No. 1044](#) (Ont. S.C.J. [Commercial List]) and *U.S. Steel Canada*. In *Walter Energy Canada Holdings, Inc., Re*, [2016 BCSC 107](#) (B.C. S.C.), this Court stated:

[58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* ([2009](#)), [57 C.B.R. \(5th\) 128](#) (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

68 In *Walter Energy* at para. 59, I discussed the *Grant Forest Products* factors, as follows:

- a) Is this employee important to the restructuring process?
- b) Does the employee have specialized knowledge that cannot be easily replaced?
- c) Will the employee consider other employment options if the KERP is not approved?
- d) Was the KERP developed through a consultative process involving the Monitor and other professionals?; and
- e) Does the Monitor support the KERP and a charge?

69 In *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#) (Ont. S.C.J. [Commercial List]) at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as discussed in the relevant case law: a) arm's length safeguards, b) necessity, and c) reasonableness of design.

70 The Monitor has reviewed the terms of the Retention Agreements and has concluded that the terms of the proposed KERP Charge are reasonable in the circumstances and customary in similar [CCAA](#) proceedings. The Monitor has also confirmed that the KERP will provide stability for MEC's business operations, particularly in the critical time period when MEC is attempting



to stabilize its operations and, if the SAVO is granted, working to finalize the final negotiations with Kingswood, leading to a closing of that transaction. The Lenders have confirmed they are agreeable to the KERP and the KERP Charge as well.

71 I accept the Monitor's assessment and conclusions with respect to the KERP. I conclude that the KERP is reasonable and necessary in the circumstances and I exercise my discretion to approve the KERP and grant the KERP Charge.

### ***The Stay***

72 Clearly, an extension of the stay is necessary to allow MEC's restructuring efforts to continue, whether the SAVO is granted or not.

73 No stakeholder objects to MEC's application for the ARIO, including an extension of the stay of proceedings. The Monitor confirms its view that MEC is acting in good faith and with due diligence.

74 I am satisfied that an extension of the stay is appropriate until November 3, 2020, in accordance with [s. 11.02 of the CCAA](#).

### ***SISP/SAVO***

75 The main focus on this application has been in relation to MEC's application for the granting of the SAVO in favour of Kingswood, pursuant to [s. 36\(1\) of the CCAA](#). [Section 36\(3\) of the CCAA](#) lists the relevant non-exhaustive factors to be considered:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

76 Mr. Harding, Plateau and Midtown all seek an adjournment of MEC's application for the SAVO for "at least" two weeks. Plateau and Midtown also seek orders that would allow them to obtain further document discovery and cross-examine MEC's deponents, including Mr. Arrata and Mr. Robert Wallis. The parties seeking an adjournment are supported by the BC Co-op Association and Cooperatives and Mutuals Canada (the "Co-op Associations").

77 I address the arguments advanced against MEC's application for the SAVO below. There is considerable overlap and interrelationship between the various categories below, so they should be read as a whole.

### **i) The Kingswood Sale Agreement**

78 MEC describes the key aims and elements of the Sale Agreement as:

- a) Kingswood will continue to operate the business as a going concern under a similar name to MEC and will maintain the goodwill of the retail business;
- b) the purchased assets comprise almost all of the assets currently used by MEC for the business;
- c) Kingswood will retain at least 75% of the active employees of MEC;

- d) Kingswood will acquire, or assume, the leases for at least 17 of MEC's retail locations. For those leases not being acquired or assumed, MEC has already or will provide disclaimers to the landlords;
- e) Kingswood will assume liabilities including with respect to warranties, existing gift cards (estimated \$13.2 million) and employees who accept offers of employment (estimated \$2 million);
- f) In order to protect goodwill with existing suppliers and contractors, Kingswood will assume liability for payments to certain inventory and other key vendors and suppliers (estimated \$25 million) and will seek assignment of certain contracts; and
- g) The Sale Agreement is not conditional on any financing or third-party approvals.

79 The Court has had the benefit of reviewing certain confidential documents arising from the SISP, including the unredacted Sale Agreement and Confidential Appendix C to the First Report that were both filed under seal in this proceeding.

80 Significantly, the Sale Agreement provides for a sale price (base amount of \$120 million, subject to certain adjustments) that will repay the Lenders in full, maximize the ongoing number of operating stores and retention of a majority number of employees, and leave MEC with additional funds to support a *CCAA* plan that would see a distribution to unsecured creditors. The Board and Special Committee consider that the Kingswood offer was consistent with the guiding principles of the SISP as had been earlier established.

81 I have reviewed the details of the other three bids received and reviewed by the Special Committee and MEC's Board prior to acceptance of Kingswood's offer. I agree that the Kingswood offer is clearly the most advantageous one, both in terms of price, continuity of business operations, retention of stores, retention of employees and assumed liabilities.

## ii) The Monitor Issue

82 As part of Plateau's objection to the SAVO, it seeks an order replacing A&M as Monitor with Ernst & Young Inc., pursuant to [s. 11.7\(3\) of the CCAA](#).

83 Plateau argues that, since A&M Securities, A&M's affiliate, was involved in the SISP, A&M is not appropriate to continue as Monitor in these proceedings. Plateau argues that, in the circumstances, the Monitor cannot opine on the adequacy of the SISP as required under [s. 36\(3\)\(b\) of the CCAA](#).

84 I will note at the outset that no one on this application, let alone Plateau, questions the professionalism of A&M. Rather, Plateau asserts that there is a perception of bias in respect of the Monitor's views of the SISP, which cannot stand in the face of the clear requirement that a monitor be independent and impartial while exercising its fiduciary obligations to all stakeholders. Plateau cites various authorities including: *United Used Auto & Truck Parts Ltd., Re*, [1999] B.C.J. No. 2754 (B.C. S.C. [In Chambers]) at para. 20; *Winalta Inc., Re*, 2011 ABQB 399 (Alta. Q.B.); *Can-Pacific Farms Inc., Re*, 2012 BCSC 760 (B.C. S.C. [In Chambers]); and *Walter Energy Canada Holdings, Inc., Re*, 2017 BCSC 53 (B.C. S.C.) at paras. 24-25.

85 I have reviewed the terms of A&M Securities' engagements with MEC. As counsel note, [s. 11.7\(2\) of the CCAA](#) provides restrictions on who may be a monitor. A&M clearly did not fall within that restricted list and was able to accept an appointment as Monitor when the Initial Order was granted.

86 Under the February 10, 2020 engagement, A&M Securities was providing consulting services with respect to identifying potential financing. A&M Securities' compensation was a fixed fee with hourly rates after a certain time period. I am unable to discern any conflict between that engagement and A&M's current one as Monitor that causes any concern.

87 Similarly, the A&M Securities' June 10, 2020 engagement with MEC also provided for consulting services in respect of the SISP, also on an hourly basis.

88 It is apparent that, by June 2020, MEC foresaw that it may be necessary to file under the *CCAA* in order to resolve the significant financial difficulties it faced. In the second engagement with A&M Securities, MEC specifically addressed that potential step. Paragraph 4 of the June 10, 2020 engagement agreement provided that MEC could choose to put A&M forward as the Monitor. MEC and A&M expressly agreed that no conflict would arise between the second engagement and that potential appointment. As the Monitor notes, this type of pre-planning for a potential monitor appointment is typically undertaken since it allows a debtor to seamless and efficiently transition into the restructuring process while taking advantage of efforts begun even prior to that time.

89 Plateau places great emphasis on the reasoning and result found in *Nelson Education Ltd., Re*, 2015 ONSC 3580 (Ont. S.C.J. [Commercial List]). In that case, Newbould J. considered an application to replace the monitor where the monitor was recommending a sale. The monitor had been a financial advisor to the company for two years prior to its appointment, and it had conducted a SISP prior to the *CCAA* filing that involved dealings with the second lien holders. Almost immediately after the filing, the debtor sought approval to sell the assets to the first lien holders, leaving nothing for the second lien holders.

90 Justice Newbould found that replacement of the monitor was necessary since firstly, the monitor was in no position to comment independently on the validity of the SISP and, secondly, there was an appearance of a lack of impartiality:

[30] The problem is that Nelson has proposed a quick court approval of a transaction in which the first lien lenders will acquire the business of Nelson and in which essentially all creditors other than the second lien lenders will be taken care of. Nelson has asserted in its material that the SISP process undertaken by Nelson prior to the *CCAA* proceedings has established that there is no value in the Nelson business that could give rise to any payout to the second lien lenders. The SISP process was taken on the advice of A&M and under their direction. It was put in Nelson's factum that:

The Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;

[31] Nelson intends to request Court approval of the proposed transaction. An issue that will be front and centre will be whether the SISP process prior to this *CCAA* proceeding can be relied on to establish that there is no value in the security of the second lien lenders and whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders. A&M was centrally involved in that process. It is in no position to be providing impartial advice to the Court on the central issue before the Court.

91 A&M Securities' involvement with MEC was clearly in the context of finding a solution to MEC's financial difficulties in the short term. It is common ground that MEC could most likely have obtained *CCAA* protection in early 2020 and then conducted the search for financing and/or the SISP within those proceedings. MEC states that it had good reason not to obtain court protection at that time, as I will discuss later in these reasons. This is a distinguishing factor from *Nelson Education*, where the monitor had a much more extensive and historical relationship with the debtor and other stakeholders.

92 Further, I can discern no conflict, whether real or apparent, arising from A&M Securities' previous involvement. Importantly, there is no success fee or compensation built into the second engagement that could possibly stand as an incentive for the Monitor to recommend the Kingswood sale (or any other sale) for approval. Unlike *Nelson Education*, this is not a case where only one secured creditor is apparently benefitting from the proposed transaction. The Sale Agreement will benefit all the stakeholders generally, although in different degrees given their different priorities. Although clearly hindsight, I note that Newbould J. later approved the proposed transaction (*Nelson Education Ltd., Re*, 2015 ONSC 5557 (Ont. S.C.J. [Commercial List])), about two-and-a-half months later, at no doubt considerable cost to the estate.

93 In addition, as I will discuss in more detail below, there would be considerable cost and delay in replacing the Monitor at this time. The monitor engagement for MEC is not a simple affair and any new firm would take some time to fully assume that role and prepare a report — likely not even within "at least" two weeks, the delay sought by the objecting parties. Time is not on MEC's side in these urgent circumstances. See *Can-Pacific Farms* at para. 26.

94 Finally, the s. 36(3)(b) factor — the monitor's approval of the process — is only one of the relevant factors that the court is to consider, among others. None of the s. 36(3) factors have primacy in respect of the court's consideration as to whether a sale should be approved. The previous involvement of the Monitor with MEC is a consideration, however, not a controlling one.

95 Every sale approval application will be fact intensive toward ensuring that any proposed sale is fair and reasonable, after an appropriate sales process.

96 I have no concerns arising from A&M's affiliate acting as MEC's financial advisor in the months leading to this proceeding. I decline to exercise my discretion to replace A&M as Monitor in these proceedings.

### iii) The SISP

97 Plateau and Midtown question the appropriateness of MEC filing for *CCAA* protection after having conducted the SISP. They say that the *CCAA* is being improperly used to approve a "quick slip sale" arising from a process that took place outside of the Court's supervision, without the Court's approval and without consultation with MEC's stakeholders.

98 MEC began taking steps toward finding a solution to its financial difficulties many months before the *CCAA* filing. MEC asserts that, while the Court did not pre-approve the SISP, the SISP was extensive and properly canvassed the market to identify the best and highest value for its business.

99 As the parties note, this is a classic "pre-packaged" proceeding, or "pre-pack", as it is colloquially known. As in many previous *CCAA* proceedings, most of MEC's restructuring efforts have taken place before the filing of the court proceeding, and the most obvious restructuring path presented now by MEC is the sale to Kingswood arising from the SISP.

100 There is nothing inherently flawed in a "pre-pack" approach. There are often good reasons why a debtor company may choose such a course of action, more often than not arising from the real or perceived threats or disruptions to a business by pursuing options within a proceeding. The Monitor confirms its own experience and views in that respect, particularly relating to retail operations where it is critical to preserve going concern value.

101 Here, MEC contends it ran the SISP prior to any *CCAA* proceedings to maintain stability in its business and to promote a going concern solution, all as supported by the Lenders, who were increasingly concerned about their credit exposure in light of the financial crisis faced by MEC. I readily accept that running a retail operation within *CCAA* proceedings, particularly with the uncertainty in the marketplace, both from a general economic view and by reason of the pandemic, would give rise to risk and potential disruption to future operations. I also accept that MEC had good reason to seek to avoid further risks and disruptions to its operations, given its already fragile economic state.

102 Similar circumstances were considered in *Sanjel Corp., Re, 2016 ABQB 257* (Alta. Q.B.), where a SISP conducted outside of the proceedings was challenged. In that case, the SISP was conducted by a financial advisor for about four months prior to the *CCAA* filing. At that time, the accounting firm was identified as the potential monitor and, when later appointed as monitor, recommended court approval of the sale that arose through the SISP.

103 Justice Romaine discussed the concerns that arise where a court is presented with a "pre-pack" where court approval of a sale that arose from a pre-filing SISP is sought. Her comments are apt here and I would adopt them:

[70] A pre-filing SISP is not of itself abusive of the *CCAA*. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the *CCAA* and must be considered against the *Soundair* principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

[71] Without prior court approval of the process, conducting a SISP outside of the *CCAA* means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

104 Justice Romaine's reasoning was followed by this Court in *Feronia Inc. (Re)*, 2020 BCSC 1372 (B.C. S.C.) where Justice Milman accepted the proposal trustee's recommendation in support of a sale achieved through a pre-filing sales process (paras. 50-57). The proposal trustee's affiliate firm had been engaged to assist with that sales process.

105 The court's comments in *Sanjel* about a pre-filing SISP being more open to attack is certainly evident here.

106 I will now address the actual financing and SISP process in more detail. Evidence of MEC and A&M Securities' efforts is found in Mr. Arrata's evidence as was supplemented by Mr. Wallis' evidence. Mr. Wallis is a MEC director and Chair of the Special Committee. The Monitor also addresses the financing and SISP process in its First Report.

107 A&M Securities was engaged to secure new financing in February 2020, principally to replace the Credit Facility which was approaching maturity. Unfortunately, the pandemic wrought havoc with those efforts and MEC quickly moved to form a committee to address those issues. That informal committee was formally constituted as the Special Committee on March 27, 2020 with its mandate to pursue a broad range of strategic alternatives.

108 Although the financing options being pursued were not successful, it was not for want of effort. The steps that A&M Securities designed to seek the financing, as listed above, can only be described as typical. Government aid programs were considered. Approximately 66 lenders were contacted; the listing of those lenders indicates a broad range of lending institutions, including two co-operatives. A May 12, 2020 term sheet provided to RBC by one lender was considerably below what the Lenders were owed and required first priority security that was not a realistic request from the Lenders' point of view given the financing amount.

109 Mr. Harding, supported by the Co-op Associations, asserts that MEC could have asked its members for the necessary funding. Mr. Wallis addresses that matter, stating that the Special Committee considered but then rejected that option as impractical. In my view, his reasons are amply supportable and are reasonable in the circumstances: a public plea for such funding was unlikely to garner the very substantial amounts needed to repay the Lenders, even if it could be achieved, which was questionable, while creating negative impacts on MEC's business in the meantime.

110 Finally, the Special Committee considered that the Lenders were very unlikely to grant an extension of the Credit Facility, without significant improvement in MEC's financial performance that, in the teeth of the pandemic, appeared also very unlikely.

111 Having exhausted refinancing efforts, the Special Committee and the Board had no choice but to then consider a sale. After interviewing other financial advisors, the Special Committee decided that it was in MEC's best interests to continue with A&M Securities under the SISP, given its expertise and experience with MEC.

