Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.
(the "APPLICANT")

BRIEF OF AUTHORITIES OF ALLEN-VANGUARD CORPORATION

(Motion Regarding Extension and Scope of Stay, returnable February 11, 2014)

January 31, 2014

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Ronald G. Slaght, Q.C. (12741A)
Tel: (416) 865-2929
Fax: (416) 865-2862
Email: rslaght@litigate.com
Eli S. Lederman (47189L)
Tel: (416) 865-3555
Fax: (416) 865-2872
Email: elederman@litigate.com
Ian MacLeod (60511F)
Tel: (416) 865-2895
Fax: (416) 865-3701
Email: imacleod@litigate.com

Lawyers for Allen-Vanguard Corporation

TO: **THE SERVICE LIST**

INDEX

TAB 1

COURT FILE NO.: 08-43188
08-43544
08-41899

DATE: November 12, 2013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: L'ABBE et al v. ALLEN-VANGUARD CORPORATION et al
ALLEN-VANGUARD CORPORATION v. L'ABBE et al
TIMMIS v. ALLEN

BEFORE: Master MacLeod

COUNSEL: Calina Ritchie, for the "offeree shareholders"
Ph: (613) 780-2011 Fax: (613) 569-8668 Email: tconway@cavanagh.ca

Eli S. Lederman & Ian MacLeod, for Allen-Vanguard – by telephone
Phone: (416) 865-3555 Fax: (416) 865-2872 Email: elederman@litigate.com

Joel Dubois, for Paul Timmis
Ph: (613) 566-2837 Fax: (613) 238-8775 Email: arubinoff@perlaw.ca

ENDORSEMENT (at case conference)

1. Two issues were discussed today. The first was the effect of the CCAA proceeding on this action and the other was Mr. Lederman's request for costs of the "motion to vary" my initial order of costs of the pleading amendment motion.

2. Dealing firstly with the costs of the "motion to vary", Mr. Lederman seeks $1,000. I have heard his argument why that is reasonable but Ms. Ritchie was not in a position to argue the matter today. I encourage counsel to discuss this and seek agreement (but not to incur costs of more than they are arguing about). If agreement is not possible I will hear argument on the matter on December 10th.

3. With respect to the stay, counsel disagreed about the legal effect of the Commercial List order. I have reviewed the order which refers to two of these proceedings. I do not accept the argument that the effect of the stay under the CCAA or the specific wording of the stay order itself has any effect on the conduct of these actions except with respect to the participation and interest of Growthworks .

4. Obviously as matters stand, Growthworks has no standing to take steps itself nor may any party take steps against Growthworks . The stay also means that nothing may be done in these actions to deal with the liability of Growthworks nor the interest of Growthworks in the escrow fund.

5. In the absence of a very specific order from a Commercial List judge indicating his or her intention to affect the rights of parties who are not involved in the CCAA proceedings, the stay against Growthworks cannot legally impede Allen-Vanguard from proceeding with its action as against the other offeree shareholders nor prohibit those shareholders from asserting their claims against Allen-Vanguard. In the Timmis action of course, Growthworks is not even a party. Certainly it is not intended that all discovery or motion activity be halted in these actions unless the participation of Growthworks is essential.

6. There are nevertheless practical implications of the CCAA proceeding which will require the timetable for this proceeding to be adjusted. In particular the scheduling of the summary judgment motion will have to be reconsidered. I am advised that the question which is the subject of that motion – that is whether or not the Share Purchase Agreement limits the potential liability of the offeree shareholders even if fraud is proven – is an important issue in the Toronto proceeding and may be determined in that proceeding by way of a mini-trial. If that is the case then it makes no sense to proceed with a parallel summary judgment motion in Ottawa.

7. I also note that counsel have not actually taken steps to obtain a date for either the summary judgment motion nor the motion to stay the summary judgment motion from RSJ Hackland who will be hearing them. When I originally discussed this matter with him, the RSJ had dates available in December but I doubt that is any longer so.

8. I am advised that the CCAA proceeding is to be spoken to before Mesbur J. in Toronto this morning. Accordingly I will put all of these scheduling issues over to the next scheduled case conference on December 10th, 2013. By that time the parties should know more about the schedule for the Toronto proceeding.

9. The morning of December 10th was reserved before me for the privilege motion. From what I am hearing today the privilege motion will also not be ready to proceed but I will keep the time available so that a more comprehensive case conference may take place. I had set aside 9:00 – 1:00 to deal with the matter. I will continue to hold that time available unless I hear from all counsel to the contrary.

10. In the event the Commercial List judge feels it is important to ensure these actions operate in harmony with the CCAA proceeding I am prepared at his or her request to have a joint case conference or case conferences. Alternatively if any party seeks leave to move these actions to the Commercial List they are to advise my office at once.

11. A copy of this endorsement will be sent to counsel as well as to RSJ Hackland and Mesbur J.

Master Calum MacLeod

TAB 2

Indexed as:

Quintette Coal Ltd. v. Nippon Steel Corp. (B.C.C.A.)

IN THE MATTER of The Companies' Creditors Act R.S.C. 1985, c. C -36
AND IN THE MATTER of The Company Act, R.S.B.C. 1979, c. 59
AND IN THE MATTER of Quintette Coal Limited
Between
Quintette Coal Limited, Petitioner, (Respondent), and Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, Sumitomo Metal Industries, Ltd., Mitsubishi Chemical Industries Ltd., Nakayama Steel Works, Ltd., Godo Steel, Ltd., Mitsui Mining Co. Ltd., Respondents, (Appellant)

[1990] B.C.J. No. 2497

51 B.C.L.R. (2d) 105

2 C.B.R. (3d) 303

24 A.C.W.S. (3d) 172

Vancouver Registry: CA12636

British Columbia Court of Appeal

Legg, Wood and Gibbs JJ.A.

Heard: October 30, 1990
Judgment: November 16, 1990

Corporations -- Company creditors arrangement -- Creditors rights -- Right to set-off -- Prohibition.

An arbitrator set a schedule of prices to be paid for coal deliveries made by the respondent Q. Ltd. to the appellant for a four year period commencing April 1, 1987. The appellant had paid the respondent higher prices than those eventually set in the arbitration, and as a result, the respondent owed $45,745,220.22 in overpayment. The respondent continued to supply coal to the appellant. The appellant made several demands for the debt owing in overpayment. When the respondent failed to pay, the appellant withheld funds otherwise payable as the purchase price of the ongoing

coal deliveries. The respondent soon became a debtor company and obtained an order pursuant to section 11 of the Companies Creditors Arrangement Act, prohibiting any creditor from exercising a right of set-off against any debts owed to it. The order specifically cited the appellant. The appellant's application to set aside the order was dismissed and it appealed.

HELD: Appeal dismissed. The purpose of section 11 of the Companies Creditors Arrangement Act is to confer on the court the power to permit a company to continue as a going concern while at the same time attempting a reorganization.

STATUTES, REGULATIONS AND RULES CITED:

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 49.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, 11, 11(b), 11 (c).
Company Act, R.S.B.C. 1979, c. 59.
Interpretation Act, R.S.C. 1985, c. I-21, s. 12.

Counsel for the Appellant: J.D. McAlpine, Q.C., P.A. Hildebrand and P.R. Bennett.
Counsel for the Respondent: Jack Giles, Q.C. and W.D.S. Wade.

GIBBS J.A. (for the Court, dismissing the appeal):-- This is an appeal from a judgment of Thackray, J. (reported at (1990) 47 B.C.L.R. (2d) 191) dismissing an application by the appellant Japanese companies for an order setting aside part of an order made by him on June 13, 1990 under the Companies' Creditors Arrangement Act, R.S.C. 1985, Chap. C-36 (the "C.C.A.A."). The primary ground of appeal is stated in the factum of the Japanese companies to be that:

> " The Learned Chambers Judge erred in holding that the power to stay any 'suit, action or other proceeding ... against the company', in s. 11 of the CCAA conferred jurisdiction upon the Court to restrain the JSI from exercising their right to set-off the Overpayments in paying for future coal deliveries."

The "right to set-off the Overpayments in paying for future coal deliveries" as asserted by the Japanese companies arose upon the delivery of an arbitral award made under the International Commercial Arbitration Act, S.B.C. 1986, Chap. 14 on May 28, 1990. The background to the arbitral award and the details of the award were discussed at some length in the judgment of Esson, C.J.S.C. in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 201, and in the judgments of a division of this Court on the appeal from Esson, C.J.S.C. handed down on October 24, 1990 under Vancouver Registry No. CA012743. It is sufficient for purposes of this appeal to note that the award set a schedule of prices to be paid for coal deliveries made by Quintette for a four year period commencing April 1, 1987. The Japanese companies had paid higher prices for coal deliveries during the arbitration process than those set in the award. As a consequence, upon delivery of the award, the respondent Quintette owed the Japanese companies $45,745,220.22 representing the total amount of the overpayment.

Quintette continued to make coal deliveries, as it was required to do by contract, and also as it had to do if it wished to survive as a going concern. The Japanese companies collectively are the

sole customer for Quintette coal. They are obliged by contract to pay for coal delivered at the rates set by the arbitral award. However, not surprisingly, they also want the overpayment debt to be paid. On May 31, 1990 they demanded payment. Quintette did not pay. Thereupon the Japanese companies commenced to retire the debt by withholding funds otherwise payable as the purchase price of the ongoing coal deliveries. By June 13, 1990, the date of the C.C.A.A. order, the debt had been reduced by the withholding process to $36,180,876.22.

At some time prior to June 12, 1990, Quintette became a debtor company as defined in s. 2 of the C.C.A.A. On that day Quintette applied ex parte, by way of a petition, for various C.C.A.A. orders so as to facilitate the making of a formal plan of compromise or arrangement with its creditors. The then total of secured and unsecured debt, according to the petition, was of the order of $772 million. On the following day Thackray, J. made a comprehensive order which includes this paragraph which is at the root of this appeal:

> " AND THIS COURT FURTHER ORDERS that no creditor of the Petitioner may exercise any right of set-off against any debts owed to the Petitioner including, without limitation, monies owed in respect of the sale of the Petitioner's coal to the Japanese Coal Purchasers or any member thereof and monies on deposit with any bank or other accounts of the Petitioner;"

On June 14, 1990, the Japanese companies applied for an order setting aside the prohibition in this paragraph so that they could continue the pattern of withholding funds payable for current coal deliveries. Thackray, J. heard the application on June 15, 1990 and dismissed it with written reasons on June 18, 1990, reported, as noted above, at (1990) 47 B.C.L.R. (2d) 191. Now, on this appeal, the Japanese companies request the following relief:

> "The JSI respectfully request an Order setting aside:
>
> (a) The Order of Mr. Justice Thackray made June 18, 1990, dismissing the JSI application made June 15, 1990; and
> (b) That portion on the Ex Parte Order precluding the JSI from exercising their right to set-off in respect to the Overpayments."

The principal issue on the appeal is whether the prohibition in the impugned paragraph is or is not within the powers vested in the court by s. 11 of the C.C.A.A.:

> 11. Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act or the Winding-up Act or either of them;
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes."

However, the issue is not to be resolved by construing the language of s. 11 in isolation. Maxwell on Interpretation of Statues, 12th Ed., 1969, states the basic rule at p. 47:

> " It was resolved in the Case of Lincoln College that the good expositor of an Act of Parliament should 'make construction on all the parts together, and not of one part only by itself.' Every clause of a statute is to 'be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute."

And at page 58 reference is made to "an elementary rule" of construction:

> " Passing from the external aspects of the statute to its contents, it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself."

The starting point in the construction exercise is an understanding of the historical setting of the C.C.A.A. to the end that s. 11 is read in such a manner as to achieve the object of parliament. Maxwell speaks of the historical setting as an aid to construction at pp. 47 and 48:

> " 'The Court,' said Sir George Jessel M.R., 'is not to be obvious ... of the history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended.' In the interpretation of statutes, the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject-matter, and may also consider whether a statute was intended to alter the law or to leave it exactly where it stood before. But although 'we can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge...we can only use these matters as an aid to the construction of the words which Parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act.'"

In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, Vancouver Registry No. CA12944, judgment handed down on October 29, 1990, another division of this Court reviewed the historic background of the C.C.A.A. saying, at pp. 10 and 11:

> "... The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insol-

> vency legislation which then existed - the Bankruptcy Act and the Winding-up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A. to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business."

The court then quoted excerpts from an article by Stanley E. Edwards at p. 587 of 1947, Vol. 25 of the Canadian Bar Review entitled "Reorganizations Under the Companies' Creditors Arrangement Act" which, it said, "explain very well the historic and continuing purposes of the Act":

> " It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)
>
> " There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.
>
> Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment

> and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations." (p. 590)

It is evident from the above that, providing no violence is done to the words used by parliament, s. 11 is to be construed so as to confer on the court the power to permit Quintette to continue as a going concern while the attempt at compromise or arrangement or reorganization is being actively pursued. Here Thackray, J. gave Quintette six months from June 13, 1990, or such longer period as may be ordered, to reach an accommodation with its creditors. As the court pointed out at p. 7 of Chef Ready:

> "... if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11."

Narrowing the focus of the enquiry somewhat, it is apparent that, with the possible exception of s. 11, the operative provisions of the C.C.A.A. apply precisely to the fortunes of Quintette, and to the circumstances which obtain as between Quintette and the Japanese companies. Quintette is a debtor company; the Japanese companies, collectively, are a creditor. Quintette as debtor is proposing a compromise or arrangement with its creditors, including the Japanese companies. The court may sanction and make binding on all creditors, including the Japanese companies, a compromise or arrangement agreed upon by a "majority in numbers representing three-fourths in value of the creditors, or class of creditors, as the case may be..."(s. 6). With respect to value, the $36 million June 13, 1990 debt owed to the Japanese companies represents approximately 4 1/2% of the total of secured and unsecured debt. It would be anomalous indeed if, by denying or restricting cash flow, a 4 1/2% creditor could frustrate the compromise or arrangement because s. 11 did not apply, whereas if s. 11 did apply so that a stay could be ordered a creditor or creditors of up to 254 could ultimately be forced to defer to the compromise or arrangement agreed upon by the 754. If the language of s. 11 so confines the court that that result flows the anomalous consequence must be accepted. On the other hand, if there is a reasonable construction which more nearly reflects the intention of the legislators, and avoids the anomaly, it is to be preferred.

The other aid to construction which is appropriate here is the view other courts have taken of s. 11. Maxwell at p. 47 (see above) quotes Sir George Jessel, M.R. as saying, inter alia, "when ... prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended."