112 Again, the Special Committee and the Board expressly considered whether the SISP should be conducted prior to any *CCAA* proceeding. They decided to do so in order to avoid the likelihood of a distressed-assets sale situation and to preserve MEC's relationships with vendors, customers and service providers with respect to its ongoing business operations in order to preserve going concern value.

113 As with the refinancing efforts, A&M Securities' design of the SISP included the usual features (as listed above), in that it was structured and implemented in the same or similar manner as is typically done in a SISP in the course of *CCAA* proceedings. No party appearing on this application contended that the SISP steps were inappropriate or lacking, resting on the contention only that they weren't consulted in its implementation.

114 The list of persons contacted was extensive, including Canadian and US private investment firms, retail conglomerates and even REI, a US co-operative that was in fact the inspiration for MEC in the first place. As stated above, Kingswood's bid was clearly the best bid of the four that MEC received.

115 The Lenders' support, including under the Interim Financing, is premised on MEC seeking approval of the Kingswood transaction. I note this as a factor, although the Lenders' support is not surprising since the proposed transaction will generate sufficient funds to pay the Lenders in full. The Monitor's liquidation analysis would also suggest that the Lenders would be paid in full under that scenario.

116 Another relevant factor in the Court's consideration of the adequacy of the SISP is the level of oversight throughout the process.

117 The Special Committee and MEC's Board, both comprised of well-qualified and experienced business professionals, oversaw A&M Securities' efforts. Both Mr. Arrata and Mr. Wallis fully endorse those efforts as having produced the very best alternative for MEC in the circumstances. I have no reason to question their commercial and business judgment: *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) at para. 71. Mr. Wallis confirms that, despite rumours in the community, no MEC Board members are receiving any incentives or compensation in respect of the Kingswood transaction. Further, the process was reviewed by the Lenders and their experienced professional advisors, again without objection.

118 In my view, it is not surprising in the circumstances that the Monitor supports the SISP efforts as being sufficiently robust in the circumstances, particularly with its usual features and oversight. The Monitor states that the SISP is likely consistent with what the Monitor would have recommended in a court-supervised process, with which I agree. It is also worth emphasizing that the entire SISP process from June-September 2020 ran over a 100 day period, hardly a rushed process (i.e., even well beyond the "aggressive timelines" approved in *Sanjel* at paras. 75-77).

119 I conclude that the SISP was a competitive process, was conducted in a fair and reasonable manner and adequately canvassed the market for options available to MEC.

#### **iv) Harding / Co-Operative Association Issues**

120 Mr. Harding is the spokesperson for the steering committee of the "SaveMEC" campaign, involving who he describes as a "highly motivated, well organized group of Members, seeking to preserve MEC's status as a cooperative association with an operating business". They have been assisted through various online efforts, suggesting support from some 140,000 individuals, and contributions from 2,500 persons toward a legal fund of over \$100,000. As I noted on October 2, 2020, the passion of the "SaveMEC" group members is evident, as it was with MEC's original founders.

121 Like Plateau and Midtown, Mr. Harding seeks an adjournment of "at least" two weeks. He suggests that his group would like to explore opportunities to address MEC's liquidity crisis in the short term. He says that the very short notice given to MEC members in respect of these proceedings is challenging in terms of identifying alternatives; MEC gave notice to its members of this proceeding on September 14, 2020. Mr. Harding is supported in his submissions by the Co-op Associations' counsel.

122 Mr. Harding indicates some "definitive" sources of funding have already been identified by his group. Unfortunately, none even come close to resolving the very significant financial issues faced by MEC, particularly given the amounts owing to the ever increasingly concerned Lenders who are owed in excess of \$80 million in a very uncertain retail environment, MEC's ongoing losses and MEC's required working capital.

123 Mr. Harding's most significant complaint against the SAVO is that the members will "lose" their substantial financial interest in MEC through their membership. He points to MEC's February 2020 balance sheet that indicated the book value of members' shares was in excess of \$192 million.

124 In my view, this argument has little merit. Each MEC member only stands to "lose" their \$5 investment, although I appreciate that collectively, the investment is significant. Based on the evidence presented on this application, the best bid

which was received from Kingswood is not sufficient to repay the unsecured creditors in full, let alone provide for any return to MEC's members. Accordingly, assuming the SISP has produced the best financial result in the circumstances, which I accept, MEC members have no real financial interest at this time.

125 I appreciate that Mr. Harding only seeks a short period of time to confirm whether other more advantageous options are available. This argument also is not persuasive. I consider that the chances of SaveMEC coming up with an option within two weeks to stave off the Lenders, secure funding to cover the losses and necessary working capital and pay the unpaid creditors to be an extremely outside one, however sincere that intention and those efforts may be.

126 I completely disagree with Mr. Harding that there is no prejudice to MEC, Kingswood or the Lenders if the sale is delayed until his group has a chance to investigate other options. As Mr. Wallis states in his Affidavit, set out below, there is significant prejudice to MEC and its stakeholders in terms of delay, cost, ongoing losses and deal risk. Mr. Harding's group is risking nothing at this point; to the contrary, other broad stakeholder interests are very much "in the money" under the Kingswood transaction in the sense of it providing recovery to creditors and preserving jobs and business relationships.

127 I note that the broad stakeholder group who Mr. Harding seeks to represent includes many MEC members who stand to preserve their jobs and redeem the significant value in gift certificates, all by reason of the Kingswood sale.

128 Mr. Harding also asserts that these *CCAA* proceedings must be conducted in a manner that respects the fundamental freedom of MEC members, namely the "freedom of association", that arises under s. 2(d) of the *Charter of Rights and Freedoms* (the "*Charter*").

129 It is unusual to face *Charter* arguments in commercial matters or even *CCAA* proceedings. That said, I accept Mr. Harding's submissions that co-operatives provide important social and community benefits and that the right to join a co-operative and exercise collective rights through that means goes to the root of the protection offered by s. 2(d): *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, 2015 SCC 1 (S.C.C.) at para. 54, citing *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (S.C.C.). MEC is clearly an example of the exercise of that right, leading to it being, as Mr. Harding asserts, the largest co-operative in Canada.

130 I cannot see, however, that MEC seeking court protection in its present circumstances offends any rights arising under s. 2(d) of the *Charter*. As MEC's counsel states, the *Charter* does not protect against an organization incurring losses and finding itself in insolvent circumstances, even if the organization is a co-operative.

131 No one, including Mr. Harding, disputes that MEC qualified to seek court protection under the *CCAA*. Rather, he asserts that MEC members must be able to exercise their democratic right to shape the future of MEC, and particularly, he argues that any decision to sell MEC's assets cannot be made without the approval of MEC's members. The *Co-op Act*, s. 71(2), and MEC's Rules of Co-operation (8.11) both provide that a sale of the whole or substantially the whole of the co-operative's undertaking requires a special resolution of the members.

132 Mr. Harding's complaint that the members have been unfairly and oppressively denied participation in this important decision to sell MEC's assets is understandable; however, it but does not change the fact that such participation is a very unwieldy step, particularly with the pandemic, it would delay matters where urgency is required, and its relevance is questionable in any event given that the best evidence is that the members have no financial interest in MEC.

133 I disagree with counsel for the Co-op Associations that the application of the *CCAA* in the face of the *Co-op Act* is an "unsettled area of law". Cooperatives are able to avail themselves of the *CCAA* if they are insolvent and they otherwise meet the statutory requirements.

134 The *CCAA* expressly recognizes that participation by corporate shareholders (the equivalent of MEC's members here) toward approving a sale of the assets, is not a requirement before the court can exercise its jurisdiction under s. 36(1):

36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[Emphasis added.]

135 Mr. Harding suggests that MEC's affairs are being conducted in an oppressive manner by this attempt to sell MEC's assets without member approval. I see no utility in embarking upon an analysis of the oppression remedy under s. 156 of the *Co-op Act* in the present circumstances, although I would hasten to add that no such court ordered relief has been formally sought. Mr. Harding refers to the comments of this Court in *Radford v. MacMillan*, 2017 BCSC 1168 (B.C. S.C.), aff'd 2018 BCCA 335 (B.C. C.A.), concerning the assessment of reasonable expectations in the oppression analysis. In this Court in *Radford*, Justice Masuhara stated that expectations must be "realistic": para. 119.

136 I hardly think the MEC members could conceivably realistically consider that they, and they alone, would dictate whether a sale would occur, when the co-operative is insolvent and their memberships presently have no value.

137 It is unfortunate that Mr. Harding appears to be singularly focussed on preserving MEC as a co-operative entity to continue its business. Given the co-operative principle of "concern for community" embraced by MEC as part of its DNA, the "SaveMEC" campaign group and the Co-op Associations might have given some consideration to the fact that the Kingswood sale will benefit many persons in the community. The sale will ensure ongoing employment to most MEC employees, the maintenance of business relationships which support other jobs and repayment of at least some portion of the debt that MEC owes to its many unsecured creditors.

138 Mr. Harding's application for an adjournment is dismissed.

#### v) Disclaimed Lease Issues

139 Plateau and Midtown both seek an adjournment of MEC's application for the SAVO for "at least" two weeks. In addition, both seek an order that MEC produce substantial further documents in relation to the refinancing and sale efforts. Finally, they seek to cross-examine Mr. Arrata and Mr. Wallis on their affidavits.

140 Plateau and Midtown's objection to the SAVO derives from the extremely unfortunate circumstances that arise from MEC's disclaimer of their store leases (in Calgary North West and Saskatoon respectively).

141 In its petition materials, MEC has earlier identified that the Sale Agreement with Kingswood did not include an assignment of three leases, including those for the Saskatoon and Calgary North West stores. The Saint-Denis store had already been permanently closed; the Saskatoon and Calgary North West stores had not yet opened.

142 In Mr. Arrata's Affidavit #1 sworn September 13, 2020, he stated that MEC expected to be disclaiming those leases, with the approval of the Monitor, in accordance with s. 32(1) of the CCAA.

143 As forecast, after the Initial Order was granted, on September 15, 2020, MEC issued notices of intention to disclaim or resiliate all three leases. The Monitor approved these disclaimers in order to "reduce costs and downsize redundant operations". On September 22, 2020, MEC provided its reason for the disclaimer of Plateau's lease, citing its liquidity crisis, that Kingswood had decided not to acquire the leases and that the disclaimer was necessary to enhance the prospects of a viable compromise. The same considerations apply to Midtown's lease.

144 In the First Report, the Monitor stated that it is also of the view that the disclaimers will enhance the prospect of a viable arrangement and further the restructuring of MEC, as contemplated by the Kingswood Sale Agreement.



145 On September 30, 2020, Plateau filed a Notice of Application to prohibit the disclaimer of its lease by the deadline, and I assume that Midtown has done likewise.

146 I agree that both Plateau and Midtown face challenging economic circumstances themselves by reason of the disclaimers. Both landlords have expended substantial sums of money in outfitting their developments for MEC, who was to have been the anchor tenant. Both landlords will suffer significant losses in respect of lost rental revenue and any indirect benefits that might have been derived by MEC's presence in their developments.

147 Based on my conclusions that the SISP was fair and reasonable in the circumstances, I reject these landlords' request for any delay in approving the Kingswood sale and decline to exercise my discretion to do so. I see no reasonable prospect that these landlords will be in any better position after a delay of two weeks. I also see no need for further document production beyond the documentation that MEC provided on September 26, 2020 in response to Plateau and Midtown's applications.

148 Kingswood's decision not to take up these leases was made independently of MEC and, on the face of things, aligns with what Kingswood envisions by way of its future operations. The Sale Agreement provides for a *contraction* of MEC's operating stores to at least 17 locations; in that event, it hardly makes business sense that, at the same time, Kingswood would also agree to incur the considerable expense of fixturing, outfitting, staffing and supplying one or two *new* locations. None of the other three bidders expressed any interest in these locations either.

149 As with Mr. Harding's argument, I also reject Plateau and Midtown's assertions that little or no prejudice arises from any adjournment. To the contrary, the unsecured creditor pool will be enhanced by an expeditious sale which obviates any further weekly losses being incurred by MEC. These landlords stand to gain by that enhanced pool of money in respect of their claims that will no doubt be filed, claims that will not increase whether or not the SAVO is granted. Plateau and Midtown have solely focussed on process issues, to the exclusion of other interests at play. They have failed to justify their position.

150 Plateau and Midtown's arguments appear to conflate MEC's application for the SAVO with their right to contest the disclaimers. They suggest that, effectively, no sale can be considered by the court until the disclaimer issue is determined. No authority was cited in support for this proposition. Indeed, the sale application might just as easily have been considered and the Kingswood sale approved even before any disclaimer notice was issued.

151 As MEC's counsel notes, MEC decided to be forthright from the outset in signalling this very bad news to these landlords.

152 I appreciate that granting the SAVO to allow a sale of substantially all of MEC's assets to Kingswood can be interpreted as effectively determining the disclaimer issue. It will be difficult for the landlords to argue that the disclaimer should be prohibited so as to allow MEC, which no longer operates its business, to take up the lease.

153 However, this ignores the simple reality of the situation. MEC cannot force a buyer to take up these leases. In addition, MEC's dire financial circumstances, as revealed on this application, would hardly have supported a business decision to start up these stores even if the SAVO is not granted. There is no realistic chance that the Lenders would support such an endeavour under the Credit Agreement. Further, I see no basis upon which this Court would effectively require MEC to spend millions of dollars on these new stores under its *CCAA* jurisdiction. It is difficult to imagine that this Court would, in balancing the various interests at play in relation to the benefits of the Kingswood sale, require such a result to the detriment of the many stakeholders other than these two landlords.

154 I would add that five other MEC landlords also appeared on this application. They indicated that they were not opposed to the granting of the SAVO or were not taking any position. I suspect that they are all hoping that their store locations will be viewed favourably by Kingswood when the at least 17 store "winners" are chosen to continue operations. If any of them are not in the "winner" category, any losses will be added to the unsecured creditor group to share in the net recovery under the Kingswood sale.

155 Plateau and Midtown's applications for an adjournment, document discovery and cross-examination of Mr. Arrata and Mr. Wallis are dismissed.

**vi) Should the Kingswood Transaction be Approved?**

156 The Court's approach in considering a proposed sale under s. 36 of the *CCAA* is informed by the *CCAA*'s statutory objectives, as was discussed in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter *Century Services*].

157 The main objective is to avoid, if possible, the devastating social and economic costs of a liquidation of a debtor's assets: *Century Services* at para. 15. In achieving these remedial goals, the court must be cognizant of the various interests at stake, including the debtor, the creditors, employees, counterparties, directors and shareholders: *Century Services* at paras. 59-60. As evident from my discussion above, many of those stakeholder interests were represented on this application and expressed their views. However, the court must also recognize and give effect to, to the extent possible, all stakeholder interests whether present on this application or not.

158 As with many applications for relief under the *CCAA*, the Court must strive to balance what are often competing interests and objectives. That exercise is often within the rubric of the need to conclude that the relief is "appropriate". Appropriateness is assessed by inquiring whether the purpose of the order sought and the means it employs advances the statutory objectives or remedial purpose of the *CCAA*. As Justice Deschamps stated in *Century Services* at para. 70, the chance of achieving that goal is enhanced when "all stakeholders are treated as advantageously and fairly *as the circumstances permit*" [Emphasis added.]

159 The relevant factors to be balanced and considered under s. 36(3) are reflective of a consideration of what can be, and is on this application, a broad range of interests.

160 I have concluded that the refinancing efforts and the SISP were conducted in a fair and reasonable manner. There is no basis upon which to second guess the adequacy of the substantial efforts that were made by the Board, the Special Committee and A&M Securities in that respect.

161 The Kingswood transaction that arose from that competitive process was clearly the best from the few bids that were received. All other bids paled in comparison, particularly in relation to the purchase price and commitments to ongoing store operations and employee retention. As noted in the Monitor's First Report, the consideration that MEC will receive is substantial. While the base purchase price is \$120 million, the total indicative purchase price is actually \$150 million, after accounting for the substantial liabilities that Kingswood will assume in respect of vendor trade payables, employee obligations and gift card obligations.

162 The process conducted outside of this *CCAA* proceeding was not a rushed affair. I accept that many of the stakeholders on this application consider that they have been ignored or disadvantaged by reason of the lack of prior consultation and the short notice given to them to respond to this application. In my view, MEC has provided reasonable and understandable explanations for proceeding in that manner. The Monitor provides further support in the First Report in stating that to proceed otherwise would have created significant uncertainty and disruption in MEC's day to day business and put MEC's business operations and a potential going concern sale at unnecessary risk.

163 As the Monitor notes, the perfect financial storm faced by MEC, still exacerbated by the risks posed by the ongoing pandemic, does not give MEC the luxury of time here. What is needed is a timely solution, after, of course, the Court has fully reviewed the evidence and is satisfied that the requested relief is appropriate. There is no evidence to suggest that MEC's Board or Kingswood have manufactured the need for what is described as urgent relief by approval of the SAVO.

164 I have also concluded that, although some minor delay could be accommodated with the time limits under the Restructuring Agreement and the Sale Agreement, the perceived benefits do not outweigh the risks that follow. I accept the evidence of Mr. Wallis as to why it is urgent to approve the Sale Agreement as soon as possible. He states:

45. [MEC] believe[s] that the approval of the Sale Agreement is a matter of urgency. Any extension or delay in obtaining Court approval and Closing may have serious and detrimental consequences for its business and stakeholders, including, but not limited to, its employees, members and suppliers. This is particularly the case given the extent of [MEC's] ongoing weekly operating losses, as shown in [MEC's] Cash Flow Forecast, and the importance that any potential purchaser of the Business would have to close this transaction in sufficient time to take advantage of the coming holiday sales period.

46. The projections reflect an erosion of the borrowing base under the Interim Financing Facility and cash availability becomes very tight under the borrowing base calculation towards the end of October. It is therefore imperative that matters progress as quickly as possible so that MEC's customers, suppliers, landlords and employees have confidence that MEC will continue as a successful going concern.

47. Given the recent rise in COVID-19 transmissions across Canada, there is also a real and unpredictable risk that increased COVID-19 rates and/or restrictions would result in further deterioration in sales below those set out in the Updated Cash Flow Forecast provided by the Monitor, which would in turn jeopardize the availability of the Interim Financing Facility or ability to meet the closing condition of requiring repayment of the Credit Facility. The Lenders have confirmed they require a timely completion of the Transaction.

165 The work to be done to conclude all matters under the Sale Agreement and move toward a closing of the transaction will no doubt be complex and take some time. Many contractual matters need to be concluded by Kingswood with stakeholders, such as employees, landlords and suppliers, in advance of the closing. As noted by MEC and the Monitor, it is critical to the success of the ongoing business that the transaction close as soon as possible so that Kingswood can order additional inventory in advance of the "Black Friday" and holiday shopping season. Kingswood is able to close the transaction by mid-late October 2020.

166 The Monitor has also conducted a liquidation analysis to compare the results of the Kingswood sale to that which might be achieved by an orderly liquidation of MEC's assets through a bankruptcy and/or receivership. Under the Kingswood sale, estimated recovery to unsecured creditors is between \$0.30-50 on the dollar; in a liquidation, estimated recovery to unsecured creditors is between \$0.30-60 on the dollar. What is significant as between these two scenarios, however, is that in a liquidation, there would be far greater creditor claims.

167 The Kingswood sale avoids the devastating impact of a liquidation on employee's jobs, preserves many of the leases, trade supply agreements and service agreements, and provides value to many unsecured creditors by Kingswood's full assumption of liabilities. These latter considerations figure greatly in the Court's decision as to whether a sale should be approved. That decision is made toward achieving the main statutory objectives under the *CCAA* which are to allow the business to continue, with all the economic, societal and community benefits that that option affords. Many of the indirect benefits are unquantifiable.

168 I agree with the Monitor that, in all the circumstances, the Kingswood sale is commercially reasonable and, on balance, is more beneficial to MEC's stakeholders, and particularly its creditors, than any other alternative. I grant the SAVO on the terms sought.

### ***Representative Counsel***

169 Mr. Harding also sought an order under *s. 11 of the CCAA* that Victory Square Law Office be appointed as representative counsel for MEC's members. He also sought a charge of \$100,000 under *s. 11.52 of the CCAA* to secure anticipated fees in respect of participation, ranking behind the four court-ordered charges but ahead of the Lenders' security.

170 I conclude that this relief might have been more seriously considered if there was any indicative value held by the MEC members and, if these proceedings had taken a different path where the members' interests were in play.

171 Having concluded that the Kingswood sale should be approved, which will divest MEC of substantially all of its assets in the short term, I see little utility in granting this relief. As I discuss above, this sale will garner some net proceeds for the unsecured creditors, leaving no recovery for MEC's members.

172 I would add that the Kingswood sale does not mean that MEC will cease to exist as a co-operative. It may be that MEC's members can still consider whether any options remain for them in that respect, particularly if a plan is approved and successfully executed to leave the co-operative intact in a legal sense but without the burden of any debt and, of course, with few assets.

173 Mr. Harding is, of course, welcome to continue to participate in these proceedings on behalf of the "SaveMEC" group, as he wishes, which I assume can be done with counsel given the funds already raised.

174 Mr. Harding's application for appointment of representative counsel and a related charge is dismissed.

#### **FINAL THOUGHTS**

175 I accept that this decision is a disappointing conclusion to the fate of what was an iconic Canadian retailer who has inspired the passion and commitment of many Canadians for outdoor activity. Like many Canadian retailers, MEC has fallen victim to economic forces, and perhaps questionable business judgments made years ago, all exacerbated by the cataclysmic and unprecedented impact of the COVID-19 pandemic throughout most of 2020.

176 This result, however, will ensure the continuation of MEC's business, albeit in another organization. While this sale transaction is not wrapped in the Canadian flag, the best evidence is that Kingswood will continue to support MEC's core values and principles, being community engagement and promotion of a healthy outdoor lifestyle. More importantly, the ongoing operations will support Canadian individuals and their families and also businesses where jobs are disappearing quickly given ongoing economic disruptions. Creditors will be paid, or paid a substantial portion of what they are owed, no doubt to the relief of many.

177 This is the core objective under a *CCAA* proceeding, and while that objective was not achieved here in a perfect manner, it was still achieved in a reasonable manner. That is all that anyone can ask.

*Application granted.*

# TAB 9

**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [Re Just Energy Corp.](#) | 2021 ONSC 1793, 2021 CarswellOnt 3724 | (Ont. S.C.J. [Commercial List], Mar 9, 2021)

2009 QCCS 6453  
Quebec Superior Court

AbitibiBowater inc., Re

2009 CarswellQue 9964, 2009 QCCS 6453, 58 C.B.R. (5th) 62, EYB 2009-164656

**In the Matter of the Plan of Compromise or Arrangement of  
AbitibiBowater Inc. and Abitibi-Consolidated Inc. and Bowater  
Canadian Holdings Inc. and The other Petitioners listed on Schedules  
"A", "B" and "C" (Petitioners) and Ernst & Young Inc. (Monitor)**

Clément Gascon, J.C.S.

Heard: May 1, 5, 6, 2009

Judgment: May 6, 2009

Docket: C.S. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, Me Mélanie Béland for Petitioners

Me Avram Fishman, Me Gilles Paquin for the Monitor

Me Robert Thornton for the Monitor

Me Bernard Boucher for BI Citibank, N.A. (London Branch), as agent and Citibank, N.A., as bank

Me Sébastien Guy for Caterpillar Financial Services

Me Éric Vallières for Bank of Montreal

Me Patrice Benoît for Investissement Québec

Me Alain Riendeau, Me Serge Guérette for Silver Oak Capital LLC et al., DDJ Capital Management, LLC et al.

Me Philippe H. Bélanger for Bank of Nova Scotia

Me Gordon Levine for Jenkins Shipping Company Limited and Jenkins Shipping (GB) Limited

Me Gerald F. Kandestin for McBurney Corporation and McBurney Power Limited

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

Me Frederick L. Myers for the Ad hoc Committee of Bondholders

Me Michael B. Rotsztain for Fairfax Financial Holdings Ltd.

Me Nicolas Plourde for Fairfax Financial Holdings Ltd.

Subject: Insolvency; Corporate and Commercial

**Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous  
Debtor ACI was pulp and paper company that had sought protection under Companies' Creditors Arrangement Act, and was undertaking restructuring process — Proposed DIP financing enjoyed huge support from most stakeholders — Monitor was of view that ACI needed to raise DIP financing to ensure stability of its operations — ACI brought motion seeking authorization to enter into DIP agreement, have super priority granted to lender and amend initial order accordingly — Motion granted — It was well settled that courts had authority to grant such super priorities — Before allowing DIP financing, court should notably satisfy itself that benefits to all creditors, shareholders and employees outweighed potential prejudice to some creditors — Here, court considered that applicable factors or guidelines were met by ACI under circumstances — Most of stakeholders as well as

monitor supported such financing and, given situation ACI was in, there was urgency to grant financing — In addition, there was reasonable prospect for successful restructuring, and term of financing was relatively short — Therefore, balance definitely tilted towards benefits that financing could bring — Minor corrections were also brought to initial order.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale — Divers Débitrice ACI était une papetière qui s'était placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies et était dans un processus de restructuration — Plupart des parties intéressées étaient grandement en faveur du financement dit « débiteur en possession » (DEP) proposé — Contrôleur était d'avis que ACI avait besoin d'un financement DEP plus élevé afin de garantir que sa conduite des affaires soit plus stable — ACI a déposé une requête visant à obtenir l'autorisation de signer une entente de financement DEP, demandant qu'une super priorité soit accordée au prêteur et de modifier l'ordonnance initiale en conséquence — Requête accueillie — Il était établi que les tribunaux avaient le pouvoir d'accorder de telles super priorités — Avant d'accorder un financement DEP, le tribunal devrait, en outre, être convaincu que les bénéfices que cela entraînait pour l'ensemble des créanciers, des actionnaires et des employés l'emportaient sur tout préjudice potentiel souffert par quelques créanciers — En l'espèce, le tribunal considérait que, dans les circonstances, ACI satisfaisait aux critères applicables — Plupart des parties intéressées et le contrôleur appuyaient un tel financement et, compte tenu de la situation dans laquelle ACI se retrouvait, il y avait urgence à accorder ce financement — De plus, il y avait une possibilité raisonnable que la restructuration réussisse, et la période associée au financement était relativement courte — Par conséquent, la balance penchait assurément du côté des bénéfiques qu'un tel financement entraînerait — Corrections mineures ont également été apportées à l'ordonnance initiale.

#### Table of Authorities

##### Cases considered by *Clément Gascon, J.C.S.*:

*Comporec inc., Re* (2008), [2008] R.J.Q. 2613, 2008 CarswellQue 14504, 2008 QCCS 4813, 2008 CarswellQue 10155 (C.S. Que.) — referred to

*Comporec inc., Re* (2008), 2008 QCCA 2222, [2008] R.J.Q. 2590, 2008 CarswellQue 11474 (C.A. Que.) — referred to  
*Hunters Trailer & Marine Ltd., Re* (2001), 2001 CarswellAlta 964, 94 Alta. L.R. (3d) 389, 27 C.B.R. (4th) 236, [2001] 9 W.W.R. 299, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — referred to

*InterTAN Canada Ltd., Re* (2008), 49 C.B.R. (5th) 248, 2008 CarswellOnt 8040 (Ont. S.C.J. [Commercial List]) — referred to

*Mecachrome International inc., Re* (2009), [2009] R.J.Q. 1306, 2009 QCCS 1575, 2009 CarswellQue 5141 (C.S. Que.) — followed

*MEI Computer Technology Group Inc., Re* (2005), 19 C.B.R. (5th) 257, 2005 CarswellQue 3675, [2005] R.J.Q. 1558 (C.S. Que.) — followed

*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — followed

*Temple City Housing Inc., Re* (2007), 2007 CarswellAlta 1806, 2007 ABQB 786, [2007] G.S.T.C. 188, [2008] 2 C.T.C. 61, 42 C.B.R. (5th) 274 (Alta. Q.B.) — referred to

*United Used Auto & Truck Parts Ltd., Re* (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

##### Statutes considered:

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

Generally — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — referred to

s. 81.2 [en. 1992, c. 27, s. 38(1)] — referred to

s. 243(2) — referred to

s. 244 — referred to

*Bankruptcy Code*, 11 U.S.C.

Chapter 11 — referred to

Chapter 15 — referred to

*Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33

Generally — referred to

*Code civil du Québec*, L.Q. 1991, c. 64

art. 2757 — referred to

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

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

s. 11 — considered

s. 11(5) — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

s. 18.1 [en. 1997, c. 12, s. 125] — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5

s. 7(3)(c) — referred to

*Qualité de l'environnement, Loi sur la*, L.R.Q., c. Q-2

en général — referred to

*Santé et la sécurité du travail, Loi sur la*, L.R.Q., c. S-2.1

en général — referred to

MOTION by debtor seeking authorization to enter into DIP agreement, to have super priority granted to lender, and to amend initial order accordingly.

**Clément Gascon, J.C.S.:**

## Introduction

1 In the context of the restructuring process undertaken by AbitibiBowater Inc. under the protection of the *CCAA*<sup>1</sup>, the Abitibi Petitioners<sup>2</sup> seek<sup>3</sup>:

- a) An order authorizing them to enter into an ACI DIP Agreement<sup>4</sup> and a Guarantee Offer<sup>5</sup>;
- b) Amendments to the First Amended Initial Order to provide for the necessary orders in connection with the ACI DIP Facility; and
- c) Other minor amendments to the First Amended Initial Order, most of which are either uncontested or mere clarifications.

2 In short, the ACI DIP Facility at issue includes:



1) A Loan Agreement between the DIP Lender, the Bank of Montreal, and the borrowers, Abitibi-Consolidated Inc. (ACI) and Donohue Corporation (DCorp), providing a \$100,000,000 USD super-priority senior secured debtor-in-possession credit facility; and

2) A Loan Guarantee by Investissement Québec (IQ) authorized by the Government of Québec.

3 While barely a few days ago, a large number of issues raised by numerous contesting parties against the ACI DIP Facility were still outstanding, thanks to the efforts of counsels, and with the help and guidance of the Monitor, just one difficulty remains and requires resolution by Judgment of this Court. These efforts include those of today by IQ's counsel.

4 The difficulty still pending concerns the ACI Term Lenders. They oppose the ACI DIP Facility sought<sup>6</sup>. They feel it is premature, unnecessary, and falling short of the applicable criteria for it to be granted.

5 Subsidiarily, they contend that the wording of the Subrogation ACI DIP Charge<sup>7</sup>, negotiated amongst counsels and approved by all the other interested parties, is insufficient to adequately protect their interest.

6 Finally, the Term Lenders insist upon the inclusion of an Adequate Protection Charge to compensate them for the inevitable deterioration of their position as a result of their security being used and continuing to be used by the Abitibi Petitioners during the restructuring process.

7 It is worth noting that the contestations initially filed by the Senior Secured Note holders<sup>8</sup> and by some construction liens holders<sup>9</sup> have been in essence withdrawn at this stage, pursuant to the negotiation process undertaken since last Thursday.