Considering that the C.C.A.A. was enacted some 57 years ago there are relatively few reported cases interpreting its provisions. That may be a reflection of the general level of prosperity, with some short term reverses, which has been the Canadian experience for the past 50-plus years. In any event, and whatever the reason, the reported cases indicate that the courts have tended to avoid microscopic parsing of the words and phrases of s. 11 in favour of a broader "purposes" perspective

thereby reaching conclusions held to further the objectives of parliament. Without so stating they have given full effect to the direction in s. 12 of the Interpretation Act, R.S.C., 1985, Chap. I-21:

> "12. Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

The following cases are illustrative of the kind of conduct the courts have found to be within their power to restrain under s. 11: Re Feifer and Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Que. C.A.); Wynden Canada Inc. v. Gaz Metropolitaine (1982), 44 C.B.R. 285 (Que. S.C.); Norcen Energy Resources v. Oakwood Petroleums (1988), 72 C.B.R. 2 (Alta. Q.B.). The judgments also contain helpful and persuasive observations about the intent and purpose of the Act, as do the following judgments: Meridian Developments Inc. v. Toronto Dominion Bank (1984), 52 C.B.R. 109 (Alta. Q.B.), Re Ursel Investments Ltd. (1990), unreported (Sask. Q.B.) and Northland Properties Limited v. Excelsior Life Insurance Company (1989), 34 B.C.L.R. (2d) 122 (B.C.C.A.). And in his judgment in this case Thackray, J. adopted the approach followed in Meridian and Norcen. There is a perceptive observation about the attitude of the courts at the end of the case comment following the C.B.R. report of Norcen:

> "The Norcen decision is one of the strongest examples to date of the willingness of the courts to permit the C.C.A.A. to be used as a practical and effective way of restructuring corporate indebtedness."

By way of brief summary, the subject matter of each of the judgments which has a direct bearing on the scope of s. 11 is as follows: in Feifer and Frame, a notice of eviction by a landlord; in Wynden Canada, cessation of utility services; in Meridian, a letter of credit; in Norcen, a replacement of the operator under an oil and gas operating agreement.

To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. The power is discretionary and therefore to be exercised judicially. It would be a reasonable expectation that it would be extremely unlikely that the power would be exercised where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries, whereas it would not be unlikely when the result would be to enforce payment for goods thereafter taken from or services thereafter received from the debtor company, as is the case here. In cases not involving the supply or receipt of goods or services, no doubt judicial exercise of the discretion would produce a result appropriate to the circumstances.

The order made by Mr. Justice Thackray was in accord with his understanding of the "overall intention of the Act" and consistent with the reported cases. It falls well within the "general principle" distilled from those cases. At p. 199, after considering the submissions of counsel for the Japanese companies, he said:

> " I must look to the overall intention of the Act, and, as has been put before me by Quintette, what is required within an order to allow Quintette the time to reorganize and make a proposal. Unless there is a sound legal principle for doing

> so, I must not carve out one portion of the order and give an advantage to one creditor over another. I have not acceded to the arguments of counsel for J.S.I. and consequently I cannot find the legal basis for compromising the effect of the ex parte order."

The one remaining question is whether, to return to an expression used earlier, the order does violence to the words used by parliament. The critical words in s. 11(b) are "restrain further proceedings in any action, suit or proceeding against the company"; and in s. 11(c) "make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company". Either subsection might apply dependant upon the view taken of the withholding conduct by the Japanese companies. But whichever applies the question remains the same and that is whether "proceeding" is to be understood as a legal proceeding only. In Meridian Wachowich, J. held that it was not to be so narrowly construed, as did Forsyth, J. in Norcen. As well, there is higher court support for a broad construction which would include extra-judicial conduct within the meaning of "proceeding" in this statute. In Vachon v. Canada Employment and Immigration Commission (1985), 57 C.B.R. 113 (S.C.C.), Beetz, J., for the court, held that withholding payment of unemployment insurance benefits, even though authorized by statute, was contrary to the provisions of s. 49 of the Bankruptcy Act, R.S.C., 1970, Chap. B-3. At p. 121 he said:

> "The Bankruptcy Act governs bankruptcy in all its aspects. It is therefore understandable that the legislator wished to suspend all proceedings. administrative or judicial. so that all the objectives of the Act would be attained."
>
> (Emphasis added.)

With the exception of the first sentence, what Beetz, J. said in this paragraph reflects precisely the attitude the courts have taken in respect of the C.C.A.A. it must be recognized that s. 49 of the Bankruptcy Act is worded differently and includes the word "remedy". However, it should also be noted that the paragraph quoted above appears at the end of a section of the judgment entitled "General Nature of Stay of Proceedings Imposed by s. 49(1) of the Bankruptcy Act" in which no fine distinction is drawn between "remedy" and "proceeding". The emphasis is on the intention of parliament and the objectives of the statute. And earlier on p. 21 Beetz, J., again in language that applies equally to the C.C.A.A, I said:

> "... in my opinion the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the Bankruptcy Act."

There is no rational ground for treating withholding by an arm of government, an "administrative" proceeding, differently than withholding by a private person. Accordingly, the withholding by the Japanese companies is as much a proceeding which can be restrained under s. 11 of the C.C.A.A. as was the withholding by the unemployment insurance authorities which was prohibited, except with leave, under s. 49 of the Bankruptcy Act.

The word "withholding" has been used throughout these reasons so as to distinguish from the concept of "set-off". The Japanese companies put their case forward on appeal primarily on the ground that what they were engaged in was set- off and that set-off was not a proceeding. With respect, the argument failed to recognize the difference between setoff in the colloquial sense and

set-off in terms of the legal lexicon. Set-off in law is only available as a defence. it has been described as "a shield and not a sword". In respect of the payments due for ongoing coal deliveries Quintette has not sued for the amounts withheld. The Japanese companies have not therefore been put into a position where they could raise the set-off shield. On the contrary, they have had, and wish to continue to have, recourse to set-off, in the colloquial sense, as a sword to achieve a species of extra judicial execution. The sword is being, and is intended to be, wielded "against the company". As it is a proceeding against the company it is within the power of the court to restrain under s. 11 of the C.C.A.A.

As Thackray, J. has not been shown to have erred, either in his reasoning or in his disposition of the application before him, he will be upheld on the first ground of the appeal.

The second ground of appeal focuses on the exercise of the discretion vested by s. 11. The Japanese companies say that:

> " If s. 11 does confer jurisdiction on the Court to restrain the JSI's right of set-off, the Learned Chambers Judge erred in all the circumstances of this case in exercising his discretion under s. 11 to dismiss the application of the JSI that they be permitted to exercise their right of set-off."

There is not much substance to this ground. Mr. Justice Thackray was called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing the application to vary the stay order. On the one hand he had the $36 million debt owing to a single creditor, the Japanese companies; on the other hand he had what the court referred to at p. 13 of Chef Ready as "a broad constituency of investors, creditors and employees". The Quintette constituency comprises approximately $3 billion of public and private investment, the other 95.5% in value of the secured and unsecured debt, and 1,500 persons directly employed in the enterprise, plus their dependants. It would not require much reflection on the part of a trial judge to conclude that the equities fell on the side of postponement of steps to be taken to realize the $36 million debt.

There was no error in the exercise of the discretion here.

For all of the foregoing reasons I would uphold the judgment of Mr. Justice Thackray. It follows that I would dismiss the appeal.

GIBBS J.A.
LEGG J.A.:-- I agree.
WOOD J.A.:-- I agree.

TAB 3

Indexed as:

Campeau v. Olympia & York Developments Ltd.

Between
Robert Campeau, Robert Campeau Inc., 75090 Ontario Inc., and Robert Campeau Investments Inc., Plaintiffs, and Olympia & York Developments Limited, 857408 Ontario Inc., and National Bank of Canada, Defendants

[1992] O.J. No. 1946

14 C.B.R. (3d) 303

14 C.P.C. (3d) 339

1992 CarswellOnt 185

35 A.C.W.S. (3d) 679

Action Nos. 92-CQ-19675 and B-125/92

Ontario Court of Justice - General Division
Toronto, Ontario

Blair J.

September 21, 1992

(14 pp.)

Practice -- Insolvency -- Stay of proceedings -- General principles -- Defendant protected by Companies' Creditors Arrangement Act.

Application for lifting a stay imposed by an order granted under section 11 of the Companies' Creditors Arrangement. The second defendant also applied for an order staying the separate action against it. The plaintiffs' action against the defendants was for the sum of $1 billion for damages allegedly suffered following breaches of contract and fiduciary duties by the defendants. The plaintiffs' claim against the second defendant directly involved certain acts of the first defendant.

HELD: Application dismissed. The second defendants' application allowed. There might be great prejudice to the first defendant if its attention was diverted from the corporate restructuring process. There was no prejudice to the plaintiffs whose rights were not precluded but merely postponed. The courts' power under section 11 extended to restraining conduct which could impair the debtor's ability to focus on the business purpose of negotiating a compromise.

STATUTES, REGULATIONS AND RULES CITED:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.
Courts of Justice Act, R.S.O. 1990, c. C-43, s. 106.
Personal Property Security Act, R.S.O. 1990, c. P.10, s. 17(1).
Ontario Rules of Civil Procedure, Rule 6.01(1).

Stephen T. Goudge, Q.C. and Peter C. Wardle, for the Plaintiffs.
Peter F.C. Howard, for the Defendant, National Bank of Canada.
Yoine Goldstein, for the Defendants, Olympia & York Developments Limited and 857408 Ontario Inc.

BLAIR J.:-- These Motions raise questions regarding the Court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,
b) the interests of a unliquidated contingent claimant to pursue an action against that debtor and an arms length third party, on the other hand.

At issue is whether the Court should resort to an interplay between its specific power to grant a stay, under s. 11 of the CCAA, and its general power to do so under the Courts of Justice Act, R.S.O. 1990, Chap C-43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

This action was commenced on April 28, 1992, and the Statement of Claim was served before May 14, 1992, the date on which an Order was made extending the protection of the CCAA to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former Chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

The story begins, according to the Statement of Claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10% of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichman (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as Chairman and CEO of Campeau Corporation and that Company, itself, had filed for protection under the CCAA (from which it has since emerged, bearing the new name of Camdev Corp.).

In the meantime, un September, 1989, the Olympia & York defendants, through Mr. Paul Reichman, had entered unto a shareholders' agreement with the plaintiffs in which, it us further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y Defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The Plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as Chairman and CEO and majority shareholder of Campeau Corporation.

Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million ore also sought.

The Claim against National Bank of Canada

Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the Defendant National Bank of Canada, as well. The causes of action against the Bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of S. 17(1) of the Personal Property Security Act. They arise out of certain alleged acts of misconduct on the part of the Bank's representatives on the Board of Directors of Campeau Corporation.

In 1988 the Plaintiffs had pledged some of their shares in Campeau Corporation to the Bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the Plaintiffs defaulted on its obligations under the loan and the Bank took control of the pledged shares. Thereafter, the Statement of Claim alleges, the Bank became more active in the management of Campeau, through its nominees on the Board.

The Bank had two such nominees. Olympia & York had three. There were twelve directors in total. What is asserted against the Bank is that its directors, in cooperation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the Bank as a secured lender rather than the interests of Campeau Corporation, of which they were

directors. In particular, it is alleged that the Bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

THE MOTIONS

There are two motions before me.

The first motion is by the Campeau Plaintiffs to lift the stay imposed by the Order of May 14, 1992 under the CCAA and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present CCAA proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the Bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau' action as against it as well, pending the disposition of the CCAA proceedings. Counsel submits that the factual substratum of the claim against the Bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the CCAA proceedings. He points out also that if the action were to be taken against the Bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60 (H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the Courts of Justice Act, R.S.O. 1990, Chap. C. 43, which provides as follows:

> s. 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the Court is specifically granted the power to stay in a particular context, by virtue of statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

s. 11 Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-up Act or either of them;
(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of CCAA Proceedings

By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the CCAA is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1 (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105 at p. 113 (B.C.C.A.).

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to the or company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. (emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra (a "Mississauga Derailment" case), at pp. 65-66. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to

the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the Court is on the party seeking the stay: see also, Weight Watchers International Inc. v. Weight Watchers of Ont. Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. Weight Watchers of Ont. Ltd. v. Weight Watchers Int. Inc.) 42 D.L.R. (3d) 320n., 10 C.P.R. (2d) 96n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from Empire Universal Films Ltd. et. al. v. Rank et al., [1947] O.R. 775 at p. 779.

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the CCAA do not involve a large number of separate actions, they do involve numerous Applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad sweeping issues. In that sense the CCAA proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

DISPOSITION

I have concluded that the proper way to approach this situation is to continue the stay imposed under the CCAA prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the Court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this Court.

In making these orders, I see no prejudice to the Campeau Plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with -- at least for the purposes of that proceeding in the CCAA proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York -- whose alleged misdeeds are the real focal point of the attack on both sets of defendants -- is able to participate.

In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the Plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the CCAA proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the CCAA proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no

effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.

2. In this sense, the Campeau claim -- like other secured, undersecured, unsecured, and contingent claims -- must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings -- i.e. the action and the CCAA proceeding -- the scales tip in favour of dealing with the Campeau claim in the context of the latter: see HM Attorney General v. Arthur Andersen & Co. (United Kingdom) and other, [1989] E.C.C. 224 (Eng. C.A.), cited in Arab Monetary Fund v. Hashim, supra.

I am aware, when saying this that in the Initial Plan of Compromise and Arrangement filed by the Applicants with the Court on August 21, 1992, the Applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the Applicants to decide how they wish to deal with that group of "creditors" in presenting their Plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the CCAA proceedings.

3. Pre-judgment interest will compensate the Plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the Plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where -- as is the case here -- the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress.

CONCLUSION

Accordingly, an Order will go as indicated, dismissing the Notion of the Campeau Plaintiffs and allowing the Motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the CCAA unless extended or otherwise dealt with by the court prior to that time. Costs to the Defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

BLAIR J.

TAB 4

Case Name:

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.

Between
Cliffs Over Maple Bay Investments Ltd., Respondent (Petitioner/Respondent), and Fisgard Capital Corp. and Liberty Holdings Excel Corp., Appellants (Respondents/Applicants)

[2008] B.C.J. No. 1587

2008 BCCA 327

296 D.L.R. (4th) 577

46 C.B.R. (5th) 7

258 B.C.A.C. 187

[2008] 10 W.W.R. 575

83 B.C.L.R. (4th) 214

2008 CarswellBC 1758

168 A.C.W.S. (3d) 785

Docket: CA036261

British Columbia Court of Appeal
Vancouver, British Columbia

S.D. Frankel, D.F. Tysoe and D.M. Smith JJ.A.

Heard: August 12, 2008.
Oral judgment: August 15, 2008.

(44 paras.)

Bankruptcy and insolvency law -- Proposals -- Voting by creditors -- Appeal by creditors from an order which extended a stay of proceedings and authorized $2.35 million in financing for the creditor company -- Appeal allowed -- The respondents sought to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan -- The Companies' Creditors Arrangement Act was not intended to accommodate such a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise upon which the creditors could vote.