### **The Questions at Issue**

8 The questions that the Court needs to resolve are accordingly the following ones:

1) Should the ACI DIP Facility of \$100,000,000 USD be granted?

2) Do paragraphs 61.10 and 61.11 of the Second Amended Initial Order sought here constitute a reasonable compromise under the circumstances in view of the priming nature of the ACI DIP Facility?

3) Are there any other paragraphs of the Second Amended Initial Order sought that require modifications?

9 Before turning to these three (3) questions, a brief overview of the significant terms of the ACI DIP Facility is appropriate. As well, a short summary of the Monitor's reports<sup>10</sup> dealing with the ACI DIP Facility is also necessary. Mr. Morrison from Ernst & Young, the Monitor appointed by the Court, was the only witness heard on this application.

### **The ACI DIP Facility**

10 The main characteristics of the ACI DIP Facility are detailed at pages 6 to 12 of the Third Report of the Monitor. They can be summarized as follows:

1) The ACI DIP Facility consists of a \$100,000,000 USD commitment, subject to a minimum availability of \$12,500,000 USD to be maintained at all times. The proceeds are to be used for working capital and other general corporate purposes. The term is April 30, 2010, but it must be repaid by the earliest of November 1<sup>st</sup>, 2009 or the filing of a plan either in Canada or in the US.

2) The proposed fee structure, which encompasses both the returns to the DIP Lender and, for a portion of the Upfront fees, to IQ, includes:

- Upfront fees of \$4,400,000 USD;

- An interest rate of LIBOR plus 1.75%, subject to a 3% LIBOR floor. A U.S. base rate option is also available. Interest accrues daily and is to be paid monthly in arrears;
- An undrawn fee of 0.525% per year.

3) The borrowers assume all legal and out-of-pocket expenses of the DIP Lender and IQ in connection with the ACI DIP Facility.

4) The ACI DIP Facility is not subject to the stay imposed upon all creditors by the Initial Order such that, upon the occurrence of any default, the DIP Lender is free to exercise all its recourses and realize upon all its collateral.

5) The other significant features of the ACI DIP Facility consist of provisions in regard to the following issues:

- a) A facility of up to \$10,000,000 USD may be available to DCorp, provided it obtains the appropriate orders from the U.S. Bankruptcy Court;
- b) The borrowings by ACI and DCorp under the Facility are guaranteed by certain other Abitibi Petitioners and secured by a first-priority charge granted on a post-petition super-priority basis on all present and after acquired property, including the proceeds from the sale of property of both the ACI Group or the DCorp Group;
- c) The ACI DIP Charge is subordinated only to the ACI Administration Charge, the Abitibi D&O First Tranche, and the interest of the Securitization Agent in the accounts receivable sold under the Securitization Program;
- d) Because the maximum amount of \$100,000,000 USD provided for in the IQ Loan Guarantee is in respect of principal and interest, a minimum availability of \$12,500,000 USD is required to be maintained at all times under the Facility;
- e) The borrowers can make voluntary prepayments of the Facility at any time, and must make certain mandatory prepayments with the net cash proceeds of asset sales, insurance claims and expropriation claims;
- f) The borrowings must be repaid in full at the earliest of the acceleration of the Facility or occurrence of a specified event of default, the effective date of a *CCAA* or Chapter 11 plan, or the unenforceability of the IQ Loan Guarantee;
- g) The borrowers have ongoing reporting obligations to both the DIP Lender and IQ twice on a weekly basis, first, for rolling cash flow forecasts detailing cash receipts and cash disbursements, and second, for combined weekly cash flow results.

### **The Monitor's Reports**

11 In his third report and second supplemental report, the Monitor discusses the ACI DIP Facility. In a nutshell, the Monitor is of the view that:

- a) ACI needs to raise DIP financing to ensure stability of its operations and availability of sufficient cash reserves to fund its operations disbursements and payroll costs; and
- b) The financial terms and conditions of the \$100,000,000 USD funding are competitive and reasonable, given the current capital market conditions.

12 In his reports, the Monitor adds that, pursuant to lengthy negotiations and discussions, and following concessions made by many, most of the concerns or objections voiced by various stakeholders have been either alleviated or resolved through acceptable compromises.

## Analysis and Discussion

### 1) Should the DIP be granted?

13 In the Court's opinion, the answer to the first question is yes.

14 No one disputes that the Court, in the context of a *CCAA* process, has the jurisdiction and authority to grant a DIP financing super-priority, provided the requirements for such are met.

15 It is indeed known and accepted that the *CCAA*'s effectiveness depends on a broad and flexible exercise of the Court's jurisdiction, so as to facilitate a restructuring and continue the debtors as a going concern in the meantime<sup>11</sup>. Bearing this in mind, DIP financing super-priorities are regularly granted by Canadian courts in *CCAA* proceedings.

16 That notwithstanding, any protection afforded by the *CCAA* and its DIP financing super-priority necessarily have a prejudicial effect on the debtors' creditors. Thus, before allowing a DIP financing or priming charge, the Court must notably satisfy itself that the benefits to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.

17 Over the years, Courts in this country, including this one<sup>12</sup>, have listed various factors one should consider before granting a DIP financing. These factors are not cast in stone. They are indeed normally presented as non-exhaustive guidelines. As anything within the realm of the *CCAA*, they evolve with time. They should be approached with flexibility.

18 Just a few years back, some courts were still wondering whether or not they had the authority to grant such priorities. Today, it appears to be well settled that such authority exists. In the near future, these priorities will be part of the new legislative provisions adopted by Parliament for inclusion in the *CCAA*. This shows that nothing is definite or absolute in terms of DIP financing in a *CCAA* restructuring process.

19 With the necessary adaptations, the Court considers that the applicable factors or guidelines are met by ACI under the circumstances.

20 First, the ACI DIP Facility enjoys huge support from most stakeholders, as well as favourable endorsement from the Monitor.

21 Second, the evidence given by the Monitor, which the Court accepts, is sufficient to establish that the need for the DIP financing is essential for the ongoing operations and successful restructuring of ACI.

22 The Monitor explains that the ACI DIP Facility will stabilize the business and bring most-needed comfort to key suppliers and customers.

23 Based on his experience, he considers that ACI's levels of cash flow and liquidity are not high enough. His assessment is not based upon speculation or mere apprehension. He relies upon the market cycles, movements, variances and volatility within the industry at stake. He takes into consideration the average weekly fixed cash disbursements for payroll and key vendors. He finally considers as well his own experience in terms of large restructurings and the level of liquidity normally maintained by peer companies in the same industry.

24 From that standpoint, the Court accepts Mr. Morrison's comment that a business such as this one cannot take the risk of a lack of liquidity that could entail the missing of a payroll payment or the turning away of key suppliers' deliveries.

25 Third, along the same lines, the circumstances do support the urgent need for such financing. Urgency is a relative factor. It is not an absolute and static concept. Notably in view of its size and complexity, the situation of ACI is peculiar. One cannot expect an organization such as this one to wait to the last minute and call the firemen once the fire has started. Reasonable caution is required. When such prudence is reasoned, articulated and explained as it is here, it is sufficient to justify the immediate need alleged.

26 The Court cannot ignore that it took no less than three weeks of intensive work, negotiations and discussions to reach this hearing on the present ACI DIP Facility, and yet, there are still some unresolved issues that the Court must rule upon. ACI does not have the luxury of waiting to the last minute, and the Court agrees with that assessment.

27 Fourth, there is no doubt that considering the support of many at this stage, there is a reasonable prospect of a successful restructuring. Indeed, at this point, the Term Lenders stand alone as opposing parties to the request sought.

28 As well, the term of the facility is relatively short, and the amounts somewhat reasonable when compared to other large restructurings such as Quebecor World or Air Canada.

29 Moreover, here, the first tranche available under the facility is limited \$30,000,000 USD. In view of paragraph 61.11 of the order sought, a party such as the Term Lenders will be able to apply to the Court to oppose future borrowing requests should they consider such to be inappropriate. If need be, they could thus seek interim order to prevent future advances before they are disbursed.

30 Fifth, it is the Court's view that the benefits of the ACI DIP Facility and super-priority for all stakeholders outweigh the potential prejudice to the Term Lenders. The facility stabilizes the continued operations of the debtors. This adds value to the whole business. Thus, it potentially adds value as well to the collateral of the Term Lenders essentially composed of the short-term assets.

31 Of course, the priming nature of the DIP facility causes some prejudice to the Term Lenders. No perfect solution exists in such situations. It is a question of balance. Here, the balance definitely tilts towards the benefits that the facility brings.

32 Furthermore, from a practical standpoint, the Court notes that the compromise offered in terms of subrogation rights and opportunity to contest future borrowing requests alleviates, albeit only in part, the prejudice suffered by the Term Lenders.

33 In addition, the Court cannot ignore either the assessment of the Term Lenders' collateral value. Even in the context of a liquidation scenario, such as the one detailed at page 14 of the Monitor's third report, it still leaves a positive margin of some \$60,000,000 USD over and above what is owed to the Term Lenders. This is enough to at least cover, if worst comes to worst, the initial draw of \$30,000,000 USD.

34 If one looks at the assessment of this collateral value outside of the liquidation scenario, the margin is even bigger. All this, in a context where the ACI DIP Facility of \$100,000,000 USD is said to be a bridge to the receipt of proceeds from the contemplated sales of the MPCo and ACH hydro assets expected by November 1<sup>st</sup>, 2009. ACI intends to repay the ACI DIP Facility from the proceeds of these sales or other sales of non-core assets under consideration.

35 This is not perfect, obviously. But, this is not enough either to say that the Term Lenders prejudice outweighs the benefits that stability brings to the ongoing operations of the business.

36 Finally, the reality is such that, in the current credit market, no DIP financing is available to ACI without such priming nature. No one brings forward a better solution.

37 DIP financings of a priming nature are neither unusual, nor unheard of. Canadian courts have ruled before that where a debtor seeks to obtain DIP financing, the authorization of the pre-existing secured creditors is not necessary. Their consent is certainly preferable, but if a super-priority could not be granted without the consent of secured creditors, the protection of the CCAA would effectively be denied<sup>13</sup>.

38 In essence, the Term Lenders suggest to wait and see. With respect, the Court prefers the Monitor's view and to cautiously move forward. The potential cost of the gamble is not worth the risk. That is even more true when one considers the obvious broader public dimension in a case such as this one.

39 All in all, the Court is satisfied that it is just and equitable to approve the DIP facility at this stage.

**2) What about paragraphs 61.10 and 61.11? Is this enough?**

40 Turning to the compromise offered by ACI and acceptable to all save for the Term Lenders, the Court considers that paragraphs 61.10 and 61.11 are adequate as they stand.

41 The Term Lenders do not quarrel with paragraph 61.11. However, they would like to see a more detailed order in terms of the steps to follow in the event of the subrogation clause (paragraph 61.10) coming into play.

42 With respect, the Court agrees with counsels for the other interested parties that it is better to leave this issue open and subject to future determination by subsequent application to the Court. Trying to predict at this stage the best formula for the most equitable outcome may not lead to the best results.

43 As for the Adequate Protection Charge in the event of the diminishing of value of the Term Lenders' collateral because of the ongoing operations of ACI, the Court finds the request unfounded, and in fact questionable.

44 On the one hand, it appears that the value of the Term Lenders' collateral is better served by the ongoing operations than by an immediate liquidation of ACI. On the other hand, the U.S. concept of Adequate Protection Charge is seldom, if ever, applied in Canadian courts. It has been issued here in the context of the Bowater Petitioners for a single reason. That is, to mirror the U.S. order approving such a charge in the context of the Chapter 11 proceedings. This hardly stands as valid precedent for the Term Lenders' request in the context of ACI.

**3) What else?**

45 Only a few remarks remain with respect to some of the modifications sought,

46 First, the Court is satisfied with the explanations of IQ's counsel with respect to Clause 6.13 of Annex A to Exhibit R-2. The intent there is not to overrule the corporate decisions of ACI, nor to interfere with the conduct of its business. Neither is this clause included to second-guess the Court's approval of the steps taken by ACI in the context of its restructuring.

47 Second, the Court is satisfied with the wording of paragraph 61.11 as it stands. The Court understands the concerns of IQ in this respect. However, the reading of the paragraph indicates that it is for those who want to contest a borrowing request to react. It is for them to move before a disbursement is made. Without a Court interim order staying a disbursement, the terms of the ACI DIP Facility simply apply.

48 Third, in terms of the amount of the charge for the \$100,000,000 USD ACI DIP Facility, the Court is not satisfied with the explanations provided to support the level of \$200,000,000 CAN that is sought. The Monitor does not understand the figure. The explanations offered by ACI's counsel are vague and speculative at best, with no supporting evidence.

49 As this Court stated before in the *Mecachrome*<sup>14</sup> matter, and as Justice Morawetz reiterated in the *InterTAN* case<sup>15</sup>, the burden of presenting sufficient support for the protection sought rests upon the Petitioners. There is no convincing evidence of any sort to justify a charge to the extent of \$200,000,000 CAN for a facility not exceeding \$100,000,000 USD.

50 Under the ACI DIP Facility, interest is to be paid monthly in arrears, while the maximum available amount is in reality \$87,500,000 USD. Even factoring in a reasonable cushion for accrued interest and for the exchange rate between the U.S. and Canadian dollars in the event a realization becomes necessary, a figure of more than \$140,000,000 CAN is hardly justifiable.

51 Even there, a 40% cushion over and above the maximum amount of the facility is close to twice the level of the similar cushion sought by Fairfax for the BI DIP facility (a \$600,000,000 USD facility versus a \$728,760,000 CAN charge).

52 The charge at paragraph 61.3 will therefore be limited to an amount of \$140,000,000 CAN.

53 Finally, for the modification sought by Fairfax at paragraph 56.1, small corrections are needed. In the opinion of the Court, the requirements should refer to a certified copy of this order instead of mere copies. Also, what will be provided to the Registrars should include the required applications that the law demands.

#### **4) Summary**

54 It is appropriate to summarize.

55 The Court agrees to issue the Second Amended Initial Order with the modifications sought at paragraphs 30, 52, 53, 54, 56, 61.1 and 61.2, 61.4 to 61.8, 61.10, 61.11, 89, 92.1, 92.2 and 95, as they stand.

56 The order includes some corrections to the wording of paragraph 56.1. The order also refers to an amount of \$140,000,000 CAN instead of \$200,000,000 CAN at paragraph 61.3.

57 Lastly, the references to the Court Appointed Officer are deleted from paragraphs 61.9 and 76, and as agreed, paragraphs 77.1 to 77.5 are not included.

#### **FOR THE REASONS GIVEN ORALLY AND REGISTERED, THE COURT:**

- 1 **GRANTS** the Petition.
- 2 **ISSUES** an order pursuant to Sections 4, 5, 11 and 18.6 of the CCAA (the "*Order*"), divided under the following headings:
  - a) Service
  - b) Application of the CCAA
  - c) Effective Time
  - d) Plan of Arrangement
  - e) Recognition of U.S. Proceedings
  - f) Procedural Consolidation
  - g) Stay of Proceedings against the Petitioners, the Partnerships, the Property, the Directors or others
  - h) Possession of Property and Carrying on Business
  - i) Securitization Program
  - j) Restructuring
  - k) Directors Indemnification and Charge
  - l) BCFPI DIP Financing
  - m) ACI DIP Financing
  - n) Subrogation to ACI DIP Charge
  - o) Inter-Company Advances
  - p) Bowater Adequate Protection Charge

- q) Powers of the Monitor
- r) Appointment of Information Officer in Respect of U.S. Proceedings
- s) Approval and Appointment of Financial Advisor
- t) Priorities and General Provisions Relating to CCAA Charges
- u) General
- v) Effect, Recognition and Assistance

### ***Service***

3 **EXEMPTS** AbitibiBowater Inc. ("*ABH*"), Abitibi-Consolidated Inc. ("*ACT*"), the Petitioners listed on Schedule "A" hereto (collectively with ACI, the "*Abitibi Petitioners*"), Bowater Canadian Holdings Inc. ("*BCHI*") and the Petitioners listed on Schedule "B" hereto (collectively with BCHI, the "*Bowater Petitioners*") from having to serve the Petition and from any notice of presentation.