Appeal by Fisgard et al from an order which extended a stay of proceedings and authorized financing in the amount of $2.35 million. The proceeding was commenced by Cliffs under the Companies' Creditors Arrangement Act after Fisgard et al appointed a receiver on May 23, 2008. No notice was given to Fisgard et al or any other of Cliffs' creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the Act, the stay contained in the order was expressed to expire on June 25. Cliffs then made application for further relief. Cliffs requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2.35 million. This financing was to be secured by a charge which would have priority over the security held by Fisgard et al and all other secured and unsecured creditors. Fisgard et al made a concurrent application to set aside the May 26 order and that an interim receiver be appointed pursuant to s. 47(1) of the Bankruptcy and Insolvency Act. The chambers judge granted Cliffs' application and dismissed the application by Fisgard et al. On this appeal, Fisgard et al contended that a stay of proceedings should not have been granted under s. 11 of the Act.

HELD: Appeal allowed. Cliffs sought to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The Act was not intended to accommodate such a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise upon which the creditors could vote.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11(6)

Counsel:

G.J. Tucker and A. Frydenlund: Counsel for the Appellants H.M.B. Ferris.

P.J. Roberts: Counsel for the Respondent.

M. Sennott: Counsel for Century Services Inc.

M.B. Paine: Counsel for the Monitor, The Bowra Group.

Reasons for Judgment

The judgment of the Court was delivered by

1 D.F. TYSOE J.A. (orally):-- The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

2 The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, (the "***CCAA***") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the ***CCAA***, no notice was given to the appellants or any other of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the ***CCAA***, the stay contained in the order was expressed to expire on June 25.

3 The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

Background

4 The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

5 The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

6 Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

7 The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

8 There are four mortgages registered against the development. The first two mortgages are not significant - the first mortgage secures an amount of $900,000 that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

9 The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an

interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

10 In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

$4,460,000 - trade creditors
1,700,000 - equipment leases
1,135,000 - loans from related parties 45,000 - unpaid source deductions
---
$7,340,000

11 The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008 when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

12 It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

13 The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the ***CCAA*** proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the ***CCAA*** and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

14 When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the ***CCAA*** (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing for the development, the Monitor estimated the value of the development under the following three scenarios:

(a) liquidation value with no source of water for irrigation - $10 million;
(b) liquidation value with a source of water for irrigation - $28 million;
(c) going concern value with completion of the development - $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appel-

lants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

15 In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court with respect to the completion of the development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

Decision of the Chambers Judge

16 The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the ***CCAA*** because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the ***CCAA***, which reads as follows:

> 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.

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the Debtor Company's business.

17 The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

18 Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

Appraisal Evidence

19 The affidavit of the principal of the Debtor Company filed at the time of the commencement of the ***CCAA*** proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

20 In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

21 Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In ***Reza v. Canada***, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61, the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (para. 20).

22 In ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1, the Court quoted the following statement in ***Charles Osenton & Co. v. Johnston***, [1942] A.C. 130 at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the ***CCAA***, ***Re New Skeena Forest Products Inc.***, 2005 BCCA 192 at para. 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in ***CCAA*** matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at para. 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

23 In my opinion, the comments of Newbury J.A. in ***New Skeena*** were directed at ongoing ***CCAA*** matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of ***CCAA*** proceedings.

Analysis

24 On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the ***CCAA*** should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the ***CCAA*** applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the ***CCAA*** and it satisfies the criterion contained in s. 3(1)

of the ***CCAA*** of having liabilities in excess of $5 million. The ***CCAA*** clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the ***CCAA***. The real question is whether a stay of proceedings should have been granted under s. 11 of the ***CCAA*** for the benefit of the Debtor Company.

25 I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the ***CCAA***, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the ***CCAA***'s fundamental purpose.

27 The fundamental purpose of the ***CCAA*** is expressed in the long title of the statute:

> "An Act to facilitate compromises and arrangements between companies and their creditors".

28 This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in ***Re United Used Auto & Truck Parts Ltd.***, 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is ***A.G. Can. v. A.G. Que.*** (*sub. nom.* ***Reference re Companies' Creditors Arrangement Act***), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:

> ... the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

29 The second decision is ***Hongkong Bank v. Chef Ready Foods*** (1990), 4 C.B.R. (3d) 311 (BCCA) at 315-16, where Gibbs J.A. said the following:

> The purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company in-

> corporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *CCAA*, the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. ll.

30 Sections 4 and 5 of the ***CCAA*** provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

31 The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see ***Re Fairview Industries Ltd.*** (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of ***Re Ursel Investments Ltd.*** (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the ***CCAA*** because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the ***CCAA*** to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, ***Re Lehndorff General Partner Ltd.*** (1992), 17 C.B.R. (3d) 24 at para. 7 (Ont. Ct. Jus. - Gen. Div.) and ***Re Anvil Range Mining Corp.*** (2001), 25 C.B.R. (4th) 1 at para. 11 (Ont. Sup. Ct. Jus.), aff'd (2002) 34 C.B.R. (4th) 157 at para. 32 (Ont. C.A.). I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the ***CCAA*** to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

33 Counsel for the Debtor Company also relies upon the decision in ***Re Skeena Cellulose Inc.*** (2001), 29 C.B.R. (4th) 157 (BCSC), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its

creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

34 In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the ***CCAA*** proceeding:

> 47. The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
> (b) securing access to water for the irrigation system of the golf course; and
> (c) finishing the construction of the golf course.
>
> 48. Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1-3, will be sufficient to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the ***CCAA***. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

36 Although the ***CCAA*** can apply to companies whose sole business is a single land development as long as the requirements set out in the ***CCAA*** are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

37 The failure of the chambers judge to consider the fundamental purpose of the ***CCAA*** and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the ***CCAA*** should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

38 I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The ***CCAA*** was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

Other Matters

39 In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

40 The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

41 I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

42 S.D. FRANKEL J.A.:-- I agree.

43 D.M. Smith J.A.:-- I agree.

44 S.D. FRANKEL J.A.:-- The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

D.F. TYSOE J.A.

cp/e/qlaxs/qlpxm/qlbrl/qlrxg/qlcas/qlrxg/qlbrl

TAB 5

Indexed as:

Woodward's Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF the Company Act, R.S.B.C. 1979, c. 59
IN THE MATTER OF Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.

[1993] B.C.J. No. 42

79 B.C.L.R. (2d) 257

17 C.B.R. (3d) 236

1993 CarswellBC 530

37 A.C.W.S. (3d) 1040

Vancouver Registry No. A924791

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

Tysoe J.

Heard: January 8, 1993
Judgment: January 11, 1993; filed January 12, 1993

(25 pp.)

Counsel for Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.:R.A. Millar, M.A. Fitch and J. Irving.
Counsel for W.J. Woodward and others: D.B. Kirkham, Q.C. and G. Tucker.
Counsel for H.J. Zayadi: E.J. Adair.

1 **TYSOE J.**:-- The aspect of these proceedings presently under consideration is whether the Court should grant a stay in respect of payments owing to retired or terminated senior executives of Woodward's Limited ("Woodward's") which are secured by letters of credit issued by Woodward's banker in favour of two trust companies acting as trustees pursuant to agreements or plans benefitting Woodward's senior executives.

2 On December 11, 1992 I granted an interim stay Order pursuant to the Companies' Creditors Arrangement Act (the "CCAA") in favour of Woodward's, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd. The Order was granted on an ex parte basis and it was expressed to expire at 6 p.m. on January 8, 1993, the day on which the hearing of the Petition in this matter was intended to take place. On December 17 and 24, 1992 I made further interim Orders which, among other things, contained a stay in relation to the letters of credit held by the two trust companies.

3 The hearing of the Petition began on January 8, 1993 but there were also between 10 and 15 related applications scheduled to be heard on January 8 and the following days. On January 8, when it was clear that the hearing of the Petition and related applications would take several days, I extended the interim Orders until further Order with the intent that they would continue until I made my determinations on the various issues to be decided. There appears to be little doubt that there will be an extension of the stay Order generally and it is the terms of the continuing stay Order that are in dispute. These Reasons for Judgment relate to one of the issues that is in dispute. I will approach this matter on the basis that the CCAA stay is going to be extended and the issue to be determined is whether the stay can or should apply in relation to the former senior executives and the trust companies acting as the trustees of the letters of credit.

4 Woodward's decided at some point in the past that it would make provision for retiring allowances to benefit its senior executives when they retired or when they were terminated without cause. Until 1991 Woodward's entered into individual agreements with certain senior executives in relation to the retiring allowances. In 1991 Woodward's established its Retiring Allowance Plan which applied to designated senior executives.

5 Mr. Kirkham's clients entered into the individual agreements prior to 1991. Letters of credit have been lodged with The Canada Trust Company ("Canada Trust") pursuant to these agreements as security for the payment of the retiring allowances. Ms. Adair's client was covered by the Retiring Allowance Plan which continues in effect and also applies to senior executives who are still employed by Woodward's. A letter of credit has been lodged with Montreal Trust Company of Canada ("Montreal Trust") pursuant to the Retiring Allowance Plan as security for the payment of the retiring allowances.

6 All of the letters of credit have been issued to the two trust companies by Woodward's banker, Canadian Imperial Bank of Commerce (the "Bank") which holds security against the assets of Woodward's for these contingent obligations. Counsel for Woodward's advised the Court that approximately $10.2 million has been paid by Woodward's to the Bank to "cash collateralize" the letters of credit. Counsel was unable to advise me when this payment was made but I believe that it was made recently and that it was not made at the time of the issuance of the letters of credit.

7 Woodward's entered into trust agreements with both of Canada Trust and Montreal Trust in relation to the letters of credit. It is useful to refer to the relevant portions of the trust agreements

dealing with the calling of the letters of credit. Paragraphs 3, 4 and 5 of the trust agreement with Canada Trust (the "Canada Trust Agreement") read, in part, as follows:

> 3. The Trustee shall be entitled at any time and from time to time to draw on the Letter of Credit comprised in the Fund, either in whole or in part, to obtain money for the purpose of making any payment required to be made by it hereunder.....
> 4. If from time to time the Company shall for any reason whatsoever fail to pay or cause to be paid to the Executive or to a Beneficiary, as the case may be, any amount owing to the Executive or a Beneficiary under the Retiring Allowance Agreement for a period of ten days after its due date, the Executive may deliver to the Trustee an executed or certified true copy of the Retiring Allowance Agreement and concurrently certify in writing to the Trustee that the amount has not been paid thereunder and that he or she is entitled to receive the payment. The Trustee shall within five days after receipt of the certificate report in writing to the Company the claim so submitted. If within seven days after delivery of the Trustee's report to the Company the Trustee has not been notified by the Company that the Company has made the payment and has not received the certificate of the Company hereinafter mentioned, the Trustee shall pay the claimed amount out of the Fund to the Executive or the Beneficiary, as the case may be, in full discharge of the Company's liability for the payment....
> 5. If the Company ..... becomes insolvent ..... and the Executive certifies to the Trustee that such an event has occurred, the Trustee shall draw the full amount of the Letter of Credit comprised in the Fund .....

8 Paragraphs 8 and 9 of the trust agreement with Montreal Trust (the "Montreal Trust Agreement") read, in part, as follows:

> 8. If the Company ..... becomes bankrupt or insolvent ..... and any officer of the Company or any Senior Executive ..... certifies in writing ..... to the Trustee that such an event has occurred and giving particulars thereof, the Trustee shall within five days after receipt of the certificate deliver a copy to the Company. Subject to any order of a court of competent jurisdiction, the Trustee shall, after the expiration of 14 days from the date of delivery of the certificate to the Company, draw the full amount of all Letters of Credit comprised in the Trust Fund .....
> 9. If the Company shall from time to time for any reason whatsoever fail to pay or cause to be paid to a Senior Executive or a Beneficiary, as the case may be, any amount owing to the Senior Executive or Beneficiary under the Retiring Allowance Plan for a period of ten days after its due date, the Senior Executive or Beneficiary ..... may certify in writing ..... to the Trustee that the amount has not been paid thereunder and that the Senior Executive or Beneficiary named in the certificate, as the case may be, is entitled to receive the payment. The Trustee shall within five days after receipt of the certificate report in writing to the Company the claim so submitted. If, within seven days after delivery of the Trustee's report to the Company, the Trustee has not been notified in writing by the Company that the Company has made the payment and has not received the certificate of

> the Company hereafter mentioned, the Trustee shall draw under the Letter of Credit .....

9 It not disputed by Woodward's that monthly retirement allowances owing to the former senior executives are overdue or that it has become insolvent.

10 It is the position of Woodward's that the calling of the letters of credit can and should be stayed pursuant to s. 11 of the CCAA or, alternatively, that the Court has the inherent jurisdiction to grant such a stay. Counsel for the former senior executives submit that the Court has no jurisdiction to grant a stay preventing the trust companies from calling on the letters of credit.

11 Section 11 of the CCAA reads as follows:

> 11. Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-up Act or either of them; (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and (c) make an order that no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

12 Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

13 An example of the broad interpretation given to s. 11 is Quintette Coal Limited v. Nippon Steel Corporation (1990), 51 B.C.L.R. (2d) 105 (B.C.C.A. - leave to appeal to S.C.C. dismissed). The B.C. Court of Appeal held that s. 11 was sufficiently broad to prevent a creditor from exercising a right of set-off against the insolvent company. The Court confirmed that the word "proceeding" in s. 11 encompassed extrajudicial conduct and it held that the exercise of a right of set-off was a "proceeding" within the meaning of s. 11. Gibbs J.A. commented on s. 11 in the following general terms at p. 113:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. The power is discretionary and therefore to be exercised judicially.

14 Coincidentally, the authority that is generally considered to be the landmark decision in respect of the broad interpretation to be given to s. 11 is a case involving a letter of credit issued by a bank at the request of the insolvent company in favour of a creditor, Meridian Developments Inc. v. Toronto Dominion Bank (1984), 11 D.L.R. (4th) 576, [1984] 5 W.W.R. 215 (Alta. Q.B.). Wachowich J. posed the issues before him in the following manner at pp. 579-580 of D.L.R. and p. 219 of W.W.R.:

> 1. Is payment of the letter of credit a "proceeding" within the meaning of cl. 2 or 3 of the 21st March order?
>
> 2. If so, is it a proceeding "against the Petitioner" [Nu-West] so as to be restrained by cls. 2 or 3 of that order?
>
> 3. If it is found to be a "proceeding" should the court in any case give leave to Meridian in the circumstances to obtain payment of the letter of credit?

Cls. 2 and 3 of the Order referred to by Wachowich J. followed the wording of s. 11 of the CCAA.