### ***Application of the CCAA***

4 **DECLARES** that the Abitibi Petitioners and the Bowater Petitioners (collectively the "*Petitioners*") are debtor companies to which the CCAA applies.

### ***Effective time***

5 **DECLARES** that from immediately after midnight (Montréal time) on the day prior to this Order i.e. from the beginning of the day on April 17, 2009 (the "*Effective Time*") to the time of the granting of this Order, any act or action taken or notice given by any Person in respect of the Petitioners, the 18.6 Petitioners, the Directors or the Property (as those terms are defined hereinafter), are deemed not to have been taken or given, as the case may be, to the extent such act, action or notice would otherwise be stayed after the granting of this Order.

### ***Plan of Arrangement***

6 **ORDERS** that the Petitioners shall file with this Court and submit to their creditors one or more plans of compromise or arrangement under the CCAA (collectively, the "*Plan*") between, among others, the Petitioners and one or more classes of their creditors as the Petitioners may deem appropriate, on or before the Stay Termination Date (as defined hereinafter) or such other time or times as may be allowed by this Court.

### ***Recognition of U.S. Proceedings***

7 **ORDERS AND DECLARE** that the proceedings (the "*U.S. Proceedings*") commenced by ABH and the Petitioners listed on Schedule "C" hereto (collectively, the "*18.6 Petitioners*") under Chapter 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (the "*U.S. Court*") be and are hereby recognized as foreign proceedings for purposes of Section 18.6 of the CCAA.

8 **DECLARES** that the 18.6 Petitioners are debtor companies within the meaning of the CCAA and, as such, are entitled to relief under Section 18.6 of the CCAA.

### ***Procedural Consolidation***

9 **ORDERS** that the consolidation of these CCAA proceedings in respect of the Abitibi Petitioners, the Bowater Petitioners and the 18.6 Petitioners shall be for administrative purposes only and shall not effect a consolidation of the assets and property of the Petitioners including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

***Stay of Proceedings against the Petitioners, the Partnerships, the Property, the Directors or others***

10 **ORDERS** that, until and including May 14, 2009, or such later date as the Court may order (the "*Stay Termination Date*", the period from the date of this Order to the Stay Termination Date being referred to as the "*Stay Period*"), no right, legal or conventional, may be exercised and no proceeding, at law or under a contract, by reason of this Order or otherwise, however and wherever taken (collectively the "*Proceedings*") may be commenced or proceeded with by anyone, whether a person, firm, partnership, corporation, stock exchange, government, administration or entity exercising executive, legislative, judicial, regulatory or administrative functions (collectively, "*Persons*" and, individually, a "*Person*") against or in respect of the Petitioners, the 18.6 Petitioners and the entities listed on Schedule "D" hereto (the "*Partnerships*"), or any of the present or future property, assets, rights and undertakings of the Petitioners, the 18.6 Petitioners or the Partnerships, of any nature and in any location, whether held directly or indirectly by the Petitioners, the 18.6 Petitioners or the Partnerships, in any capacity whatsoever, or held by others for the Petitioners, the 18.6 Petitioners or the Partnerships (collectively, the "*Property*"), and all Proceedings already commenced against the Petitioners, the 18.6 Petitioners, the Partnerships or any of the Property, are stayed and suspended until the Court authorizes the continuation thereof, the whole subject to the provisions of the CCAA.

11 **ORDERS** that, without limiting the generality of the foregoing, during the Stay Period, all Persons having agreements, contracts or arrangements with the Petitioners, the 18.6 Petitioners, the Partnerships or in connection with any of the Property, whether written or oral, for any subject or purpose:

- a) are restrained from accelerating, terminating, cancelling, suspending, refusing to modify or extend on reasonable terms such agreements, contracts or arrangements or the rights of the Petitioners, the 18.6 Petitioners, the Partnerships or any other Person thereunder;
- b) are restrained from modifying, suspending or otherwise interfering with the supply of any goods, services, or other benefits by or to such Person thereunder (including, without limitation, any directors' and officers' insurance, any telephone numbers, any form of telecommunications service, any oil, gas, electricity or other utility supply); and
- c) shall continue to perform and observe the terms and conditions contained in such agreements, contracts or arrangements, so long as the Petitioners, the 18.6 Petitioners or the Partnerships pay the prices or charges for such goods and services received after the date of this Order as such prices or charges become due in accordance with the law or as may be hereafter negotiated (other than deposits whether by way of cash, letter of credit or guarantee, stand-by fees or similar items which the Petitioners, the 18.6 Petitioners or the Partnerships shall not be required to pay or grant);

Unless the prior written consent of the Petitioners, the 18.6 Petitioners or the Partnerships, as well as that of the Monitor, is obtained or leave is granted by this Court.

12 **ORDERS** that, without limiting the generality of the foregoing and subject to Section 18.1 of the CCAA, if applicable, cash or cash equivalents placed on deposit by the Petitioners, the 18.6 Petitioners or the Partnerships with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of this Order or due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by the Petitioners, the 18.6 Petitioners or the Partnerships and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into the Petitioners', the 18.6 Petitioners' or the Partnerships' account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.



13 **ORDERS** that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, bond or guarantee (the "*Issuing Party*") at the request of the Petitioners, the 18.6 Petitioners or the Partnerships shall be required to continue honouring any and all such letters, bonds and guarantees, issued on or before the date of this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid therefor.

14 **DECLARES** that, to the extent any rights, obligations, or time or limitation periods, including, without limitation, to file grievances, relating to the Petitioners, the 18.6 Petitioners or Partnerships or any of the Property may expire, other than the term of any lease of real property, the term of such rights or obligations, or time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Petitioners, the 18.6 Petitioners or the Partnerships become bankrupt or a receiver within the meaning of [paragraph 243\(2\) of the Bankruptcy and Insolvency Act \(Canada\)](#) (the "*BIA*") is appointed in respect of the Petitioners, the 18.6 Petitioners or the Partnerships, the period between the date of this Order and the day on which the Stay Period ends shall not be calculated in respect of the Petitioners, the 18.6 Petitioners or the Partnerships in determining the 30-day periods referred to in [Sections 81.1 and 81.2 of the BIA](#).

15 **ORDERS** that no Person may commence, proceed with or enforce any Proceedings against any former, present or future director or officer of the Petitioners, the 18.6 Petitioners, the Partnerships or any person that, by applicable legislation, is treated as a director of the Petitioners, the 18.6 Petitioners or the Partnerships, or that will manage in the future the business and affairs of the Petitioners, the 18.6 Petitioners or the Partnerships (each, a "*Director*", and collectively the "*Directors*") in respect of any claim against such Director that arose before this Order was issued and that relates to obligations of the Petitioners, the 18.6 Petitioners or the Partnerships for which such Director is or is alleged to be liable (as provided under Section 5.1 of the CCAA) until further order of this Court or until the Plan, if one is filed, is refused by the creditors or is not sanctioned by the Court.

16 **ORDERS** that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, officers, employees, legal counsel or financial advisers of the Petitioners, the 18.6 Petitioners, the Partnerships, the Monitor, the BI DIP Lenders (as defined hereinafter) or the legal counsel or financial advisers to the Monitor or to the BI DIP Lenders, for or in respect of the Restructuring (as defined hereinafter) or the formulation and implementation of the Plan without first obtaining leave of this Court, upon seven days written notice to the Petitioners' and the Partnerships' *ad litem* counsel and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

#### ***Possession of Property and Carrying on Business***

17 **ORDERS** that, subject to the terms of this Order, the Petitioners shall remain in possession of their Property until further order in these proceedings.

18 **ORDERS** that the Petitioners and the Partnerships shall continue to carry on their business and financial affairs, including the business and affairs of any person, firm, joint venture or corporation owned by a Petitioner or in which a Petitioner owns an interest, in a manner consistent with the commercially reasonable preservation thereof.

19 **ORDERS** that the Petitioners and Partnerships shall be authorized and empowered to continue to retain and employ the employees, consultants, individual self-employed contractors, agents, experts, accountants, counsel and such other persons (collectively "*Assistants*") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

20 **ORDERS** that the Petitioners and the Partnerships shall be entitled to continue to utilize the existing centralized cash management systems currently in place as described in this Petition or, subject to the terms of the BI DIP Documents (as defined hereinafter), replace them with other substantially similar central cash management system(s) (together, the "*Cash Management System*") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Petitioners or the Partnerships of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person other than the Petitioners and the Partnerships, pursuant to the

terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System. The Monitor shall review and monitor the Cash Management System and report to this Court from time to time.

21 **ORDERS** that the Petitioners and the Partnerships shall be entitled to pay the following expenses whether incurred prior to or after this Order:

- a) all outstanding and future wages, salaries, commissions, vacation pay, current pension contributions and other benefits, reimbursement of expenses (including, without limitation, amounts charged by employees to credit cards) and other amounts payable to former, current or future employees, officers or directors on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
- b) all outstanding and future amounts owing to or in respect of individuals working as independent contractors in connection with the Petitioners' business;
- c) all outstanding amounts payable to third party customer brokers or agents on or after the date of this Order;
- d) all outstanding amounts payable on or after the date of this Order in respect of (i) customer programs including, *inter alia*, rebates, adjustments, performance and volume discounts and (ii) billing errors, including duplicative invoicing, improper invoicing, duplicative payment, mispricing and various other billing and payment errors;
- e) the fees and disbursements of any Assistants retained or employed by the Petitioners or the Partnerships in respect of these proceedings, at their standard rates and charges; and
- f) the interest, fees and expenses payable under the Canadian Credit Agreement (as defined hereinafter).

22 **[Intentionally omitted]**

23 **[Intentionally omitted]**

24 **[Intentionally omitted]**

25 **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners and the Partnerships shall be entitled but not required to pay all reasonable expenses incurred by them in carrying on the business in the ordinary course from and after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- a) all expenses and capital expenditures reasonably necessary for the preservation of their Property or the business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and
- b) payment for goods or services actually supplied to the Petitioners or the Partnerships following the date of this Order.

26 **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners and the Partnerships shall remit, in accordance with legal requirements, or pay:

- a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes;

b) amounts accruing and payable by a Petitioner or a Partnership in respect of employment insurance, Canada Pension Plan, workers compensation, employer health taxes and similar obligations of any jurisdiction with respect to employees;

c) all goods and services or other applicable sales taxes (collectively, "*Sales Taxes*") required to be remitted by the Petitioners or the Partnerships in connection with the sale of goods and services by the Petitioners or the Partnerships, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

d) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the business by the Petitioners or the Partnerships.

27 **ORDERS** that, except as specifically permitted herein, the Petitioners and the Partnerships are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Petitioners or Partnerships to any of their creditors as of this date unless such amounts have been approved by the Monitor; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the business.

28 **ORDERS** that the Petitioners and the Partnerships are authorized to pay any pre-filing amounts outstanding and to complete any outstanding transactions and engage in new transactions with each other and with any of their respective affiliates and other entities, partnerships and joint ventures within and among the ABH Group (as defined hereinafter) in which they have a direct or indirect ownership interest (the Petitioners collectively with Abitibi-Bowater US Holding LLC, Bowater Newsprint South LLC and Bowater Incorporated and their respective subsidiaries are referred to herein as the "*ABH Group*") and the Petitioners and the Partnerships may, *inter alia*, continue on and after the date hereof to buy and sell goods and services and allocate, collect and pay costs, including without limitation head office expenses and shared goods and services, from and to each other and from and to the other members of the ABH Group in the ordinary course of business on terms consistent with existing arrangements or past practice (including without limitation, pursuant to the Securitization Program Agreements (as defined hereinafter) and sales of inventory by ACI to ACSC (as defined hereinafter)).

### ***Securitization Program***

29 **ORDERS** that the execution and delivery by ACI of the "Omnibus Amendment No. 5 to Amended and Restated Receivables Purchase Agreement and Amendment No. 3 to Amended and Restated Purchase and Contribution Agreement and Waiver Agreement", *Exhibit R-19* in support of the Petition, (the "*Waiver Agreement*") to:

a) a certain Amended and Restated Receivables Purchase Agreement, dated as of January 31, 2008 (as heretofore amended, the "*RPA*"), **Exhibit R-17** in support of the Petition, among Abitibi-Consolidated U.S. Funding Corp. ("**ACUSFC**" - a wholly-owned subsidiary of ACSC that is not a debtor in the U.S. Proceedings), Eureka Securitisation, plc ("**Eureka**"), Citibank, N.A. ("**Citibank**"), Citibank, N.A. London Branch (the "**Securitization Agent**"), ACI, in its capacity as Subservicer and an Originator, and Abitibi-Consolidated Sales Corporation ("**ACSC**", a debtor in the U.S. Proceedings), in its capacity as Servicer and an Originator; and

b) a certain Amended and Restated Purchase and Contribution Agreement, dated as of January 31, 2008 (as heretofore amended, the "*PCA*"), **Exhibit R-16** in support of the Petition, among ACI and ACSC as Sellers and ACUSFC as Purchaser (the terms "**Receivables**" and "**Related Security**" shall have the meanings attributed thereto in the PCA),

as well as all related documents and instruments executed or to be executed and delivered in connection therewith (as amended by the Waiver Agreement, collectively referred to as the "**Receivables Agreements**") are hereby ratified and approved.

30 **ORDERS** that ACI is hereby authorized and empowered to perform or continue to perform its obligations, including the sale and servicing of Receivables and all Related Security, under the Receivables Agreements and under the following agreements to which it is a party, *Exhibit R-18* in support of the Petition:

- a) the Undertaking Agreement (Servicer) dated as of October 27, 2005 by ACI in favour of Eureka, Citibank and the other Banks (as defined in the RPA) that are party to the RPA, as amended;
- b) the Undertaking Agreement (Originator) dated as of October 27, 2005 by ACI in favour of ACI Funding, as amended;
- c) the Deposit Account Control Agreement dated as of January 31, 2008 among ACUSFC, ACI, ACSC, Citibank and the Securitization Agent;
- d) the Blocked Accounts Agreement dated as of October 27, 2005 among ACI, ACSC, the Securitization Agent, Royal Bank of Canada and ACUSFC;
- e) the Agreement Re: Pledged Deposit Accounts dated as of October 27, 2005 among ACSC, ACI, ACUSFC, the Securitization Agent and LaSalle Bank National Association;
- f) the Second Amended and Restated Four Party Agreement for Sold Accounts (General) dated as of January 31, 2008 among Export Development Canada and Compagnie Française d'Assurance pour le Commerce Extérieur - Canada Branch, ACI, ACUSFC, the Securitization Agent and Citibank;
- g) the Intercompany Agreement dated as of December 20, 2007 between ACI and ACSC; and
- h) the Accounts Receivable Policy (Shipments) General Terms and Conditions, plus the Coverage Certificate effective September 1, 2008 (together with all schedules and endorsements thereto) issued by Export Development Canada and Compagnie Française d'Assurance pour le Commerce Extérieur - Canada Branch to ACI;

(collectively with the Receivables Agreements, and such non-material amendments and modifications thereto as may be agreed upon, from time to time, the "**Securitization Program Agreements**").