15 Wachowich J. first decided that the payment of a letter of credit fell within the meaning of the word "proceeding" in s. 11 of the CCAA and it is this portion of his judgment that deals with the broad interpretation to be given to s. 11. However, Wachowich J. went on to conclude that the payment of the letter of credit could not be termed "a proceeding against the company" with the result that the stay Order did not prevent the calling of the letter of credit.

16 Counsel for Woodward's submitted that the present situation falls within an exception enunciated by Wachowich J. He first points to the following passage at p. 584 of D.L.R. and p. 224 of W.W.R.:

> It must be noted, however, that by the terms of the March 21, 1984 order it is only "further proceedings in any action, suit or proceeding against the petitioner" that are restrained. Unless the payment of the letter of credit is a "proceeding against the petitioner" (Nu-West) it was not restrained by this order. I agree with counsel for Meredian that the payment of the letter of credit cannot be termed a proceeding against Nu-West unless the money to be paid is Nu-West's property. (my italics)

Counsel next points to points to a passage on p. 588 of D.L.R. and p. 227 of W.W.R. where Wachowich J. is reviewing the American authority of Page v. First National Bank of Maryland (1982), 18 B.R. 713:

17 At p. 4 of the (unreported) decision the court stated:

> In issuing the letter of credit the bank entered into an independent contractual obligation to pay W.C.C. out of its own assets. Although cashing the letter will immediately give rise to a claim by the bank against the debtors pursuant to the latter's indemnification obligation, that claim will not divest

> the debtors of any property since any attempt to enforce that claim would be subject to an automatic stay pursuant to 11 U.S.C., para. 362(4).

> In my view, the Toronto-Dominion Bank is in the same position. It is obliged to honour its contract with Meridian even though the cashing of the letter of credit will increase Nu-West's debt to the bank and even though the bank has no method of enforcing its claim against Nu-West because of the March 21st order.

18 Counsel for Woodward's submits that the present situation falls within the exception recognized in the Meridian case in the sense that the money to be paid under the letter of credit is the property of Woodward's and that payment on the letters of credit will divest Woodward's of its property because the letters of credit are "cash collateralized" by $10.2 million of Woodward's money. I do not accept this submission.

19 The fact that Woodward's may have secured its obligations to the Bank in respect of the letters of credit does not mean that the letters of credit will be paid with Woodward's money. The letter of credit is an independent obligation of its issuer which is obliged to honour a call on the letter of credit with its own money. After being required to make a payment under a letter of credit, the issuer of the letter of credit is then entitled to look to its customer pursuant to the indemnification agreement that usually exists in relation to a letter of credit. If the issuer of the letter of credit holds a cash deposit from its customer as security for the obligations under the indemnification agreement, it may indemnify itself from the cash deposit. This involves the issuer of the letter of credit utilizing the money of its customer to indemnify itself but it is not the money on deposit that is to be used to make payment under the letter of credit.

20 After Wachowich J. made his statement that payment of the letter of credit cannot be termed to be a proceeding against Nu- West "unless the money to be paid is Nu-West's property", he proceeded to review the general nature of a letter of credit and he then reached his conclusion that payment of the letter of credit could not be termed a proceeding against Nu-West. It is my view that Wachowich J. was not creating an exception when he made the statement. Rather, he was stating the issue to be determined in deciding whether it could be termed a proceeding against Nu-West. After he review the general nature of a letter of credit and immediately before stating his conclusion, Wachowich J. said the following at p. 587 of D.L.R. and p. 226 of W.W.R.:

> The customer of the bank has, in my view, never had "ownership" of any funds represented by the letter of credit. He can lay claim only to the debt that has been thereby created.

In addition, it should be noted that in the Parker v. First National Bank of Maryland decision relied upon by Wachowich J., the bank held a certificate of deposit as security for the indemnification obligations of its customer and the U.S. District Court held that a claim on the letter of credit would not divest the debtor of any of its property.

21 Accordingly, I do not think that the letters of credit presently under consideration fall within any exception in Meridian. However, that does not end the s. 11 analysis in my view.

22 Section 11 cannot be utilized to prevent the holder of a letter of credit from requiring the third party who issued the letter of credit to honour it because no steps are taken against the insolvent company when a call is made on the letter of credit. But there will be circumstances where the

holder of the letter of credit will not be entitled to call on it unless he or she first does take some step that is a prerequisite to a drawing under the letter of credit. If such a step constitutes a proceeding against the insolvent company, it may be stayed by the Court under s. 11. For example, the step taken against the insolvent company could be the making of demand on the company. Stay Orders under the CCAA frequently prevent creditors from making demand on the insolvent company.

23 The issue thus becomes whether any proceeding must be taken against Woodward's before the letters of credit may be called upon. The prerequisites under paragraph 4 of the Canada Trust Agreement are the following:

(a) the Company has failed to make a payment;
(b) the Executive has delivered to the Trustee a copy of the Retiring Allowance Agreement and a certificate to the effect that he or she has not been paid;
(c) the Trustee has reported in writing to the Company that a claim has been submitted;
(d) the Company has not notified the Trustee that the payment has been made.

The prerequisites under paragraph 5 of the Canada Trust Agreement are that the Company has become insolvent and that the Executive has certified the occurrence of that event to the Trustee.

24 The prerequisites under paragraph 8 of the Montreal Trust Agreement are as follows:

(a) the Company has become insolvent;
(b) the Executive has certified the occurrence of the event to the Trustee;
(c) the Trustee has delivered a copy of the Executive's certificate to the Company:
(d) a court of competent jurisdiction has not made an order preventing the Trustee from drawing on the letters of credit.

The prerequisites under paragraph 9 of the Montreal Trust Agreement are the same as the prerequisites under paragraph 4 of the Canada Trust Agreement.

25 It is clear that paragraph 5 of the Canada Trust Agreement does not require that any proceeding be taken against the Company before the Trustee can draw on the letter of credit. Paragraph 4 of the Canada Trust Agreement becomes academic because Woodward's is insolvent and Canada Trust can call on the letter of credit pursuant to paragraph 5.

26 Both of paragraphs 8 and 9 of the Montreal Trust Agreement require a step to be taken vis-a-vis the Company before the Trustee can call on the letter of credit. Paragraph 8 requires that the Trustee deliver to the Company a copy of the certificate of the Senior Executive. Paragraph 9 requires that the Trustee must report to the Company that a claim has been made. It is my view that the delivery of a copy of the certificate to the Company and the making of a report to the Company are both proceedings against Woodward's that can be stayed pursuant to s. 11 of the CCAA.

27 If a step must be taken vis-a-vis the insolvent company before a creditor (or a trustee on behalf of a creditor) may enforce its rights, the form of the step should make no difference for the purposes of s. 11 of the CCAA. It should not matter whether the step is a demand for payment on the company, the delivery to the company of a notice of acceleration or the delivery to the company of some other type of document such as a copy of a certificate or a report. In the Meridian case, supra, Wachowich J. quoted the following portion of the definition of the word "proceeding" in Black's Law Dictionary, 5th ed. (1979) (at p. 582 of D.L.R. and p. 221 of W.W.R.):

> Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. Rooney v. Vermont Invt. Corp. (1973), 10 Cal. (3d) 351, 110 Cal. Rptr. 353, 515 P. (2d) 297 (Cal. S.C.).

The delivery of a copy of a certificate or a report to Woodward's is no less a proceeding than the payment of a letter of credit (Meridian) or the exercise of a right of set-off (Quintette). It is a proceeding against Woodward's because the copy of the certificate or the report must be delivered to Woodward's.

28 The result is that a stay under s. 11 of the CCAA can effectively prevent Montreal Trust from calling on the letters of credit held by it but Canada Trust cannot be restrained by such a stay from calling on the letters of credit held by it. It is therefore necessary to consider Woodward's alternative argument that the Court has the inherent jurisdiction to grant a stay that prevents a creditor (or a trustee on behalf of a creditor) from taking proceedings against third parties.

29 To my knowledge, the only example of the Court exercising its inherent jurisdiction in relation to the CCAA is Re Westar Mining Ltd., [1992] B.C.J. No. 1360 (June 15, 1992, B.C. Supreme Court Action No. A921164). In that case Macdonald J. exercised the inherent jurisdiction of the Court in order to create a charge against the assets of Westar for the benefit of suppliers which were continuing to provide goods and services to Westar after the commencement of the CCAA proceedings. Macdonald J. created the charge on June 10, 1992 without giving extensive reasons. His Order was made without prejudice to the claims of the Crown which did oppose the creation of the charge a few days later on the basis that it altered the priorities in the event that Westar went into bankruptcy. In his Reasons for Judgment dated June 16, 1992 Macdonald J. first explained how and why he created the charge (at p. 3):

> The charge has already been created. In doing so, I purported to exercise the inherent jurisdiction of this court. The Company would have no chance of completing a successful reorganization without the ability to continue operations through the period of the stay. It must be able to arrange for further limited credit from its suppliers if it is to continue operations. Thus, security which is sufficient, in the eyes of its suppliers, to justify the extension of some further credit is a condition precedent to any acceptable plan of reorganization.

Macdonald J. rejected the argument of the Crown and he elaborated on the use of the Court's inherent jurisdiction at pp. 9 and 10:

> The issue is whether or not those suppliers who are prepared (or have been compelled, between May 14 and June 10) to extend credit which will hopefully keep the Company operating during the period of the stay, should be secured. I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end. (See, Winnipeg Supply & Fuel v. Genevieve Mortgage Corp. [1972] 1 W.W.R. 651 (Man. C.A. at p. 657).

> The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by Halsbury's (4th ed., volume 23, para. 14) as:
>
> > ...the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so...
>
> Proceedings under the CCAA are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

30 Mr. Kirkham submitted that Westar is distinguishable on the basis that the assets against which the Court created a charge were within the jurisdiction of the Court because they belonged to Westar and that in this case his clients and Canada Trust are not before the Court. I do not think that this is a valid distinction because the charge against Westar's assets affected the Crown which was not before the Court any more than Mr. Kirkham's clients and Canada Trust.

31 It may be argued that the Court should only exercise its inherent jurisdiction to "flesh out the bare bones" of the CCAA and that the Court should not utilize its inherent jurisdiction to grant stays because s. 11 of the CCAA already deals with the subject matter of stays and it contains Parliament's full intentions in that regard. This potential argument has not been given effect in analogous circumstances in the United States when proceedings under Chapter 11 of the U.S. Bankruptcy Code are pending. Under Chapter 11 there is an automatic stay of proceedings and, like s. 11 of the CCAA, it is a stay of proceedings against the debtor company only. The U.S. Courts have used an equivalent of inherent jurisdiction (i.e., a general provision in the U.S. Bankruptcy Code to make necessary or appropriate orders) to grant stays in relation to proceedings against third parties. The most common example is a proceeding against the principals of the insolvent company whose efforts are required to attempt to reorganize the company. One of the leading U.S. authorities is Re Johns-Manville Corp. (1984), 40 B.R. 219 which was referred to by Macdonald J. in the decision of Re Philip's Manufacturing Ltd. (1991), 60 B.C.L.R. (2d) 311 where he declined to continue a stay of all proceedings against the directors and officers of the insolvent company. In that case Macdonald J. expressed a reservation about whether the inherent jurisdiction of the Court could be utilized but this predated his decision in Westar, supra.

32 Hence, it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In Westar Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.

33 In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the

benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

34 In this case I am persuaded that it is important to the reorganization process that the former senior executives not be allowed to be paid the entire amounts of their retirement allowances at this time. On the day of the hearing of this matter Woodward's took the first step in implementing the reorganization of its business affairs (which involves a downsizing of its operations) by terminating approximately 1,200 of its 6,000 employees. These terminated employees will be entitled to severance pay which will be a significant obligation of Woodward's. They will be creditors of Woodward's who will be involved in the reorganization of its financial affairs and who will be entitled to vote on the reorganization plan. These former employees will undoubtedly be unhappy when they realize that their severance pay entitlement is an unsecured obligation of Woodward's that will be compromised as part of the reorganization while the former senior executives have security for the entire amounts of their retirement allowances (which are in reality severance payments in the cases of the senior executives who were terminated). If the former senior executives are paid the full amounts of their retirement allowances at this time, the recently terminated employees may not be understanding and it may cause them to vote against Woodward's reorganization plan even if it is in their economic interests to vote in favour of the plan. Negotiations under the CCAA require a delicate balance and payment of the full amounts of the retirement allowances at this time could well irreparably upset the balance.

35 The former senior executives will not be materially prejudiced if the full amounts of the letters of credit are not paid at this time. The amounts owed to them are fully secured by the letters of credit and there will not be any deterioration in the security if the right to draw on the full amounts of the letters of credit is postponed pending the outcome of Woodward's reorganization effort. There was some evidence that there may be adverse income tax consequences if the full amounts of the letters of credit are drawn upon.

36 Another consideration is the dominant intention of the two trust agreements in allowing the full amounts of the letters of credit to be drawn upon. In quoting the relevant provisions of the two trust agreements, I only make reference to the triggering event of Woodward's becoming insolvent. The other triggering events are as follows:

(a) if Woodward's ceases operations;
(b) if Woodward's makes a general assignment for the benefit of creditors or files an assignment in bankruptcy or otherwise becomes bankrupt;
(c) if Woodward's is wound up or dissolved;
(d) if any receiver, trustee, liquidator of or for Woodward's or any substantial portion of its property is appointed and is not discharged within a period of 60 days.

The primary purpose of these triggering events in my view was to allow the former senior executives to cause the full amounts of the letters of credit to be paid if Woodward's has effectively come to an end. The draftspersons of the trust agreements happened to chose insolvency as one of the triggering events because insolvency of a company frequently signifies its end. However, in this case, it will not be known whether Woodward's insolvency will result in its demise until it has made

an attempt to reorganize pursuant to the CCAA. I am not saying that the Court should ignore the wording of the agreements but it is open to the Court to take into consideration the overall intent of the parties when deciding whether it is just and equitable to invoke its inherent jurisdiction.

37 The decision in Meridian, supra, is distinguishable from this case. In Meridian the Court was interpreting an Order that it had previously made and it was not considering whether a further Order could be made pursuant to its inherent jurisdiction.

38 Although I have concluded that the relative benefit of staying the calling of the letters of credit in their entirety outweighs the prejudice to the former senior executives and that I should exercise the Court's inherent jurisdiction to grant a stay to prevent the letters of credit from being fully drawn, it does not necessarily follow that the stay should prevent partial draws upon the letters of credit. In exercising its inherent jurisdiction in these circumstances the Court should endeavour to exercise the jurisdiction in a manner that balances the interests of the parties as much as possible.