31 **ORDERS** that ACI is hereby authorized and empowered to sell the relevant Receivables and Related Security to ACUSFC pursuant to and in accordance with the Securitization Program Agreements, and such sale shall be free and clear of any lien, claims, charges or encumbrances and other interests of any of ACI, ACSC, the Petitioners or their respective creditors, including any charges created pursuant to this Order.

32 **DECLARES** that the transfers by ACI of its Receivables and Related Security to ACUSFC under the PCA shall constitute true sales under applicable non-bankruptcy law and are hereby deemed true sales and were or will be for fair consideration. Upon the transfer of the Receivables to ACUSFC, the Receivables and Related Security did (with respect to transfers occurring prior to the Effective Time as defined in the RPA) and will (with respect to transfers occurring on or after the date hereof) become the sole property of ACUSFC, and none of the Petitioners, nor any creditors of the Petitioners, shall retain any ownership rights, claims, liens or interests in or to the Receivables and Related Security, or any proceeds therefrom including, without limitation, pursuant to any theory of substantive consolidation or otherwise.

33 **DECLARES** that each Securitization Program Agreement constitutes a valid and binding obligation of ACI, enforceable against ACI in accordance with its terms and that the terms and conditions of the Securitization Program Agreements have been

negotiated in good faith and at arm's length and the transfers made or to be made and the obligations incurred or to be incurred shall be deemed to have been made for fair or reasonably equivalent value and in good faith.

34 **DECLARES** that upon the transfer by ACI pursuant to the Securitization Program Agreements neither the Receivables nor the Related Security, nor the proceeds thereof, shall constitute property of the patrimonies of any of the Petitioners or their affiliates, including notwithstanding any intentional or inadvertent deposit of any proceeds of the Receivables in bank accounts owned or controlled by any of the Petitioners or their affiliates.

35 **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein; (ii) any bankruptcy application or bankruptcy motion filed pursuant to the **BIA** in respect of the Petitioners and any bankruptcy order or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by ACI under Chapter 15 of Title 11 of The United States Code ("*ACI's Chapter 15 Proceedings*"); or (iv) the provisions of any federal or provincial statute, the transfers of Receivables and Related Security made by ACI pursuant to the Securitization Program Agreements and this Order do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

36 **DECLARES** that the performance by ACI, ACSC and ACUSFC of their respective obligations under the Securitization Program Agreements, and the consummation of the transactions contemplated by the Securitization Program Agreements, and the conduct by ACI, ACSC and ACUSFC of their respective businesses, whether occurring prior to or subsequent to the Effective Time, do not, and shall not, provide a basis for a substantive consolidation of the assets and liabilities of ACI and ACSC, or any of them, with the assets and liabilities of ACUSFC or a finding that the separate corporate identities of ACI, ACSC and ACUSFC may be ignored. Notwithstanding any other provision of this Order, the Agent, Citibank, Eureka and the other parties thereto have agreed to enter into the Securitization Program Agreements in express reliance on ACUSFC being a separate and distinct legal entity, with assets and liabilities separate and distinct from those of any of the Petitioners.

37 **DECLARES** that the transfers of Receivables and Related Security by ACI pursuant to the Securitization Program Agreements and this Order shall be valid and enforceable as against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners, for all purposes.

38 **DECLARES**, for greater certainty, that the Facility Termination Date and the Commitment Termination Date (as each is defined in the Receivables Agreements) have not occurred as a consequence of the commencement of these proceedings, the U.S. Proceedings, ACI's Chapter 15 Proceedings or the taking of corporate actions by ACI or ACSC to approve such proceedings, or the failure of ACI or ACSC to pay any debts that are otherwise stayed by any of the foregoing or the written admission by ACI or ACSC of its inability to pay such debts.

39 **ORDERS AND DECLARES** that collections of Receivables and other funds which are subject to the Deposit Account Control Agreement dated as of January 31, 2008, the Agreement Re: Pledged Deposit Accounts dated as of October 27, 2005 and the Second Amended and Restated Four Party Agreement for Sold Accounts (General), dated as of January 31, 2008 referred to above, shall be processed and transferred pursuant to such deposit account agreements and each deposit bank party thereto is directed to comply therewith.

40 **ORDERS** that ACI is hereby authorized and empowered to make, execute and deliver all instruments and documents and perform all other acts (including, without limitation, the perfection of ACUSFC's ownership interest in the Receivables) that may be required in connection with the Securitization Program Agreements and the transactions contemplated thereby; it being expressly contemplated that pursuant to the terms of the Securitization Program Agreements, ACI and ACSC shall be expressly authorized and empowered to service, administer and collect the Receivables on behalf of ACUSFC pursuant to the Securitization Program Agreements, and with respect to ACI, ACSC and ACUSFC, each shall be expressly authorized and empowered to make, execute and deliver all instruments and documents and perform all other acts that may be required in connection with the Securitization Program Agreements and the transactions contemplated thereby.

41 **ORDERS** that ACI is hereby authorized and empowered to use the proceeds of the arrangements contemplated by the Securitization Program Agreements in the operation of the Petitioners' businesses, provided however, that the use of the proceeds are consistent with the terms of the Securitization Program Agreements, this Order or as may otherwise be agreed in writing by the Securitization Agent.

42 **ORDERS AND DECLARES** that without limiting ACI's duty to comply with and fulfill any obligations under the Securitization Program Agreements, ACI shall perform and pay all indemnification and other obligations to the Securitization Agent, Eureka, Citibank and any other Indemnified Parties (as defined in the RPA) under the Securitization Program Agreements, all obligations to ACUFSC under the Securitization Program Agreements, and all of its obligations in respect of the Insurance Policy (as defined in the RPA).

43 **ORDERS AND DECLARES** that, notwithstanding the terms of this Order, the parties to the Securitization Program Agreements other than ACI shall in that capacity be unaffected in these proceedings and by any plan of compromise or arrangement proposed by any of the Petitioners under the CCAA or by any proposal filed by any of the Petitioners under the [BIA](#), and for greater certainty, paragraph 46(f) of this Order shall not apply to the Securitization Program Agreements.

44 **DECLARES** that this Order shall not stay or otherwise apply to restrict in any way the exercise of any rights of any Person under any of the Securitization Program Agreements.

45 **ORDERS AND DECLARES** that subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraph 28 hereof in respect of the Securitization Program, or inventory sales by ACI and the sale of inventory by ACI to ACSC and paragraphs 29 to 45 hereof or any other reference to the Securitization Program or the Securitization Program Agreements herein, unless either (a) notice of a motion for such order is served on the Securitization Agent and ACI by the moving party within seven (7) days after that party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) the Securitization Agent and ACI apply for or consent to such order.

### ***Restructuring***

46 **DECLARES** that, to facilitate the orderly restructuring of their business and financial affairs (the "*Restructuring*"), the Petitioners and Partnerships shall have the right, subject to approval of the Monitor or further order of the Court and to:

- a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provisions for the consequences thereof in the Plan;
- b) pursue all avenues to market and sell, subject to subparagraph (c), their Property, in whole or part;
- c) convey, transfer, assign, lease, or in any other manner dispose of their Property, in whole or in part, provided that the price in each case does not exceed \$10 million or \$50 million in the aggregate, and provided that Petitioners or Partnerships apply any proceeds thereof in accordance with the Interim Financing Documents (as defined hereinafter) and the Securitization Program Agreements;
- d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision for any consequences thereof in the Plan, as the Petitioners or Partnerships may determine;
- e) subject to paragraphs 48 and 49 hereof, vacate or abandon any leased real property or repudiate any lease and ancillary agreements related to any leased premises as they deem appropriate, provided that the Petitioners or Partnerships give the relevant landlord at least seven days prior written notice, on such terms as may be agreed between the Petitioners or Partnerships and such landlord, or failing such agreement, to make provision for any consequences thereof in the Plan; and

f) repudiate such of their agreements, contracts or arrangements of any nature whatsoever, whether oral or written, as they deem appropriate, on such terms as may be agreed between the Petitioners or Partnerships and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan and to negotiate any amended or new agreements or arrangements.

47 **DECLARES** that, in order to facilitate the Restructuring, the Petitioners and Partnerships may, subject to approval of the Monitor:

a) settle claims of customers and suppliers that are in dispute; and

b) subject to further orders from this Court, establish a plan for the retention of key employees and the making of retention payments or bonuses in connection therewith.

48 **DECLARES** that, if leased premises are vacated or abandoned by the Petitioners or Partnerships pursuant to subparagraph 46(e), the landlord may take possession of any such leased premises without waiver of, or prejudice to, any claims or rights of the landlord against the Petitioners or Partnerships, provided the landlord mitigates its damages, if any, and re-leases any such leased premises to third parties on such terms as any such landlord may determine.

49 **ORDERS** that the Petitioners and Partnerships shall provide to any relevant landlord notice of the Petitioners' or Partnerships' intention to remove any fixtures or leasehold improvements at least seven days in advance. If the Petitioners or Partnerships have already vacated the leased premises, they shall not be considered to be in occupation of such location pending the resolution of any dispute.

50 **DECLARES** that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5*, the Petitioners and Partnerships are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "Third Party"), but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners or Partnerships binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Petitioners or Partnerships or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation and implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners or Partnerships.

#### ***Directors' indemnification and Charge***

51 **ORDERS** that, in addition to any existing indemnities, the Petitioners shall indemnify each of the Directors from and against the following (collectively, "*D&O Claims*"):

a) all costs (including, without limitation, full defence costs), charges, expenses, claims, liabilities and obligations, of any nature whatsoever, which may arise on or after the date of this Order (including, without limitation, an amount paid to settle an action or a judgment in a civil, criminal, administrative or investigative action or proceeding to which a Director may be made a party), provided that any such liability relates to such Director in that capacity, and, provided that such Director (i) acted honestly and in good faith in the best interests of the Petitioners and Partnerships and (ii) in the case of a criminal or administrative action or proceeding in which such Director would be liable to a monetary penalty, such Director had reasonable grounds for believing his or her conduct was lawful, except if such Director has actively breached any fiduciary duties or has been grossly negligent or guilty of willful misconduct; and

b) all costs, charges, expenses, claims, liabilities and obligations relating to the failure of the Petitioners or Partnerships to make any payments or to pay amounts in respect of employee or former employee entitlements to wages, vacation pay, termination pay, severance pay, pension or other benefits, or any other amount for services performed prior to or after the date of this Order and that such Directors sustain, by reason of their association with the Petitioners as a Director, except to the extent that they have actively breached any fiduciary duties or have been grossly negligent or guilty of willful misconduct.

The foregoing shall not constitute a contract of insurance or other valid and collectible insurance, as such term may be used in any existing policy of insurance issued in favour of the Petitioners, the Partnerships or any of the Directors.

52 **DECLARES** that, as security for the obligation of the Abitibi Petitioners to indemnify the Directors of the Abitibi Petitioners pursuant to paragraph 51 hereof, the Directors of the Abitibi Petitioners are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) to the extent of the aggregate amount of \$75 million (the "*Abitibi D&O Charge*"), having the priority established by paragraphs 89 and 91 hereof. Such Abitibi D&O Charge shall not constitute or form a trust. Notwithstanding any language in any applicable policy of insurance to the contrary, (a) such Abitibi D&O Charge shall only apply to the extent that the Directors of the Abitibi Petitioners (collectively, the "*Abitibi Respondent Directors*") do not have coverage under any directors' and officers' insurance, which shall not be excess insurance to the Abitibi D&O Charge or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 51 of this Order and (b) no insurer shall be entitled to be subrogated to or claim the benefit of the Abitibi D&O Charge.

53 **DECLARES** that, as security for the obligation of the Bowater Petitioners to indemnify the Directors of the Bowater Petitioners pursuant to paragraph 51 hereof, the Directors of the Bowater Petitioners are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property of the Bowater Petitioners to the extent of the aggregate amount of \$25 million (the "*Bowater D&O Charge*"), having the priority established by paragraphs 90 and 91 hereof. Such Bowater D&O Charge shall not constitute or form a trust. Notwithstanding any language in any applicable policy of insurance to the contrary, (a) such Bowater D&O Charge shall only apply to the extent that the Directors of the Bowater Petitioners (collectively, the "*Bowater Respondent Directors*") do not have coverage under any directors' and officers' insurance, which shall not be excess insurance to the Bowater D&O Charge or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 51 of this Order and (b) no insurer shall be entitled to be subrogated to or claim the benefit of the Bowater D&O Charge,

### ***BCFPI DIP Financing***

54 **ORDERS** that the Bowater Petitioners (which for the purposes only of paragraphs 54 to 60, 90, 91, 93, 94 and 97 of this Order shall include, in addition to the Bowater Petitioners, Bowater Pulp and Paper Canada Holdings Limited Partnership and Bowater Canada Finance Limited Partnership and Bowater Ventures Inc., in its capacity as the general partner of Bowater Pulp and Paper Canada Holdings Limited Partnership) are hereby authorized and empowered to enter into, obtain and borrow under credit facilities provided pursuant to a Senior Secured Superpriority Debtor in Possession Credit Agreement among Avenue Investments, L.P., as a lender, Fairfax Financial Holdings Limited ("*Fairfax*"), as a lender, the other lenders party thereto from time to time (collectively, the "*BI DIP Lenders*" and, Fairfax as Administrative Agent and Collateral Agent (the Administrative Agent and the Collateral Agent, as either such agent may be replaced from time to time in accordance with the BI DIP Documents, as hereinafter defined, collectively, the "*BI DIP Agent*") substantially in the form communicated as *Exhibit R-23* in support of the Petition (subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor) (the "*BI DIP Credit Agreement*"), provided that borrowings under such credit facility shall not exceed the principal amount of US\$600 million unless permitted by further Order of this Court, and the BI DIP Credit Agreement is hereby approved.

55 **ORDERS** that the Bowater Petitioners are hereby authorized and empowered to execute and deliver the BI DIP Credit Agreement and such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents,



guarantees and other definitive documents (collectively, with the BI DIP Credit Agreement, the "*BI DIP Documents*"), as are contemplated by the BI DIP Credit Agreement or as may be reasonably required by the BI DIP Lenders or the BI DIP Agent pursuant to the terms thereof, and the Bowater Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the BI DIP Lenders and the BI DIP Agent under and pursuant to the BI DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

56 **ORDERS** that all of the Property of the Bowater Petitioners is hereby charged by a movable and immovable hypothec, mortgage, lien and security interest to the extent of the aggregate amount of CDN\$728,760,000 (such hypothec, mortgage, lien and security interest, together with any other hypothec, mortgage, lien or security interest created or contemplated by the DIP Documents, the "*BI DIP Lenders Charge*") in favour of the BI DIP Agent, in its capacity as Collateral Agent, for and on behalf of the Secured Parties (as defined in the BI DIP Credit Agreement) (collectively, the "*BI DIP Secured Parties*") as security for all obligations of the Bowater Petitioners to the BI DIP Secured Parties with respect to all amounts owing, including principal, interest and the BI DIP Lenders Expenses (as defined hereinafter) and all obligations required to be performed under or in connection with the BI DIP Documents, The BI DIP Lenders Charge shall have the priority established by paragraphs 90 and 91 hereof.

56.1 **ORDERS AND DIRECTS** all the Registrars of all the Land Registry Offices for all Registration Divisions where property, immovables, lands and premises of the Bowater Petitioners are located and to whom certified copies of this Order (and any and all documentation ancillary thereto, if presented to them) will be presented, to accept, upon payment of the prescribed fees and filing of the required applications, such certified copies for registration in their respective register, of a charge and hypothec in an amount of CDN\$728,760,000 on immovables, lands and premises of the Bowater Petitioners, in favour of the BI DIP Agent, in its capacity as Collateral Agent, for and on behalf of the Secured Parties (as defined in the BI DIP Credit Agreement).