39 The main prejudice to the former senior executives if they are not permitted to cause any call to be made on the letters of credit is the fact that the monthly payments of the retiring allowances will not be made. The monthly payments provide a source of income to the former senior executives and they will be prejudiced if the payments cease. Both of Mr. Kirkham and Ms. Adair indicated that if I did grant a stay of proceedings with respect to the letters of credit, one or more of their clients may make an application to have the stay discontinued on the basis that it creates a hardship to them.

40 On the other hand, the continuation of the monthly payments of the retiring allowances is much less likely to create a difficulty in the negotiations with the recently terminated employees than the payment of the retiring allowances in full. Although the former senior executives will be paid the monthly amounts of the retiring allowances without compromise pending the reorganization attempt, they will have to accept payment over a period of time. In addition, the recently terminated employees will hopefully appreciate that Woodward's would not be voluntarily making the monthly payments to the former senior executives and that it is the Court which is allowing the payments to be made.

41 It is my view that the interests of the parties can be largely balanced if the Court exercises its inherent jurisdiction to grant a stay that prevents payment on the letters of credit except to the extent of satisfying the obligation of Woodward's to make the monthly payments of the retiring allowances. In exercising the Court's discretion in this fashion I appreciate that a stay under s. 11 of the CCAA could effectively prevent the calling on the letters of credit for the purpose of paying the monthly amounts. In view of the fact that the Court is exercising its inherent jurisdiction to prevent the letters of credit being drawn in their entire amounts, I am exercising my discretion to decline to grant a stay under s. 11 which would prevent the calling on the letters of credit for the purpose of paying the monthly amounts.

42 It is necessary for the Court to exercise its inherent jurisdiction because a stay under s. 11 could not be utilized to prevent Canada Trust from drawing the full amounts of the letters of credit that are held by it. However, a stay under s. 11 could effectively prevent Montreal Trust from making any call on the letter of credit in its favour. I must now decide whether I should exercise my discretion under s. 11 to prevent Montreal Trust from making the partial draws on its letter of credit that I am permitting Canada Trust to make on each of its letters of credit.

43 As I have indicated above, the main purpose of s. 11 is to preserve the status quo among the creditors of the insolvent company. Huddart J. commented on the status quo in Re Alberta- Pacific Terminals Ltd. (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) at p. 105:

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

44 In that case Huddart J. dismissed the application of the owner of the insolvent company's operating facilities for payment of ongoing amounts owing under the operating agreement between the two parties. In essence, the payments were the equivalent of rental payments under a lease. Huddart J. dismissed the application because there were insufficient funds to make the payments and the owner of the facilities had not shown hardship. The circumstances in that case were quite unusual because the insolvent company was continuing to pay interest to one of its lenders. In more normal cases under the CCAA one would expect during the reorganization period that rental payments for the ongoing use of facilities would be made and that interest on debt would not be paid. In any event, the case is an example of a situation where the status quo was maintained by way of different treatment of creditors.

45 In the present case I have decided to exercise my discretion under s. 11 of the CCAA so that Montreal Trust is treated in the same fashion as Canada Trust. It is my view that the status quo is best maintained in this case by giving equal treatment to creditors within the same class irrespective of the different wording in the two trust agreements. I add that Woodward's does have surplus cash at the present time and that other creditors will not be materially prejudiced by allowing partial payments to be made under the letter of credit held by Montreal Trust.

46 In the result, I continue the stay to prevent Canada Trust from calling on the letters of credit held by it except to the extent that it may be necessary to obtain payment of the monthly retiring allowances that are overdue. I grant a stay restraining Montreal Trust from delivering to Woodward's a copy of any certificate provided to it under paragraph 8 of the Montreal Trust Agreement.

47 The Order dated December 11, 1992 stipulates that Woodward's is to retain its funds in its operating accounts with the Bank and that Woodward's may only use the funds for certain specified purposes. I anticipate that the continuing stay Order will have a similar provision. If it does contain a similar provision, the permitted purposes for use of funds may include the payment of the monthly retiring allowances to the former senior executives. I appreciate that Woodward's may prefer to require that the letters of credit be called upon so that there is no appearance to the recently terminat-

ed employees that Woodward's is voluntarily making payments to the former senior executives. On the other hand, Woodward's may not want to create an administrative nuisance for the Bank by having numerous calls being made on the letters of credit. Woodward's may exercise its discretion as to whether the monthly payments to the former senior executives are made voluntarily or involuntarily, recognizing of course that they will be made involuntarily if they are not made voluntarily.

TYSOE J.

TAB 6

Indexed as:

Lehndorff General Partner Ltd. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF The Courts of Justice Act, R.S.O. 1990, c. C. 43
AND IN THE MATTER OF a plan of compromise in respect of Lehndorff General Partner Ltd., in its own capacity and in its capacity as general partner of Lehndorff United Properties (Canada) Lehndorff Properties (Canada)
- and -
Lehndorff Properties (Canada) II and in respect of certain of their nominees Lehndorff United Properties (Canada) Ltd., Lehndorff Canadian Holdings Ltd., Lehndorff Canadian Holdings II Ltd., Baytemp Properties Limited and 102 Bloor Street West Limited and in respect of The Lehndorff Vermogensverwaltung GmbH in in its capacity as limited partner of Lehndorff United Properties (Canada)
Applicants

[1993] O.J. No. 14

9 B.L.R. (2d) 275

17 C.B.R. (3d) 24

37 A.C.W.S. (3d) 847

1993 CarswellOnt 183

Court File No. B366/92

Ontario Court of Justice - General Division
Toronto, Ontario

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993

(36 pp.)

Alfred Apps, Robert Harrison and Melissa J. Kennedy, for the Applicants.
L. Crozier, for the Royal Bank of Canada.
R.C. Heintzman, for the Bank of Montreal.
J. Hodgson, Susan Lundy and James Hilton, for Canada Trustco Mortgage Corporation.
Jay Schwartz, for Citibank Canada.
Stephen Golick, for Peat Marwick Thorne Inc., proposed monitor.
John Teolis, for the Fuji Bank Canada.
Robert Thorton for certain of the advisory boards.

FARLEY J.:-- These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") and the Courts of Justice Act, R.S.O. 1990, c. C. 43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;
(b) a declaration that the applicants were companies to which the CCAA applies;
(c) authorization for the applicants to file a consolidated plan of compromise;
(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;
(e) A stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered title-holder to certain of their assets as bare trustee and nominee; and
(f) certain other ancillary relief.

The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issued under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermogensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany.

Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the Limited Partnership Act, R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the Partnership Act, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.
(b) The restructuring of existing project financing commitments.
(c) New financing, by way of equity or subordinated debt.
(d) Elimination or reduction of certain overhead.
(e) Viability of existing businesses of entities in the Lehndorff Group.
(f) Restructuring of income flows from the limited partnerships.
(g) Disposition of further real property assets aside from those disposed of earlier in the process.
(h) Consolidation of entities in the Group; and
(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior

secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA maybe made on an ex parte basis (s. 11 of the CCAA; Re Langley's Ltd., (1938) O.R. 123, (1938) 3 D.L.R. 230 (C.A.); Re Kennoch Development Ltd. (1991), 8 C.B.R. (3d) 95 (N.S.S.C.T.D.). The court will be concerned when major creditors have not been alerted even in the most minimal fashion (Re Inducon Development Corporation (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

"Instant" debentures are now well recognized and respected by the courts: see Re United Maritime Fisherman Co-Op (1988), 67 C.B.R. (N.S.) 44, at pp. 55-6, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 at pp. 165-6; Re Stephanie's Fashions Ltd. (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) at pp. 250-1; Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); Ultracare Management Inc. v. Gammon (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make 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. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; in Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., (1934) S.C.R. 659 at p. 661; 16 C.B.R. 1; (1934) 4 D.L.R. 75; Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Group Ltd., (1984) 5 W.W.R. 215 at pp. 219-20; Norcen Energy Resources v. Oakwood Petroleums Limited. et al. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Alta., Q.B.), at pp. 12-13 (C.B.R.); Re Ouintette Coal Limited (1990), 2 C.B.R.(3d) 303 (B.C.C.A), at pp. 310-1, affirming Ouintette Coal Limited v. Nippon Steel Corporation et al. (1990) 2 C.B.R. (3d) 291, 47 B.C.L.R. 193 (B.C.S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.).; Elan, supra at p. 307 (O.R.); Fine's Flowers v. Creditors of Fine's Flowers (1992), 7 O.R.

(3d) 193 (Gen. Div.), at p. 199 and "Re-Organizations under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947), 25 Cdn. Bar Rev. 587 at p. 592.

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. See Elan, supra at pp. 297 and p. 316; Stephanie's, supra, at pp. 251-2 and Ultracare, supra, at p. 328 and p. 330. 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 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: see Meridian, supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see Ouintette, supra, at pp. 108-110; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (B.C.C.A.), at pp. 315-318, (C.B.R.) and Stephanie's, supra, at pp. 251-2.

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. Unlike the Bankruptcy Act, R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the Bankruptcy and Insolvency Act ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the CCAA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See Chef Ready, supra, at p. 318 and Re Assoc. Investors of Can. Ltd. (1987), 67 C.B.R. (N.S.) 237 at pp. 245; rev'd on other grounds at (1988), 71 C.B.R. 72. It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See Assoc. Investors, supra, at p. 318; Re Amirault Co. (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-up Act or either or them;
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affects the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See Norcen, supra at pp. 12-7 (C.B.R.) and Ouintette, supra, at pp. 296-8 (B.C.S.C.) and pp. 312-4 (B.C.C.A.) and Meridian, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see Chef Ready, supra, at p. 320 where Gibbs J.A. for the Court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C. in Bankruptcy) at pp. 290-1 and Ouintette, supra, at pp. 311-2 (B.C.C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see Re Northland Properties Limited et al. (1988), 73 C.B.R. (N.S.) 141 (B.C.S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see In Re Nathan Feifer et al. v. Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Qué. C.A.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see Sklar-Peppler Furniture Corporation (1992), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

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

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see Ouintette, supra, at pp. 312-4 (B.C.C.A.).

It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see In the Matter of the Proposal of Norman Slavik, unreported, [1992] B.C.J. No. 341. However in the Slavik situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the Court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

It appears to me that Dickson J. in International Donut Corp. v. 050863 N.B. Ltd., unreported, (1992) N.B.J. No. 339 (N.B.Q.B.T.D.) was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the Companies' Creditors Arrangement Act, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these. (Emphasis added).

I am not persuaded that the words of s. 11 which are quite specific as relating as to a company can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in Campeau v. Olympia & York Developments Ltd. unreported, (1992) O.J. No. 1946 at pp. 4-7.

The Power to Stay

The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60 (H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the Courts of Justice Act, R.S.O. 1990, Chap. C. 43, which provides as follows:

s. 106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the Court is specifically granted the power to stay in a particular context, by virtue of statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

...

The Power to Stay in the Context of CCAA Proceedings:

By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the CCAA is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1 (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the

courts" by Gibbs J.A. in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105 at p. 113 (B.C.C.A.).

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the new cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period (emphasis added).

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. (In this respect, see also Sairex GmbH v. Prudential Steel Ltd. (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77).

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra (a "Mississauga Derailment" case), at pp. 65-66. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from Empire-Universal Films Limited et al. v. Rank et al., (1947) O.R. 775 (H.C.) that McRuer C.J.H.C. considered that the Judicature Act then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also McCordic et al. v. Township of Bosanquet (1974) 5 O.R. (2d) 53 (H.C.) and Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. (1982) 29 C.P.C. 60 (H.C.) at pp. 65-6.

Montgomery J. in Canada Systems, supra, at pp. 65-6 indicated:

> Goodman J. (as he then was) in McCordic v. Bosanquet (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be

made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in Edmeades v. Thames Board Mills Ltd., [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in Edmeades was approved by Lord Justice Davies in Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis), [1972] 1 All E.R. 430, [1972] 1 W.L.R. 326 (sub nom. Lane v. Willis; Lane v. Beach) (C.A.).

...

In Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

> "The principles which must govern in these matters are clearly stated in the case of Empire Universal Films Ltd. et al. v. Rank et al., [1947] O.R. 775 at p. 779, as follows [quoting St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al., [1936] 1 K.B. 382 at p. 398]:
>
> '(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.'"

Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-a-vis any proceedings taken by any party against the property assets and Undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in

this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Depburn, Limited Partnerships, De Boo (1991), at p. 1-2 and 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the Bankruptcy Act (now the BIA) sections 85 and 142.

A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario Rules of Civil Procedure, O. Reg. 560/84 Rules 8.01 and 8.02.

It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See Lindley on Partnership, 15th ed. (1984), at p. 33-5; Seven Mile Dam Contractors v. R. in Right of British Columbia (1979), 13 B.C.L.R. 137 (S.C.) affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad E. Milne, (1985) 23 Alta. Law Rev. 345, at p. 350-1. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in Re Thorne between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in Ruzicks unless it appeared that the Legislature clearly

> intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the Canada Business Corporation Act [S.C. 1974-75, c. 33] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, The Control Test of Investor Liability in Limited Partnerships (1983), 21 Alta L. Rev. 303; E. Apps, Limited Partnerships and the "Control" Prohibition: Assessing the Liability of Limited Partners (1991), 70 Can. Bar. Rev. 611; R. Flannigan, Limited Partner Liability: A Response (1992), 11 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner - the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: Control Test, (1992), supra, at pp. 524-5. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-a-vis) any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or

continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. I seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

The order is therefore granted as to the relief requested including the proposed stay provisions.

FARLEY J.

* * * * *

APPENDIX A

THE STAY

4. THIS COURT ORDERS that each of the Applicants shall remain in possession of its property, assets and undertaking and of the property, assets and undertaking of the Limited Partnerships in which they hold a direct interest (collectively the "Property") until March 15, 1993 (the "Stay Date") and shall be authorized, but not required, to make payment to Conventional Mortgage Creditors and to trade creditors incurred in the ordinary course prior to this Order including, without limitation, fees owing to professional advisors, wages, salaries, employee benefits, crown claims, unremitted source deductions in respect of income tax payable, Canada Pension Plan contributions payable, unemployment insurance contributions payable, realty taxes, and other taxes, if any, owing to any taxing authority and shall continue to carry on its business in the ordinary course, except as otherwise specifically authorized or directed by this Order, or as this Court may in future authorize or direct.
5. THIS COURT ORDERS that without in any way restricting the generality of paragraph 4 hereof, each of the Applicants, whether on behalf of a Limited Partnership or otherwise, be and is hereby authorized and empowered, subject to the existing rights of Creditors and any security granted in their favour, to:

   (a) borrow such additional sums as it may deem necessary,
   (b) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order provided that such additional security expressly states that it ranks subsequent in priority to all then existing security including all floating charges, whether crystallized or uncrystallized,
   (c) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order which may rank ahead of existing security if the consent is obtained of all secured creditors having an interest in the collateral in respect of which the additional security is granted to the granting of the additional security, and

(d) dispose of any of its Property subject, however, to the terms of any security affecting same, provided that no disposition of any Property charged in favour of any secured lender shall be made unless such secured lender consents to such disposition and to the manner in which the proceeds derived from such disposition are distributed,

the whole on at least three (3) business days' prior notice to all of the Senior Creditors and the Monitor and on such terms as to notice to any other affected creditor as this Court may direct, but nothing in this Order shall prevent any Applicant, whether on behalf of a Limited Partnership or otherwise, from borrowing further funds or granting further security against the Londonderry Mall substantially in accordance with any existing agreements in order to fund the project completion and leasing costs of the Londonderry Mall and nothing in this Order shall prevent any Senior Creditor from advancing further funds to any of the Applicants or the Limited Partnerships under any existing security, subject to the existing rights of such Senior Creditor and any subordinate creditor including pursuant to any postponements or subordinations as may be extant in respect thereof.

6. THIS COURT ORDERS that, until the Stay Date, the General Partner Company and LUPC shall cause the monthly interest and, as applicable, amortization owing by LUPC under CT1 and CT3, but not the arrears thereof, to be paid as and when due and to cause LUPC to perform all of its obligations to CT in respect of CT2 under its existing arrangement in respect of the segregation and application of the net operating income of the Northgate Mall.

7. THIS COURT ORDERS that, subject to paragraphs 4 and 6 and to subparagraph 5(d) hereof, the Applicants and Limited Partnerships be and are hereby directed, until further Order of this Court:

(a) to make no payments, whether of capital, interest thereon or otherwise, on account of amounts owing by the Applicants to the Affected Creditors, as defined in the Plan, as of this date; and
(b) to grant no mortgages, charges or other security upon or in respect of the Property other than for the specific purpose of borrowing new funds as provided for in paragraph 5 hereof.

but nothing in this Order shall prevent the General Partner Company or LUPC from making payments to Senior Creditors of interest and/or principal in accordance with existing agreements and nothing in this Order shall prevent the General Partner Company or the Limited Partnerships from making any funded monthly interest payments for loans secured against the Londonderry Mall.

8. THIS COURT ORDERS that until the Stay Date, the existing collateral position of Creditors in respect of marketable securities loans or credit facilities shall be frozen as at the date of this Order and all margin requirements in respect of such loans or credit facilities shall be suspended.

9. THIS COURT ORDERS that the Applicants shall be authorized to continue to retain and employ the agents, servants, solicitors and other assistants and consultants currently in its employ with liberty to retain such further assistants and consultants as they acting reasonably deem necessary or desirable in the ordinary course of their business or for the purpose of carrying out the terms of this Order or, subject to the approval of this Court.

10. THIS COURT ORDERS that, subject to paragraph 13 hereof, until the Stay Date or further Order of this Court:

    (a) any and all proceedings taken or that may be taken by any of the Creditors, any other creditors, customers, clients, suppliers, lessors (including ground lessors), tenants, co-tenants, governments, limited partners, co-venturers, partners or by any other person, firm, corporation or entity against or in respect of any of the Applicants or the Property, as the case may be, whether pursuant to the Bankruptcy and Insolvency Act, S.C. 1992, c. 27, the Winding up Act, R.S.C. 1985, c. W-11 or otherwise shall be stayed and suspended;

    (b) the right of any person, firm, corporation or other entity to take possession of, foreclose upon or otherwise deal with any of the Property, or to continue such actions or proceedings if commenced prior to the date of this Order, is hereby restrained;

    (c) the right of any person, firm, corporation or other entity to commence or continue realization in respect of any encumbrance, lien, charge, mortgage, attornment of rents or other security held in relation to the Property, including the right of any Creditor to take any step in asserting or perfecting any right against any Applicant or Limited Partnership, is hereby restrained, but the foregoing shall not prevent any Creditor from effecting any registrations with respect to existing security granted or agreed to prior to the date of this Order or from obtaining any third party consents in relation thereto;

    (d) the right of any person, firm, corporation or other entity to assert, enforce or exercise any right, option or remedy available to it under any agreement with any of the Applicants or in respect of any of the Property, as the case may be, arising out of, relating to or triggered by the making or filing of these proceedings, or any allegation contained in these proceedings including, without limitation, the making of any demand, the sending of any notice or the issuance of any margin call is hereby restrained;

    (e) no suit, action or other proceeding shall be proceeded with or commenced against any of the Applicants or in respect of any of the Property, as the case may be;

    (f) all persons, firms, corporations and other entities are restrained from exercising any extra-judicial right or remedy against any of the Applicants or in respect ,of any of the Property, as the case may be;

    (g) all persons, firms, corporations and other entities are restrained from registering or re-registering any of the Property which constitutes securities into the name of such persons, firms, corporations or other entities or their

nominees, the exercise of any voting rights attaching to such securities, any right of distress, repossession, set off or consolidation of accounts in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation as at the date hereof; and

(h) notwithstanding paragraph 9(g) hereof, a Creditor may set off against its indebtedness to an Applicant, as the case may be, pursuant to any existing interest rate swap agreement any corresponding indebtedness of such Applicant, as the case may be, to such Creditor under the same interest rate swap agreement,

but nothing in this Order shall prevent suppliers of goods and services involved in completing the construction of the Londonderry Mall from commencing or continuing with any construction lien claims they may have in relation to the Londonderry Mall and nothing in this Order shall prevent the Bank of Montreal ("BMO") and the Applicants from continuing to operate the existing bank accounts of the Applicants and of the Limited Partnerships maintained with BMO, in the same manner as those bank accounts were operated prior to the date of this Order including any rights of set off in relation to monies deposited therein and nothing in this Order shall prevent CIBC from realizing upon its security in respect of CIBC1 and nothing in this Order shall prevent or affect either FB or CT in the enforcement of the security it holds on the Sutton Place Hotel and the Carleton Place Hotel, respectively.

11. THIS COURT ORDERS that no Creditor shall be under any obligation to advance or re-advance any monies after the date of this Order to any of the Applicants or to any of the Limited Partnerships, as the case may be, provided, however, that cash placed on deposit by any Applicant with any Creditor from and after this date, whether in an operating account or otherwise and whether for its own account or for the account of a Limited Partnership, shall not be applied by such Creditor, other than in accordance with the terms of this Order, in reduction or repayment of amounts owing as of the date of this Order or which may become due on or before the Stay Date or in satisfaction of any interest or charges accruing in respect thereof.

12. THIS COURT ORDERS that all persons, firms, corporations and other entities having agreements with an Applicant or with a Limited Partnership, as the case may be, whether written or oral, for the supply or purchase of goods and/or services to such Applicant or Limited Partnerships, as the case may be, including, without limitation, ground leases, commercial leases, supply contracts, and service contracts, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such agreements without the written consent of such Applicant or Limited Partnership, as the case may be, or with the leave of this Court. All persons, firms, corporations and other entities are hereby restrained until further order of this Court from discontinuing, interfering or cutting off any utility (including telephone service at the present numbers used by any of the Applicants or Limited Partnerships, as the case may be, whether such telephone services are listed in the name of one or more of such Applicants or Limited

Partnerships, as the case may be, or in the name of some other person), the furnishing of oil, gas, water, heat or electricity, the supply of equipment or other services so long as such Applicant or Limited Partnerships, as the case may be, pays the normal prices or charges for such goods and services received after the date of this Order, as the same become due in accordance with such payment terms or as may be hereafter negotiated by such Applicant or Limited Partnerships, as the case may be, from time to time. All such persons, firms, corporations or other entities shall continue to perform and observe the terms and conditions contained in any agreements entered into with an Applicant or Limited Partnerships, as the case may be, and, without further limiting the generality of the foregoing, all persons, firms, corporations and other entities including tenants of premises owned or operated by any of the Applicants or Limited Partnerships, as the case may be, be and they are hereby restrained until further order of this Court from terminating, amending, suspending or withdrawing any agreements, licenses, permits, approvals or supply of services and from pursuing any rights or remedies arising thereunder.

13. THIS COURT ORDERS that, upon the failure by any of the Applicants to perform their obligations pursuant to this Order, any Creditor affected by such failure may, on at least one day's notice to each of the Applicants and to all Senior Creditors and the Monitor, bring a motion to have the provisions of paragraphs 10, 11 or 12 of this Order set aside or varied, either in whole or in part.
14. THIS COURT ORDERS that from 9:00 o'clock a.m. on December 24, 1992 to the time of the granting of this Order, any act or action taken or notice given by any Creditors receiving such Notice of Application in furtherance of their rights to commence or continue realization, will be deemed not to have been taken or given, as the case may be, subject to the right of such Creditors to further apply to this Court in respect of such act or action or notice given, provided that the foregoing shall not apply to prevent any Creditor who, during such period, effected any registrations with respect to security granted prior to the date of this Order or who obtained third party consents in relation thereto.
15. THIS COURT ORDERS that all floating charges granted by any of the Applicants prior to the date of this Order, whether granted on behalf of any of the Limited Partnerships or otherwise, shall be crystallized, and shall be deemed to be crystallized, effective for all purposes immediately prior to the granting of this Order.
16. THIS COURT ORDERS that the Applicants shall be entitled to take such steps as may be necessary or appropriate to discharge any construction, builders, mechanics or similar liens registered against any of their property including, without limitation, the posting of letters of credit or the making of payments into Court, as the case may be, and no lender to any Applicant shall be prevented from doing likewise or from making such protective advances as may be necessary or appropriate, in which case such lender, in respect of such advances, shall be entitled to the benefit of any existing security in its favour as of the date of this Order in accordance with its terms.
17. THIS COURT ORDERS that the Applicants on or before January 1, 1993, shall provide the Senior Creditors with projections as to the monthly general, adminis-

trative and restructuring ("GAR") costs for the months of January, February and March, 1993, together with a cash-flow projection for LUPC for the period commencing on January 1, 1993 through to April 30, 1993 inclusive.

18. THIS COURT ORDERS that, notwithstanding the terms of this Order, the gross operating cash flow generated during the period commencing on the date of this Order to and until the Stay Date (the "Interim Period") by the Londonderry Mall shall be reserved and expended on the property in accordance with existing agreements, but all property management or other similar fees payable to any Applicant shall continue to be paid therefrom subject to the terms of any existing loan agreements affecting same.

TAB 7

Case Name:

Hawkair Aviation Services Ltd. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF The Business Corporations Act, S.B.C. 2002 c. 57
AND IN THE MATTER OF Hawkair Aviation Services Ltd., petitioner

[2006] B.C.J. No. 938

2006 BCSC 669

18 B.L.R. (4th) 294

22 C.B.R. (5th) 11

150 A.C.W.S. (3d) 99

Vancouver Registry No. L052400

British Columbia Supreme Court
Vancouver, British Columbia

Burnyeat J.
(In Chambers)

Heard: April 18, 2006.
Judgment: April 26, 2006.

(38 paras.)

Creditors and debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Motion by Hawkair Aviation for a declaration that CAW-Canada Union breached two 2005 orders by filing for certification against Hawkair allowed -- Motion by CAW-Canada for an order vacating the paragraph in a 2006 order to permit the union's application for certification and varying the 2005 orders dismissed -- The 2005 orders prohibited the filing of the certification application -- The broad scope of the Companies' Creditors Arrangement Act to postpone the exercise of the rights of employees and unions under Labour Code should prevail -- Lifting of the stay in the

2005 orders was not appropriate as Hawkair presently had insufficient resources to carry through with negotiations if a collective agreement was to be reached -- Companies' Creditors Arrangement Act, s. 11.

Motion by Hawkair Aviation for a declaration that CAW-Canada Union breached two 2005 orders by filing for certification against Hawkair and a motion by CAW-Canada for an order vacating the paragraph in a 2006 order to permit the union's application for certification and varying the 2005 orders -- The 2005 orders prohibited the bringing of any proceedings or applications pursuant to the Labour Code against Hawkair which was under the protection of the Companies' Creditors Arrangement Act -- Union applied for certification in 2006 describing the proposed bargaining unit as pilots and flight attendants -- Pilots and flight attendants might not be creditors of Hawkair -- Hawkair required time to assess the impact of a potential union certification application and to carefully consider the best way to make Hawkair as competitive as possible -- HELD: Motion by Hawkair allowed -- Motion by CAW-Canada dismissed -- The 2005 orders prohibited the filing of the certification application -- The broad scope of the Companies' Creditors Arrangement Act to postpone the exercise of the rights of employees and unions under Labour Code should prevail -- An order under s. 11 of the Act was effective against third parties who were not creditors where the actions of the third parties could potentially prejudice the ability of the company to continue in business or to bring forward a Plan having any likelihood of success -- A liberal and expansive interpretation of the powers under s. 11 of the Act would include the stay of proceedings being in effect against the pilots and flight attendants and the Union -- Maintenance of the status quo of Hawkair at the time of filing required an order that the court would maintain the relationship that Hawkair had with its employees -- Lifting of stay was not appropriate as Hawkair had insufficient resources to carry through with negotiations if a collective agreement was to be reached -- Once reorganization had taken place, Hawkair would be better able to deal with a certification application -- There would be no injustice to the union or the flight attendants and pilots if the stay of proceedings stayed in effect.

Statutes, Regulations and Rules Cited:

Business Corporations Act, S.B.C. 2002 c. 57, R

Canada Labour Code,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11(3)(a), s. 11(3)(b), s. 11(3)(c), s. 11(4)(a), s. 11(4)(b), s. 11(4)(c), s. 11(6)(a), s. 11(6)(b)

Counsel:

Counsel for Hawkair Aviation Services Ltd.: A.H. Brown

Counsel for I.M.P. Group Ltd.: A. Frydenlund

Counsel for Field Aviation Company Inc.: M.I.A. Buttery

Counsel for the Attorney General of Canada representing Transport Canada: R.D. Leong

Counsel for Campbell Saunders Ltd., the Monitor: B. Lewis-Hand

Counsel for National Automobile, Aerospace, Transportation and General Workers Union of Canada: S.A. Rush, Q.C.

1 **BURNYEAT J.**:-- There are two motions in these proceedings pursuant to the ***Companies Creditors Arrangement Act***, R.S.C. 1985, C. -36 ("***Act***"). First, a Motion by Hawkair Aviation Services Ltd. ("Company") for:

(a) a declaration that by filing with the Canada Industrial Relations Board on February 17, 2006 an Application for Certification against the Petitioner, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) is in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006;

(b) an Order that the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) shall, on or before March 30, 2006, comply with the Orders by providing notice in writing to the Canada Industrial Relations Board that they formally withdraw their Application for Certification dated and filed with the Canada Industrial Relations Board on February 17, 2006.

(c) In the alternative, an Order that the Application for certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be declared null and void and of no force or effect whatsoever, as having been filed in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006.

(d) In the further alternative, an Order that the Application for Certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be stayed pending further Order of this Honourable Court, as having been filed in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006.