57 **ORDERS** that, notwithstanding any other provision of this Order, the Bowater Petitioners shall pay to the BI DIP Agent and the BI DIP Lenders when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the BI DIP Agent and the BI DIP Lenders on a full indemnity basis (the "*BI DIP Lenders Expenses*")) under the BI DIP Documents and shall perform all of their other obligations to the BI DIP Agent and to the BI DIP Lenders pursuant to the BI DIP Documents and this Order.

58 **ORDERS** that the claims of the BI DIP Agent and the BI DIP Lenders pursuant to the BI DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the BI DIP Agent and the BI DIP Lenders, in that capacity, shall be treated as unaffected creditors in these proceedings and in any Plan or any proposal filed by a Bowater Petitioner under the [BIA](#).

59 **ORDERS** that the BI DIP Agent and the BI DIP Lenders may;

a) notwithstanding any other provision of this Order, take such steps from time to time as they may deem necessary or appropriate to register, record or perfect the BI DIP Lenders Charge and the BI DIP Documents in all jurisdictions where they deem it is appropriate; and

b) notwithstanding the terms of paragraphs 10 and 11 hereof, upon the occurrence of an Event of Default (as defined in the BI DIP Documents), refuse to make any advance to the Bowater Petitioners and terminate, reduce or restrict any further commitment to the Bowater Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the BI DIP Agent or by the BI DIP Lenders to the Bowater Petitioners against the obligations of the Bowater Petitioners to the BI DIP Agent and the BI DIP Lenders under the BI DIP Documents or the BI DIP Lenders Charge, make demand, accelerate payment or give other similar notices, and the foregoing rights and remedies of the BI DIP Lenders under this paragraph shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Bowater Petitioners or the Property of the Bowater Petitioners, the whole in accordance with and to the extent provided in the BI DIP Documents.

60 **ORDERS** that the BI DIP Lenders shall not take any enforcement steps under the BI DIP Documents or the BI DIP Lenders Charge without providing a five (5) business days (the "*Notice Period*") written enforcement notice of a default thereunder to the Bowater Petitioners, the Monitor and to creditors requesting a copy of such notice. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the BI DIP Agent and the BI DIP Lenders shall be entitled to take any and all steps and exercise all rights and remedies provided for under the BI DIP Documents and the BI DIP Lenders Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under [Section 244 of the BIA](#).

61 **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 54 to 61 hereof, the approval of the BI DIP Documents or the BI DIP Lenders Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, the BI DIP Agent and the BI DIP Lenders by the moving party and returnable within seven (7) days after that party was provided with notice of this Order in accordance with [paragraph 70\(a\)](#) hereof or (b) the BI DIP Agent and the BI DIP Lenders apply for or consent to such order.

### ***ACI DIP Financing***

61.1 **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a "Letter Loan Agreement US\$100,000,000 Super-priority, Senior Secured Debtor-in-Possession Credit Facility" among Abitibi and Donohue Corp., as borrowers, and the Bank of Montreal, as lender (the "*ACI DIP Lender*") (the "*ACI DIP Agreement*") and to enter into the offer of loan guarantee from Investissement Québec ("*IQ*") (the "*IQ Guarantee Offer*"), in each case substantially in the forms communicated as Exhibits R-1 and R-2 in support of the Motion for Approval of DIP Financing in Respect of the Abitibi Petitioners dated April 27, 2009 (subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor), provided that borrowings under such credit facility shall not exceed the principal amount of US\$100 million, unless permitted by further Order of this Court, and the ACI DIP Agreement and the IQ Guarantee Offer are hereby approved, subject to the terms of this Order.

61.2 **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ACI DIP Agreement and the IQ Guarantee Offer, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ACI DIP Agreement and the IQ Guarantee Offer, the "*ACI DIP Documents*"), as are contemplated by the ACI DIP Agreement or the IQ Guarantee Offer or as may be reasonably required by the ACI DIP Lender or IQ pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ACI DIP Lender or IQ under and pursuant to the ACI DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

61.3 **ORDERS** that all of the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge (as defined below) shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) is hereby charged by a movable and immovable hypothec, mortgage, lien and security interest to the extent of the aggregate amount of CDN\$140 million (such hypothec, mortgage, lien and security interest, together with any other hypothec, mortgage, lien or security interest created or contemplated by the DIP Documents, the "*ACI DIP Charge*") in favour of the ACI DIP Lender and IQ as security for all obligations of the Abitibi Petitioners to the ACI DIP Lender and IQ with respect to all amounts owing, including principal, interest and the ACI DIP Expenses (as defined hereinafter) and all obligations required to be performed under or in connection with the ACI DIP Documents. The ACI DIP Charge shall have the priority established by paragraphs 89 and 91 hereof.

61.4 **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ACI DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ACI DIP Lender and IQ on a full indemnity basis (the "*ACI*

*DIP Expenses*") under the ACI DIP Documents and shall perform all of their other obligations to the ACI DIP Lender and IQ pursuant to the ACI DIP Documents and this Order.

61.5 **ORDERS** that the claims of the ACI DIP Lender and IQ pursuant to the ACI DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ACI DIP Lender and IQ, in such capacities, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the [BIA](#).

61.6 **ORDERS** that the ACI DIP Lender may:

(a) notwithstanding any other provision of this Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ACI DIP Documents in all jurisdictions where it deems it to be appropriate; and

(b) notwithstanding the terms of paragraphs 10 and 11 hereof, upon the occurrence of a Specified Event of Default or a Termination Event (as each such term is defined in the ACI DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ACI DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ACI DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ACI DIP Documents, the ACI DIP Lender shall be entitled to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ACI DIP Lender in accordance with the ACI DIP Documents and the DIP Lender's Charge.

61.7 **ORDERS** that the foregoing rights and remedies of the ACI DIP Lender under this paragraph shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ACI DIP Documents.

61.8 **ORDERS** that the ACI DIP Lender shall not take any enforcement steps under the ACI DIP Documents or the ACI DIP Charge without providing a five (5) business days (the "*Notice Period*") written enforcement notice of a default thereunder to the Abitibi Petitioners and the Monitor. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ACI DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ACI DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under [Section 244 of the BIA](#). For greater certainty, the ACI DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

61.9 **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 hereof, the approval of the ACI DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, the ACI DIP Lender and IQ by the moving party on or before June 5, 2009 or (b) the ACI DIP Lender applies for or consents to such order.

### ***Subrogation to ACI DIP Charge***

61.10 **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "*Secured Creditors*") and McBurney Corporation, McBurney Power Limited and MBB Power Services inc. (collectively, the "*Lien Holder*") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "*Impaired Secured Creditor*" and "*Existing Security*", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater

certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay the ACI DIP Lender (including by any means of realization) on account of principal, interest or costs, in whole or in part as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to the Impaired Secured Creditor that are secured by its Existing Security. For this purpose "ACI DIP Lender" shall be read to include Bank of Montreal, IQ, and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce the right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that the right of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer and for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer, In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge, such Impaired Secured Creditors shall rank *pari passu* as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary.

61.11 **ORDERS** that, subject to the execution and delivery of non-disclosure agreements satisfactory to the Petitioners and the Monitor, (i) copies of any borrowing request given to the Lender and the Sponsor pursuant to the ACI DIP Agreement shall be provided concurrently to the Monitor, the Secured Creditors and their respective financial advisors and the Ad Hoc Committee of Unsecured Noteholders (collectively, the "Notice Parties"); and (ii) all financial information, documents and reports required to be provided to the Lender or the Sponsor pursuant to the ACI DIP Agreement shall be provided concurrently to the Monitor and the Notice Parties. The Monitor will advise the Notice Parties of the Monitor's understanding of the proposed timing of any requested advance. All advances shall be subject to the prior approval of the Monitor and any Notice Party may apply to the Court to contest any Borrowing Request.

#### ***Inter-Company Advances***

62 **ORDERS** that any Abitibi Petitioner is authorized to borrow, repay and reborrow (such party being an "ACI Inter-Company Borrower") from any member of the ABH Group (such party being an "ACI Inter-Company Lender"), such amounts from time to time as it may consider necessary or desirable on a revolving basis (the "ACI InterCompany Advances") pursuant to a promissory note issued in favour of the ACI InterCompany Lender as evidence thereof, to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order.

63 **ORDERS** that all of the Property of an ACI Inter-Company Borrower (other than the Property subject to the Securitization Program Agreements) is hereby charged by a lien, mortgage and security interest (the "ACI Inter-Company Advances Charge") in favour of the ACI Inter-Company Lender as security for the obligations of the ACI InterCompany Borrower to the ACI Inter-Company Lender with respect to the ACI InterCompany Advances made to it. The ACI Inter-Company Advances Charge shall have the priority established by paragraphs 89 and 91 hereof.

64 **ORDERS** that the claims of the ACI Inter-Company Lender pursuant to the ACI Inter-Company Advances shall not be compromised or arranged pursuant to the Plan or these proceedings, but unless otherwise ordered, the exercise of any remedies by the ACI Inter-Company Lender in respect thereof under the ACI Inter-Company Advances Charge shall be subject to the stay provided for in this Order.

65 **ORDERS** that, subject to the terms of the BI DIP Documents, any Bowater Petitioner is authorized to borrow, repay and reborrow (such party being a "BI Inter-company Borrower") from any member of the ABH Group (such party being a "BI Inter-Company Lender"), such amounts from time to time as it may consider necessary or desirable on a revolving basis (the "BI Inter-Company Advances") pursuant to a promissory note issued in favour of the BI inter-Company Lender as evidence thereof, to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order.

66 **ORDERS** that all of the Property of an BI Inter-Company Borrower is hereby charged by a lien, mortgage and security interest the ("*BI Inter-Company Advances Charge*") in favour of the BI Inter-Company Lender as security for the obligations of the BI Inter-Company Borrower to the BI Inter-Company Lender with respect to the BI Inter-Company Advances made to it. The BI Inter-Company Advances Charge shall have the priority established by paragraphs 90 and 91 hereof.

67 **ORDERS** that the claims of the BI Inter-Company Lender pursuant to the BI Inter-Company Advances shall not be compromised or arranged pursuant to the Plan or these proceedings, but unless otherwise ordered, the exercise of any remedies by the BI Inter-Company Lender in respect thereof under the BI Inter-Company Advances Charge shall be subject to the stay provided for in this Order.

#### ***Bowater Adequate Protection Charge***

68 **ORDERS** that all of the Property of the Bowater Petitioners is hereby charged by a lien, mortgage and security interest the ("*Bowater Adequate Protection Charge*") as security for the diminution in the value of the BI Bank Syndicate Security (as defined below), if any, subsequent to April 16, 2009 by sale, lease or use of the BI Bank Syndicate Security. The Bowater Adequate Protection Charge shall have the priority established by paragraphs 90 and 91 hereof.

69 **ORDERS** that the obligations secured and the Property affected by the Bowater Adequate Protection Charge shall be subject to approval of such charge in the U.S. Proceedings and, in the event a lesser charge is approved or a lesser obligation is secured, the Bowater Adequate Protection Charge shall be reduced *pro tanto*. The exercise of any remedies under the Bowater Adequate Protection Charge shall be subject to the stay provided for in this Order.

#### ***Powers of the Monitor***

70 **ORDERS** that Ernst & Young Inc. is hereby appointed to monitor the business and financial affairs of the Petitioners and Partnerships as an officer of this Court and that the Monitor shall, in addition to the duties and functions referred to in Section 11.7 of the CCAA:

- a) give notice of this Order, within 10 days, to every known creditor of the Petitioners having a claim of more than \$5,000.00 against it, advising that such creditor may obtain a copy of this Order on the internet at the website of the Monitor (the "*Website*") or, failing that, from the Monitor and the Monitor shall, upon request, so provide it. Such notice shall be deemed sufficient in accordance with Subsection 11(5) of the CCAA;
- b) review and monitor the receipts and disbursements of the Petitioners and Partnerships including without limitation the intercompany transactions referred to in paragraphs 28 and 62 to 67 of this Order;
- c) assist the Petitioners, to the extent required by the Petitioners and Partnerships, in dealing with their creditors and other interested Persons during the Stay Period;
- d) assist the Petitioners, to the extent required by the Petitioners and Partnerships, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;
- e) advise and assist the Petitioners, to the extent required by the Petitioners and Partnerships, to review the Petitioners' and Partnerships' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;
- f) assist the Petitioners, to the extent required by the Petitioners and Partnerships, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

- g) report to the Court on the state of the business and financial affairs of the Petitioners and Partnerships or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order;
- h) report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;
- i) retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;
- j) engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceedings, under this Order or under the CCAA;
- k) may act as a foreign representative of the Petitioners in any proceedings outside of Canada;
- l) may give any consents or approvals as are contemplated by this Order; and
- m) perform such other duties as are required by this Order, the CCAA or this Court from time to time.

The Monitor shall not otherwise interfere with the business and financial affairs carried on by the Petitioners and Partnerships, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the Petitioners and Partnerships.

71 **ORDERS** that the Petitioners and their directors, officers, employees and agents, accountants, auditors and all other Persons having notice of this Order shall forthwith provide the Monitor with unrestricted access to all of the Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Petitioners and Partnerships in connection with the Monitor's duties and responsibilities hereunder.

72 **DECLARES** that the Monitor may provide creditors and other relevant stakeholders of the Petitioners with information in response to requests made by them in writing addressed to the Monitor and copied to the Petitioners' counsel. The Monitor shall not have any duties or liabilities in respect of such information disseminated by it pursuant to the provisions of this Order or the CCAA, other than as provided in paragraph 74 hereof. In the case of information that the Monitor has been advised by the Petitioners, the BI DIP Agent or the BI DIP Lenders is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Petitioners, the BI DIP Agent and the BI DIP Lenders unless otherwise directed by this Court.

73 **DECLARES** that the Monitor shall not be, nor be deemed to be, an employer or a successor employer of the employees of the Petitioners and Partnerships or a related employer in respect of the Petitioners and Partnerships within the meaning of any federal, provincial or municipal legislation governing employment, labour relations, pay equity, employment equity, human rights, health and safety or pensions or any other statute, regulation or rule of law or equity for any similar purpose and, further, that the Monitor shall not be, nor be deemed to be, in occupation, possession, charge, management or control of the Property or business and financial affairs of the Petitioners pursuant to any federal, provincial or municipal legislation, statute, regulation or rule of law or equity which imposes liability on the basis of such status, including, without limitation, the *Environment Quality Act* (Québec), the *Canadian Environmental Protection Act*, 1999 or the *Act Respecting Occupational Health and Safety* (Québec) or similar other federal or provincial legislation.

74 **DECLARES** that, in addition to the rights and protections afforded to the Monitor by the CCAA, this Order or its status as an officer of the Court, the Monitor shall not incur any liability or obligation as a result of its appointment and the fulfilment of its duties or the provisions of this Order, save and except any liability or obligation arising from a breach of its duties to act honestly, in good faith and with due diligence, and no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out the provisions of any order of this Court, except with prior leave of this Court, on at least seven days notice to the Monitor and its counsel.

75 **ORDERS** that the Petitioners shall pay the fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioners' legal counsel and other advisers, incurred in connection with or with respect to the Restructuring, whether incurred before or after this Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

76 **DECLARES** that the Monitor, the Monitor's legal counsel, the Abitibi Petitioners' legal counsel and other advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order by the Abitibi Petitioners in respect of these proceedings, the Plan and the Restructuring, in addition to the retainers referred to paragraph 75 hereof, be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) to the extent of the aggregate amount of \$6 million (the "*Abitibi Administration Charge*"), having the priority established by paragraphs 89 and 91 hereof.