2 Second, a Motion by the National Automobile Aerospace, Transportation, General Workers Union of Canada (CAW-Canada)("Union"):

(a) vacating paragraph 3 of the Order of Mr. Justice Tysoe dated March 9, 2006 staying the application for certification of the Union;

(b) that the Initial Order, dated October 7, 2005 be varied by adding the following words to paragraph 1(c) in the fourth line after the word Petitioner "but not including an application for certification brought by the Union on behalf of employees of the Petitioner pursuant to the Canada Labour Code";

(c) in the alternative, for leave to permit the Union to commence and to continue an application for certification by the Union on behalf of the employees of the Petitioner pursuant to the Canada Labour Code;

(d) in the further alternative that the certification proceedings before the Canada Industrial Relations Board commenced by the Union on behalf of the employees of the Petitioner are not proceedings which are stayed by the Initial Order;

(e) in the further alternative, for leave to permit the Union to carry on certification proceedings on behalf of employees of the Petitioner pursuant to the Canada Labour Code.

3 The Orders that have been made to date in these proceedings include the following:

(a) The October 7, 2005 Order of Madam Justice Brown made on an *ex parte* basis which provided the following provisions relevant to these applications:

(i) Paragraph 1(c) which provided the following stay of proceedings:

> no suit, action, enforcement process, extra-judicial proceeding or proceeding of any other nature, including without restriction, any application or proceeding pursuant to the British Columbia Labour Code or other legislation of like or similar import, shall be proceeded with or commenced against the Petitioner;

(ii) Paragraph 5(b)(i) allowing the Company to remain in possession of the assets and undertaking of the Company but having the following power:

> it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing or restructuring of its business and operations ("Downsizing or Restructuring"), including:
>
> (i) terminating the employment of or renegotiating agreements with such of its employees or temporarily laying off such of its employees, as it deems appropriate; ...
>
> all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from leased premises, and may take any Downsizing or Restructuring steps at any time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioners to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.

(iii) the appointment of a Monitor to maintain the business and financial affairs of the Company;

(b) The next Order was made on November 4, 2005 by Mr. Justice Rice confirming the October 7, 2005 Order. However, this Order amended paragraph 1(c) of the earlier Order so that this paragraph then read that the following was prohibited:

no suit, action, enforcement process, extra-judicial proceeding or proceeding of any other nature.

4 The Union applied for certification with the Canada Industrial Relations Board ("CIRB") on February 17, 2006 describing the proposed bargaining unit as "pilots and flight attendants". In his Affidavit, John Bowman who is a National Representative of CAW sets out the background leading up to the application for certification:

> On or about the first of February, 2006, I was contacted over the phone by an employee from Hawkair Aviation Services Ltd. ("Hawkair") who was interested in finding out how the employees of Hawkair could go about joining the Union.
>
> The employee advised that the employees were concerned that their wages had been reduced and that there were arbitrary layoffs by the company. Nothing was said during this conversation about the company operating under CCAA protection.
>
> Arrangements were made to have membership cards and information about the Union given to this individual for distribution to the employees. The information was provided on February 7, 2006.
>
> After distributing the information to co-workers and obtaining the membership support from a majority of the workers in the bargaining unit applied for, the signed membership cards were returned to the Union on or about February 16, 2006. In further discussions with this individual during the week of February 13, there was no mention of the company operating under CCAA protection.

5 Given the publicity surrounding the filing by the Company and the information available to employees, it is inconceivable that whoever contacted the Union would not have known about the filing and the Order which was in effect. However, I cannot find that any official with the Union had knowledge of the filing by the Company.

6 A Motion was then brought by the Company for a declaration that the Certification Application was in breach of the provisions in the Order establishing the Stay of Proceedings. That Motion was heard by Mr. Justice Tysoe on March 9, 2006 who ordered that the Stay of Proceedings be further extended to June 9, 2006 and that the following stay be in effect regarding the Certification Application:

> The Application for Certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be and the same is hereby stayed pending further Order of this Honourable Court.

7 I am satisfied that the Orders made to date have not dealt with the issues which are before me so that it will be necessary to deal with the following questions:

> (1) Did the October 7, 2005 and November 4, 2005 Orders prohibit the filing of the Certification Application?
> (2) Did the November 4, 2005 Order have the effect of removing any prohibition regarding labour proceedings as set out in the October 7, 2005 Order so that the Certification Application could be filed?
> (3) If the Certification Application was prohibited, should there be a declaration that it is void and of no effect or should approval of the filing of the Application be given *nunc pro tunc* but a Stay of Proceedings then imposed?

STATUS OF THE PREPARATION OF A PLAN OF REORGANIZATION

8 In his Affidavit, the General Manager of the Company states that an agreement has been arranged with one of its aircraft financiers, that this agreement with Field Aviation Ltd. was approved by the Court on January 18, 2006, that negotiations are ongoing with its other financier, I.M.P. Group Ltd. ("I.M.P."), and that the Certification Application would create the following difficulties for the Company:

> I have no previous experience as an employer with unions and did not know how to deal with this development. I was completely unfamiliar with the certification process.
>
> I contacted a number of individuals who have substantial experience in the airline industry and who had previously indicated a willingness to join Hawkair's board of directors. Discussions with those individuals and other restructuring experts led me to appreciate that, when taking into account: a) the change in Transport Canada regulations rendering our aircraft less than optimum for our needs; b) our inability to negotiate an acceptable compromise with IMP; and c) the fact that the company is now at risk of having a unionized work force, Hawkair is truly in a fight for its existence. To maximize Hawkair's ability to survive in both the short and longer term, it is imperative that the company take a more aggressive approach to its restructuring than had previously been done.
>
> Attached ... is a true copy of the letter Hawkair received from the Canada Industrial Relations Board. The presentation of this application has rendered it necessary for Hawkair to incur the additional cost of engaging legal counsel to deal with the application. It has also required that I and Hawkair's insolvency counsel spend a good deal of time learning the implications of certifications and

developing a strategy to respond. This has imposed a significant detriment upon Hawkair's ability to successfully conclude its restructuring.

I understand that section 24(4) of the Canada Labour Code specifies that where an application for certification has been made, the employer is prohibited from altering any term or condition of employment or any right or privilege, of any of Hawkair's pilots or flight attendants. If that section applies to Hawkair's restructuring it would likely impede Hawkair's ability to carry out the Downsizing or Restructuring contemplated in paragraph 5(b) of the Initial Order. For that reason, I believe it is inadequate for this Honourable Court to merely order that the certification application be stayed. In my view it is imperative that it be either declared null and void or be dismissed.

I do not yet have any well developed sense of the financial and other implications to Hawkair if a Union Certification Application is successful. Hawkair needs to investigate this and determine what effects, if any it has on our presently envisioned restructuring plan and upon the viability of Hawkair in both the short and long term.

I have been told that if the union certification application proceeds, it would typically take 60 to 90 days to run its course.

In my opinion, Hawkair is at a critical crossroad. It is imperative that management be given sufficient time to:

(a) assess the financial and other impact of a potential union certification application;
(b) locate replacement aircraft; and
(c) carefully consider the best way to make Hawkair as competitive as possible in its current situation.

9 The February 20, 2006 letter from the CIRB referred to, advised the Company that "except under certain circumstances", the terms and conditions of employees could not be changed, that information regarding all employees was to be compiled and forwarded, that any objections regarding the proposed Bargaining Union had to be forwarded with 10 days, that any response to the application had to be forwarded within 10 days, and that an oral hearing before the Board could be requested. Counsel for the CAW advised that the entire process leading to a contract if there was a Certification might take anywhere from six to nine months depending on how active a role was played by the Company and how long it would take to negotiate a contract.

PURPOSE OF THE *ACT* AND THE STAY OF PROCEEDINGS

10 Section 11(3) of the ***Act*** provides the Court with the power to make an order on an "Initial Application" to be effective for no more than 30 days. That Initial Order can have the effect of:

(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) [being 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 or proceeding with any other action, suit or proceeding against the company.

11 After the "Initial Order" has been made, a further order can be made pursuant to s. 11(4) of the ***Act*** which states:

> 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.

12 Pursuant to s. 11(6) of the ***Act***, an order shall not be made under s. 11(3) or s. 11(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.

13 The purpose of the ***Act*** was described by our Court of Appeal in ***Hongkong Bank of Canada v. Chef Ready Foods Ltd.*** (1990), 4 C.B.R. (3d) 311 as follows:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business .... When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.
>
> There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is

> even underscored by s. 8, which negates any contracting out provisions in a security instrument. (at paras. 10 and 11)

14 The purpose of maintaining the status quo existing at the time of the filing is so that the proceedings under the ***Act*** can produce a plan of reorganization which will benefit the company, its creditors, and, potentially, the community in which the Company operates. In this case, the Company has 98 employees in Terrace, Vancouver, Prince Rupert, Fort St. John, and Dawson Creek.

15 The intension was also set out in ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (n.s.) 141 (B.C.S.C.) at p. 117. and where Trainor J. cited with approval the following statement made by Duff C.J.C. on behalf of the Court in ***A.G. Canada v. A.G. Quebec***, [1934] 16 C.B.R. 1 (S.C.C.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. (at p. 2)

16 In ***Re Lehndorff General Partner Ltd.*** (1993), 17 C.B.R. (3d) 24 (Ont. G.D.) Farley J. stated:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make 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. (at para. 5)
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* ... [(1990), 1 C.B.R. (3d) 101 (Ont. C.A.)] at pp. 297 and 316; *Re Stephanie's Fashions Ltd.*, ... [(1990), 1 C.B.R. (3d) 248 (B.C.S.C.)] at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* ... [(1990), 1 O.R. (3d) 321 (Ont. G.D.)] at p. 328 and p. 330. 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 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: see *Meridian Developments Inc. v. Toronto Dominion Bank* ... [1984] 5 W.W.R. 215 (Alta. Q.B.) p. 220]. The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.), at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd., supra* at pp. 251-252. (at para. 6)

17 The purpose of the stay of proceedings is to forestall the possibility that anyone will obtain an advantage to the detriment of others while those others remain bound by the general stay of proceedings commonly ordered in the First Order. In this regard, Tysoe J. in Re ***Woodward's Ltd.*** (1993) 17 C.B.R. (3d) 236 stated:

> The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process. (at p. 241)

18 In ***Campeau v. Olympia and York Developments Ltd.*** (1992), 14 C.B.R. (3d) 303 (Ont. J.D.), R.A. Blair J. stated:

> By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors. (at p. 309)

19 In deciding whether a stay of proceedings should be ordered on the hearing of the first application or continued in subsequent orders, the stay of proceedings set out in s. 11 of the ***Act*** will be invoked if not restraining a judicial or extra judicial conduct will seriously impair the ability of a company either to continue in business or to bring a Plan forward. In this regard, Gibbs J.A. in ***Quintette Coal Ltd. v. Nippon Steel Corp.*** (1990), 51 B.C.L.R. (2d) 105 (B.C.C.A.) stated on behalf of the Court:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.
>
> (at p. 113)

20 While adopting that statement, R.A. Blair J. in ***Campeau***, *supra,* added:

> I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

DID THE STAY OF PROCEEDINGS APPLY TO THE CERTIFICATION APPLICATION?

21 A certification application comes within the definition of a "proceeding against the company" as that phrase is used in s. 11(3) of the ***Act*** or a "extra-judicial proceeding or proceeding of any other nature" as set out in the Orders made in these proceedings: ***International Woodworkers of America Local 1-324 v. Wescana Inn Ltd.*** (1977), 82 D.L.R. (3d) 368 (Man. C.A.); and ***Re: Air Canada***, [2003] C.I.R.B. No. 225 (C.I.R.B.). While the Canada Labour Code sets out the procedure to be followed when an application for certification is made and provides rights to employees and unions and imposes obligations of entities sought to be unionized, I am satisfied that the broad scope of the ***Act*** to postpone the exercise of those rights should prevail.

22 A number of decisions have dealt with a potential conflict between the ***Act*** and other federal legislation. For instance, the Court in ***Chef Ready***, *supra*, stated:

> Having regard to the broad public policy objectives of the C.C.A.A., there is good reason why s. 178 security [under the ***Bank Act*** R.S.C. 1985, c. B-1] should not be excluded from its provisions (at para. 22).
>
> If a bank's rights in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern (at para. 24).

23 On behalf of the Court Gibbs J.A. then concluded:

> The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails (at para. 26).

24 There is no indication that the broad scope of the ***Act*** should not prevail over the procedures and the rights given to employees and unions as set out in the Canada Labour Code. It would have been easy for the Canada Labour Code or the ***Act*** to have excluded the possibility that the ***Act*** would not apply. The next question is whether pilots and flight attendants and the Union would ordinarily be bound by the Stay of Proceedings.

25 I am advised by counsel for the Company that the pilots and flight attendants who would be in the proposed bargaining unit may not be creditors of the Company. Clearly, the Union is not a creditor of the Company. However, an order under s. 11 of the ***Act*** is effective against third parties

who are not creditors where the actions of the third parties could potentially prejudice the ability of the company to continue in business or to bring forward a Plan having any likelihood of success: ***Re Lehndorff***, *supra*, at paras. 14-16 and 21 where a stay of proceedings was granted against assets of the limited partnership in which the applicants held interests; ***Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) at p. 12 where a stay of proceedings was granted against a non-creditor joint operator of an oil and gas property prohibiting the substitution of a new operator in place of the company where it was noted that the effect of the removal of the company as operator would likely be "fatal to attempt to restructure the company" (at p. 13); ***Re T. Eaton Co.*** (1997) 46 C.B.R. (3d) 293 (Ont. G.D.) at para. 6 where a non-creditor, landlord was subjected to the stay of proceedings; in ***Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.*** (2000) 48 O.R. (3d) 746 (Ont. S.C.J.) where a proposed meeting to consider whether or not to suspend trading in the securities of the company was subjected to the stay of proceedings; and ***Re Versatech Group Inc.*** [2000] O.J. No. 3785 (Ont. S.C.J.) where a stay of proceedings was not set aside where the Toronto Stock Exchange wish to commence proceedings to consider whether to suspend trading in the listing shares of Versatech.

26 In this regard, it should be noted that ss. 11(3) and (4) does not make reference to proceedings taken or that might be taken by creditors. Rather, it is merely proceedings taken or that might be taken "in respect of the company". As well, it is clear that the inherent power of the Court to grant stays of proceedings can be used to supplement s. 11 ***Act*** when it is just and reasonable to do so: ***Re Lehndorff***, *supra*, at para. 16.

27 I am satisfied that the October 7, 2005 and November 4, 2005 Orders prohibited the filing of the Certification Application. Even if it is ultimately determined that the pilots and flight attendants are not found to be creditors of the Company, I am satisfied that the Certification Application is a "proceeding" and that a liberal and expansive interpretation of the powers under s. 11 of the ***Act*** would include the Stay of Proceedings being in effect against the pilots and flight attendants and the Union.