77 **DECLARES** that the Monitor, the Monitor's legal counsel, the Bowater Petitioners' legal counsel and other advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order by the Bowater Petitioners in respect of these proceedings, the Plan and the Restructuring, in addition to the retainers referred to paragraph 75 hereof, be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property of the Bowater Petitioners to the extent of the aggregate amount of \$2 million (the "*Bowater Administration Charge*"), having the priority established by paragraphs 90 and 91 hereof.

***Appointment of Information Officer in Respect of U.S. Proceedings***

78 **ORDERS** that, in respect of the U.S. Proceedings of the 18.6 Petitioners, Ernst & Young Inc. is hereby appointed as an information officer with the powers and obligations set out herein (the "*Information Officer*").

79 **ORDERS** that the Information Officer shall report to this Court at such times and intervals as the Information Officer deems appropriate and, in any event, shall deliver a report to this Court at least once every two months outlining the status of the U.S. Proceedings of the 18.6 Petitioners, and such other information as the Information Officer believes to be material with copies of such reports provided to the BI DIP Agent and the BI DIP Lenders and report to the BI DIP Lenders on such additional issues related thereto upon the request of the BI DIP Agent and the BI DIP Lenders or their counsel.

80 **ORDERS** that, in addition to the rights and protections afforded to the Information Officer as an officer of this Court, the Information Officer shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except from a failure to act in good faith and to take reasonable care. Nothing in this Order shall derogate from the protections afforded to the Information Officer by the CCAA or any applicable legislation.

81 **ORDERS** that the Information Officer shall provide any creditor of the 18.6 Petitioners located in Canada with information provided by the 18.6 Petitioners in response to reasonable requests for information made in writing by such creditor addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the 18.6 Petitioners is confidential, the Information Officer shall not provide such information to creditors unless as otherwise directed by this Court or on such terms as the Information Officer and the 18.6 Petitioners may agree upon.

82 **ORDERS** that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the business of the 18.6 Petitioners and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the business or Property of the 18.6 Petitioners, or any part thereof. For greater certainty, the Information Officer shall not employ any employee of the 18.6 Petitioners;

83 **ORDERS** that nothing herein contained shall require the Information Officer to occupy or to take control, care, charge, possession or management of any of the Property of the 18.6 Petitioners that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to

any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Environment Quality Act* (Quebec), the *Canadian Environmental Protection Act*, 1999 or similar other federal or provincial legislation and regulations under such legislation (the "*Environmental Legislation*"), provided however that nothing herein shall exempt the Information Officer from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Information Officer shall not, as a result of this Order or anything done in pursuance of the Information Officer's duties and powers under this Order, be deemed to be in possession of any of the Property of the 18.6 Petitioners within the meaning of any Environmental Legislation, unless it is actually in possession of such property.

84 [Intentionally omitted]

85 [Intentionally omitted]

86 [Intentionally omitted]

87 [Intentionally omitted]

88 [Intentionally omitted]

#### ***Priorities and General Provisions Relating to CCAA Charges***

89 **DECLARES** that the priorities of the Abitibi Administration Charge, Abitibi D&O Charge, ACI Inter-Company Advances Charge and the ACI DIP Charge (collectively, the "*Abitibi CCAA Charges*"), as between them with respect to any Property of the Abitibi Petitioners to which they apply, shall be as follows:

- a) first, the Abitibi Administration Charge;
- b) second, the Abitibi D&O Charge, up to a maximum of \$22.5 million (the "*Abitibi D&O First Tranche*");
- c) third, the ACI DIP Charge;
- d) fourth, the ACI Inter-Company Advances Charge; and
- e) fifth, the Abitibi D&O Charge in respect of the balance of amounts, if any, secured thereby (the "*Abitibi D&O Second Tranche*").

90 **DECLARES** that the priorities of the Bowater Administration Charge, Bowater D&O Charge, BI DIP Lenders Charge, Bowater Adequate Protection Charge and BI Inter-Company Advances Charge (collectively, the "*Bowater CCAA Charges*"), as between them with respect to any Property of the Bowater Petitioners to which they apply, shall be as follows:

- a) first, the Bowater Administration Charge;
- b) second, the Bowater D&O Charge, up to a maximum of \$7.5 million (the "*Bowater D&O First Tranche*");
- c) third, the BI DIP Lenders Charge;
- d) fourth, the Bowater Adequate Protection Charge;
- e) fifth, the BI Inter-Company Advances Charge; and
- f) sixth, the Bowater D&O Charge in respect of the balance of amounts, if any, secured thereby (the "*Bowater D&O Second Tranche*").

91 **DECLARES** that the Abitibi CCAA Charges and the Bowater CCAA Charges (collectively, the "*CCAA Charges*") shall rank in priority to any and all other hypothecs, mortgagees, liens, trusts, security, priorities, conditional sale agreements,



financial leases, charges, encumbrances or security of whatever nature or kind (collectively, "*Encumbrances*") affecting the Property of the Petitioners, other than:

a) in the case of the BI DIP Lenders Charge, the Bowater Adequate Protection Charge, the BI Inter-Company Advances Charge and the Bowater D&O Second Tranche, valid and perfected Encumbrances in respect of principal and interest, affecting the Property of the Bowater Petitioners and currently held pursuant to the Credit Agreement dated as of May 31, 2006, as amended and restated (the "*Canadian Credit Agreement*") or supplemented, among BCFPI, as borrower, the lenders named thereto and the Bank of Nova Scotia, as administrative agent (the "*BI Bank Syndicate Security*"), which BI Bank Syndicate Security shall rank in priority to the BI DIP Lenders Charge, the Bowater Adequate Protection Charge, the BI Inter-Company Advances Charge and the Bowater D&O Second Tranche; and

b) in the case of the ACI Inter-Company Advances Charge and the Abitibi D&O Second Tranche above:

a. valid and perfected Encumbrances in respect of principal and interest affecting the Property of the Abitibi Petitioners and currently held pursuant to the Credit and Guaranty Agreement dated as of April 1, 2008 among, *inter alia*, ACI, as borrower, Abitibi-Consolidated Company of Canada ("*ACCC*") as guarantor, the Lenders party thereto and Goldman Sachs Credit Partners L.P. as administrative agent (the "*ACI Bank Security*"); and

b. valid and perfected Encumbrances in respect of principal and interest, affecting the Property of the Abitibi Petitioners and currently held pursuant to the US\$413 million 13.75% Senior Secured Notes due April 1, 2011 (the "*Senior Notes Security*");

which ACI Bank Security and Senior Notes Security shall rank in priority to the ACI Inter-Company Advances Charge and the Abitibi D&O Second Tranche.

92 **ORDERS** that nothing in this Order shall affect any determination of (i) the validity or perfection of the BI Bank Syndicate Security, the ACI Bank Security or the Senior Notes Security, (ii) whether such security is opposable to third parties, or (iii) whether such security is avoidable under applicable Canadian or United States laws.

92.1 **DECLARES** that nothing in this Order, including the CCAA Charges, shall affect or charge in any manner whatsoever (i) any Perfected Encumbrances affecting and charging the cash deposits held to secure amounts owing or which in the future may be owing to CIBC by ACCC under the Facility Agreement dated as of April 1st, 2008, as it may be renewed or amended (the "*Facility Agreement*"); and (ii) set-off rights available to CIBC under the Facility Agreement or at law.

92.2 **DECLARES** that nothing in this Order, including the CCAA Charges, shall affect or charge in any manner whatsoever any Perfected Encumbrances affecting and charging the cash deposits held to secure amounts owing or which in the future may be owing to Bank of Nova Scotia by ACCC with respect to that certain letter of credit bearing number S 51151-178519 in the face amount of \$1,075,824.97 issued by Bank of Nova Scotia to WSIB at the request of ACCC.

93 **ORDERS** that, except as otherwise expressly provided for herein, the Petitioners shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Petitioners obtain the prior written consent of the Monitor and in the case of the Bowater Petitioners, the prior consent of the BI DIP Agent, the BI DIP Lenders and the prior approval of the Court.

94 **DECLARES** that each of the CCAA Charges shall attach, as of the Effective Time of this Order, to all present and future Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) or the Bowater Petitioners, as the case may be, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

95 **DECLARES** that the CCAA Charges and the rights and remedies of the beneficiaries of such Charges, as applicable, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration

of insolvency made herein; (ii) any application for a bankruptcy order filed pursuant to the BIA in respect of the Petitioners or any bankruptcy order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by any of the Petitioners under Chapter 11 of Title 11 of The United States Code; or (iv) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, or the granting of financial assistance between affiliated companies, contained in (y) any federal or provincial statute or (z) any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Petitioners (a "Third Party Agreement"), and notwithstanding any provision to the contrary in any Third Party Agreement:

a) the creation of any of the CCAA Charges shall not create or be deemed to constitute a breach, by the Petitioners, of any Third Party Agreement to which they are a party; and

b) any beneficiary of the CCAA Charges shall not be held liable against any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

96 **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a bankruptcy order filed pursuant to the BIA in respect of the Petitioners and any bankruptcy order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by any of the Petitioners under Chapter 11 of Title 11 of The United States Code; or (iv) the provisions of any federal or provincial statute, the payments or disposition of Property made by the Petitioners pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

97 **DECLARES** that the CCAA Charges shall be valid and enforceable as against all Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) or of the Bowater Petitioners as the case may be and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners, for all purposes.

### **General**

98 **DECLARES** that this Order and any proceeding or affidavit leading to this Order, shall not, in and of themselves, constitute a default or failure to comply, by the Petitioners, under any statute, regulation, license, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

99 **DECLARES** that, except as otherwise specified herein, the Petitioners are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Petitioners and that any such service shall be deemed to be received on the date of delivery (if by personal delivery or electronic transmission), on the following business day (if delivered by courier), or three business days after mailing (if by ordinary mail).

100 **DECLARES** that the Petitioners may serve any Court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Petitioners shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

101 **DECLARES** that any party in these proceedings, other than the Petitioners, may serve any Court materials electronically, by emailing a PDF or other electronic copy of all materials to counsels' email addresses, provided that such party shall deliver both PDF or other electronic copies and "hard copies" of all materials to counsel to the Petitioners and the Monitor and to any other party requesting same.

102 **DECLARES** that, unless otherwise provided herein or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on the solicitors for the Petitioners and the Monitor and has filed such notice with this Court.

103 **DECLARES** that the Petitioners or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice only to each other.

104 **DECLARES** that any interested Person may apply to this Court to vary or rescind this Order or seek other relief upon seven days notice to the Petitioners, the Monitor, the BI DIP Agent, the BI DIP Lenders and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

***Effect, Recognition and Assistance***

105 **DECLARES** that this Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

106 **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian Federal Court or administrative body and any federal or State Court or administrative body in the United States of America including, without limitation, the U.S. Bankruptcy Court, and other nations and states to give effect to this Order and to assist the Petitioners, the Monitor and their respective agents in carrying out the terms of this Order and any other Order in these proceedings. All Courts or administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to ACI and/or the Monitor in any foreign proceedings and to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order and any other Order in these proceedings, including, without limitation, recognizing the Petitioners' CCAA proceedings as a foreign main proceeding under applicable law.

107 **DECLARES** that each of the Petitioners and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and any other Order granted by this Court including, without limitation, applications under Chapter 15 of the U.S. Bankruptcy Code in respect of ACI and ACCC, and to recognize or give effect to or otherwise further the Restructuring.

108 **DECLARES** that for the purposes of seeking the aid and recognition of any court or any judicial, regulatory or administrative body outside of Canada and in particular in the U.S. Bankruptcy Court in respect of proceedings commenced under Chapter 15 of the U.S. Bankruptcy Code and any ancillary relief in respect thereto, ACI shall be appointed as and is hereby authorized and directed to act as the foreign representative of the Petitioners and to seek such aid and recognition.

109 **DECLARES** that for the purposes of seeking the aid and recognition of any court or any judicial, regulatory or administrative body outside of Canada, the Petitioners' centre of main interest (COMI) is ACI's principal executive offices situated at 1155 Metcalfe Street, in the city and district of Montréal, Province of Québec.

110 **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

111 **THE WHOLE WITHOUT COSTS.**

**Schedule "A" — Abitibi Petitioners**

1. *ABITIBI-CONSOLIDATED INC.*
2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*
3. *3224112 NOVA SCOTIA LIMITED*
4. *MARKETING DONOHUE INC.*
5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*

6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.

**Schedule "B" — Bowater Petitioners**

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC,
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.

14. *ALLIANCE FOREST PRODUCTS (2001) INC.*

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

**Schedule "C" — 18.6 CCAA Petitioners**

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

**Schedule "D" — Partnerships**

1. *BOWATER CANADA FINANCE LIMITED PARTNERSHIP*

2. *BOWATER PULP AND PAPER CANADA HOLDINGS LIMITED PARTNERSHIP*

3. *ABITIBI-CONSOLIDATED FINANCE LP*

*Motion granted.*

Footnotes

- 1 [Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.](#)
- 2 For purposes of this Judgment, all capitalized terms, unless otherwise defined herein, have the same meaning as set out in the paragraphs of the Second Amended Initial Order found at the end of these reasons.
- 3 Motion for Approval of a DIP Financing in Respect of the Abitibi Petitioners.
- 4 Exhibit R-1.
- 5 Exhibit R-2.
- 6 Contestation of Respondents dated May 4, 2009 (proceeding number 74 of the Court Record).
- 7 Paragraph 61.10 of the Second Amended Initial Order sought here.
- 8 Contestation of April 30, 2009 (proceeding number 47 of the Court Record).
- 9 Motion to Vary of April 29, 2009 (proceeding number 32 of the Court Record).
- 10 They include the Third Report of the Monitor dated April 27, 2009 and the Second Supplemental Report of the Monitor dated May 4, 2009.
- 11 [Stelco Inc., Re \(2005\), 9 C.B.R. \(5th\) 135](#) (Ont. C.A.), 2005 CanLII 8671.
- 12 See [Mecachrome International inc., Re \[2009 CarswellQue 5141\]](#) (C.S. Que.), S.C. Montreal, n<sup>o</sup> 500-11-035041-082, 2009-01-13, Gascon J., at paragr. 31-33; [MEI Computer Technology Group Inc., Re, \[2005\] R.J.Q. 1558](#) (C.S. Que.), at paragr. 25.
- 13 See in this respect [Hunters Trailer & Marine Ltd., Re, 2001 ABQB 546](#) (Alta. Q.B.), at paragr. 32 (Wachowich J.); [Conporec inc., Re, \[2008\] R.J.Q. 2590](#) (C.A. Que.), at paragr. 16 (Thibault J.A.), confirming [Conporec inc., Re, 2008 QCCS 4813](#) (C.S. Que.), at paragr. 50 to 54 (Parent J.); [United Used Auto & Truck Parts Ltd., Re \(2000\), 73 B.C.L.R. \(3d\) 236](#) (B.C. C.A.), at paragr. 29; [Temple City Housing Inc., Re, 2007 ABQB 786](#) (Alta. Q.B.), at paragr. 14 (Romaine J.).
- 14 [Mecachrome International inc. \(Arrangement relatif à\), S.C. Montreal, n<sup>o</sup> 500-11-035041-082, 2009-01-13, Gascon J.](#), at paragr. 37 to 51.
- 15 [InterTAN Canada Ltd., Re, 2008 CarswellOnt 8040](#) (Ont. S.C.J. [Commercial List]), Initial Order rendered on November 26, 2008, No. CV-0800007841-00 CL, at paragr. 57ff (Morawetz J.).