28 At the time of the filing, the "status quo" was that none of the employees of the Company were unionized and there was no application for certification. At the time of the Initial Order and the subsequent November 4, 2005 Order, the maintenance of the status quo required an order that the Court would maintain the relationship that the Company had with its employees. The next question raised is whether the November 4, 2005 Order had the effect of removing the prohibition set out in the October 7, 2005 Order so that the Certification Application could have been filed because it was not prohibited by the Stay of Proceedings.

29 The Union submits that the November 4, 2005 amendment to paragraph 1(c) of the October 7, 2005 Order had the effect of removing the effect of the Stay of Proceedings regarding any application pursuant to the Canada Labour Code. It was submitted that the removal of the specific reference should be interpreted as meaning that the general reference remaining does not apply to the Application for Certification. I cannot accede to that submission.

30 First, the remaining reference to "extra-judicial proceeding or a proceeding of any other nature" applies to Certification Applications. Second, paragraph 5(b)(i) confirms that the Company has the ability to downsize or restructure its business operations including the ability to terminate the employment of or to renegotiate agreements with its employees or to temporary lay off its employees. This power is "all without interference of any kind from third parties". These powers remaining available to the Company contemplate something that would not necessarily be available to

the Company if an Application for Certification was filed with the CIRB. If paragraph 5(b)(i) of the Initial Order is to have any meaning, the amendment to paragraph 1(c) of the Initial Order could not have had the effect submitted by the Union. Accordingly, I am satisfied that the amendment to paragraph 1(c) would not contemplate the ability of some or all of the employees to apply for Certification. The Stay of Proceedings ordered remained in effect after November 4, 2005 so that the Certification Application should not have been filed.

31 The appropriate procedure that the Union should have followed would be to have applied to have the stay lifted: ***Re Air Canada***, *supra*, at para. 15. Such an application parallels what is available under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3: ***GMAC Commercial Credit Corp - Canada v. TCT Logistics Inc.*** (2004), 48 C.B.R. (4th) 256 (Ont. C.A.). The question which then arises is whether the Stay of Proceedings should now be lifted in order to allow the filing of Application for Certification.

32 The granting of the stay under the s. 11 of the ***Act*** is discretionary and the burden of proof to obtain a stay of proceedings or an extension of the stay is on the Company. In this regard, the Company had to satisfy the onus of showing that circumstances exist that make the request for a stay extension appropriate and that it has acted and is acting in good faith and with due diligence. However, there is no statutory test under the ***Act*** to guide the Court in deciding whether it is appropriate to lift a stay of proceeding. While I am satisfied that the burden of proof to lift a stay of proceedings should lie with the party making such an application, I will proceed on the assumption that the Company must satisfy the onus of showing that the Stay of Proceedings should not be lifted.

33 In deciding the question of whether the Stay of Proceedings should be lifted in order that the Application for Certification can be continued or a new Application for Certification filed, I am guided by the statements of Paperny J. in ***Re Canadian Airlines Corp.*** (2000) 19 C.B.R. (4th) 1:

> In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):
>
> > In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.
>
> (at para. 15)
>
> Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holdings Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):
>
> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its

continued operation subject to the requisite approval of the creditors and court.

(2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.

(3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.

(4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze or relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of the particular case.

At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

(at paras. 19-20)

34 I am satisfied that the filing of the Certification Application has and will seriously impair the ability of the Company to focus and concentrate on its efforts to bring forward a plan of reorganization. While I am not satisfied that the Certification Application will seriously impair the ability of the Company to carry on business, it is clear that the management of the Company does not have the financial or personnel resources to deal with the Certification Application on its own. In a small company such as this, I am satisfied that there are insufficient resources to carry through with the submissions and negotiations which will be required if a collective agreement is to be reached on

the assumption that Certification will be granted. I am satisfied that the Company will be better able to handle such an application once the reorganization has taken place as the Company will then know with certainty the economic status of the Company. I am also satisfied that one of the purposes of the stay of proceedings provided under s. 11 of the ***Act*** is to allow time and energy to be directed towards the preparation and presentation of a plan of reorganization in a timely manner. There have already been a number of delays and extensions of deadlines to present a Plan. If the Company is required to follow through with the Application for Certification and, if there is certification, the negotiations for a contract, the purpose of providing a Plan of Reorganization on a timely basis will be thwarted. The Plan is now scheduled to be before all parties by June 9, 2006. If the Union is in a position to proceed with the Certification Application, no certainty will be available regarding the status of the employees until late in the year at the earliest. That can hardly be described as a Plan which is presented to all parties on a timely basis.

35 I am satisfied that the Company has satisfied the onus of showing that there would be no injustice to the Union or the flight attendants and pilots if the Stay of Proceedings stays in effect. In order to move the process along to the point where a Plan is available or it is evident that the attempt to find an acceptable Plan is doomed to failure, the status quo must be maintained. At this point, I cannot be satisfied that the Plan is likely to fail. I am also satisfied that it has been shown that the Union and the employees will not suffer hardship or will be prejudiced. It has not shown that anyone will be severely prejudiced by the refusal to lift the stay or that any right or advantage would be lost by the passage of time which, in this case, is only until June 9, 2006. It has not been shown that any rights will be lost by the passage of time if the Stay of Proceedings is not lifted to allow the Certification Application to continue. I am also satisfied that the Company has acted and continues to act in good faith and with due diligence.

36 I make a declaration that the Application for Certification of the Union is in breach of the October 7, 2005 Order as extended by the Orders pronounced November 4, 2005, December 19, 2005 and February 10, 2006 and is null and void and of no force or effect. Those declarations are made in accordance with the application by Hawkair Aviation Services Ltd. and as supported by Field Aviation, a secured creditor who agreed to become an unsecured creditor, I.M.P. Group Ltd., an owner of two aircraft leased to the Company, and the Monitor appointed under the Order. I dismiss the application of the Union that the October 7, 2005 Order be varied and I do not grant leave to the Union to commence and to continue an application for certification on behalf of any employees of Hawkair Aviation Services Ltd..

37 All creditors plus the pilots and flight attendants and the Union will not have to wait long to see what Plan is proposed by the Company and I am satisfied that it is appropriate that the Stay of Proceedings be continued against the Union and the employees of the Company in the interim.

38 I will remain seized of all future applications relating to these proceedings. Those parties represented at the April 18, 2006 applications will be at liberty to speak to the question of costs.

BURNYEAT J.

cp/i/qw/qlemo

TAB 8

Indexed as:

SNV Group Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36 AND IN THE MATTER OF the Canada Business Corporations Act as amended, R.S.C. 1985, C-44 AND IN THE MATTER OF SNV Group Ltd. and SNV International Ltd., petitioners

[2001] B.C.J. No. 2497

2001 BCSC 1644

95 B.C.L.R. (3d) 116

109 A.C.W.S. (3d) 891

Vancouver Registry No. L012888

British Columbia Supreme Court
Vancouver, British Columbia

Pitfield J.

Heard: November 13, 2001.
Judgment: November 28, 2001.

(27 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Ex parte order, variation -- Arrangement, effective date -- Contempt -- What constitutes contempt -- Judgments and orders -- Defences.

Application by SNV Group for an order finding Dominion Hotel in contempt of an order made under the Companies' Creditors Arrangement Act. SNV marketed vacation packages that included hotel accommodation. It entered into an agreement with Dominion whereby Dominion would provide rooms at specified rates to persons on whose behalf SNV made reservations. Dominion would invoice SNV for all contracted services based on a voucher system to be used by guests. Upon arrival at the Dominion Hotel with a room voucher, guests were obliged to provide a credit card imprint

and to sign a guest registration form, which included a proviso that they were liable for the bill if SNV failed to pay it. By September 2001, SNV owed Dominion approximately $40,000 in respect of guest room charges. Dominion processed about $30,000 of room charges to the credit cards of guests in reliance upon the guest registration forms. On October 18, SNV was granted an ex parte order under the Act prohibiting its creditors from seeking payment directly from travellers. The remaining portion of the unpaid room charges, approximating $10,000, was billed to guests on October 27, 2001. On October 29, the order was amended to add that if a creditor had charged a traveller directly, the creditor was to process a refund immediately. SNV alleged that Dominion was in contravention of the latter order.

HELD: Application dismissed. Dominion was not a creditor of SNV at October 29, 2001. Its actions in respect of the outstanding guest accounts were taken prior to the grant of any order that might apply to it. Three-quarters of the amounts owing were billed to guests in the latter part of September, well in advance of the October 18 initial order. The remaining actions in respect of outstanding guest accounts were taken by Dominion on October 27, 2001, two days before the order was amended. Because Dominion was not a creditor of SNV at October 29, 2001, and because the court could not order a stay of proceedings in relation to actions completed before the effective date of the order, Dominion could not be in contempt of the order of October 29, 2001.

Statutes, Regulations and Rules Cited:

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

Counsel:

Mary I.A. Buttery, for the petitioner.
Craig D. Johnston, for the respondent, Park Hotel (Edmonton) Ltd.

---

1 **PITFIELD J.**:-- SNV Group Limited and its wholly owned subsidiary SNV International Ltd. (collectively "SNV") are operating under the protection of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 pursuant to the terms of an initial ex parte order obtained October 18, 2001 and amended on October 29, 2001. On November 16, 2001 the initial stay of proceedings was extended to 6:00 p.m. on December 14, 2001 unless extended by further order of the Court before that time.

2 SNV applies for an order finding Park Hotel (Edmonton) Ltd., carrying on business as Dominion Hotel in Victoria, British Columbia, in contempt of the order for having taken steps to collect room charges from guests rather than limiting its pursuit of payment to SNV to whom the guests had pre-paid the room charges.

3 The relevant facts are the following. SNV is engaged in the business of marketing vacation packages that include hotel accommodation. SNV sells the packages at both the wholesale and retail levels of trade. SNV entered into an agreement with Dominion Hotel whereby the hotel was obliged to provide rooms at specified rates to persons on whose behalf SNV made reservations. The agreement describes the manner in which Dominion Hotel would be paid as follows:

> The Dominion Hotel will invoice your organization for all contracted services. Payment terms are 30 days net. Accounts more than 30 days overdue are subject to a surcharge equivalent to 1.5% per month calculated from the billing date.

4 The agreement describes the voucher system that would be used by guests in the following terms:

> [SNV] clients travel with pre-paid travel vouchers which will be presented upon check-in. These vouchers normally cover room and taxes only. However, if there are any variances to that, it will have been noted at the time of reservation. As well, the voucher will make note of this variance. Our wholesaler partners might also issue vouchers on our behalf and in such cases it will be clearly indicated that billing is to be forwarded to SNV International. Should your records differ from that of the voucher, please call us immediately.

5 Upon arrival at the Dominion Hotel with room voucher in hand, each guest was obliged to provide a credit card imprint and to sign a guest registration form, the text of which included the following:

> The management is not responsible for valuables not secured in safety deposit boxes provided at the front desk. *I agree that my liability for this bill is not waived and agree to be held personally liable in the event that any of the above indicated person(s), company(s), or association(s) fails to pay any or the full amount of all charges associated with this account including the 'DB' rate.* I further agree that I am responsible for any damages to or missing items from my guest room and will be charged accordingly by hotel management. I also agree that all charges contained in this account are current and any disputes or requests for copies of charges must be made within five days after my departure. [emphasis added]

6 By mid-September 2001, SNV owed Dominion Hotel approximately $40,000 in respect of guest room charges and the account was in arrears. Dominion Hotel concluded that the collection of the amount owing by SNV was in jeopardy. It began to process room charges to the credit cards of the guests in reliance upon the guest registration forms it had in hand. Charges made to guests in this manner during the week of September 26, 2001 approximated $30,000. The remaining portion of the unpaid room charges approximating $10,000 was billed to guests on October 27, 2001. SNV owed no amount to Dominion Hotel after October 27, 2001 in respect of pre-October 18th room charges as a result.

7 Paragraph 3(h) of the initial order obtained October 18, 2001 provided as follows:

> 3(h) no creditor of [SNV] who has received pre-payment in respect of post-filing claims may seek payment directly from a traveller in respect of the same services, or in an effort to satisfy any pre-filing claims.

8 The initial order was amended on October 29, 2001 upon further application by SNV on notice only to SNV's banker. Paragraph 3(k) was added as follows:

> 3(k) no creditor of [SNV] may seek payment directly from a traveller for travel that has already occurred in an effort to satisfy any pre-filing claims, and a creditor who has charged a traveller directly in satisfaction of such claim shall immediately process a refund to that traveller.

9 SNV agrees that paragraph 3(h) of the initial order did not apply to the actions of Dominion Hotel in respect of guest charges for the period preceding October 29, 2001. It says, however, that paragraph 3(k) applies to Dominion Hotel and the hotel acted in contravention of the order by seeking payment directly from travellers and omitting to process refunds in the manner directed by the paragraph.

10 Dominion Hotel says it was not a creditor of SNV at October 29, 2001 when paragraph 3(k) became effective. It says it elected to recover payment from the guests rather than SNV and, by processing the credit card charges, it ceased to be a creditor of SNV. Dominion Hotel also says that the Court does not have jurisdiction, whether under the CCAA or by virtue of its inherent jurisdiction, to order the refund of the amounts the hotel charged to guests before October 29, 2001.

11 In the circumstances, the applicable legal principles are these.

12 The CCAA confers a statutory power upon the Court to grant a stay of proceedings in respect of a debtor company or its assets. Section 11(3) of the CCAA provides as follows:

> 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.

13 The statutory power conferred by s. 11(3) of the CCAA is not restricted to a stay of proceedings involving persons who are creditors of SNV but extends to any person who is in position to take action in respect of SNV or its assets: Norcen Energy Ltd. v. Oakwood Petroleums Ltd. (1989), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) at pp. 12-17; Quintette Coal Limited v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193 (B.C.S.C.) at p. 200; and Re Lehndorff General Partner Ltd., [1993] O.J. No. 14 (O.C.J. Gen. Div.) at p. 5.

14 The statutory power to grant a stay is augmented by the Court's inherent jurisdiction to grant a stay in appropriate circumstances: Re Woodward's Ltd., [1993] B.C.J. No. 42 (B.C.S.C.) at para. 32; Re Lehndorff General Partner Ltd., supra, at p.7; and T. Eaton Co. Ltd. (1997), 46 C.B.R. (3d) 293 (O.C.J. Gen. Div.) at para. 6. The power to augment the stay permitted by s. 11(3) of the CCAA allows the Court to stay, prohibit or restrain proceedings that may be taken by any person against another person who is not the debtor where that proceeding may have the effect of placing the possibility of concluding a compromise or arrangement at risk: see Re Woodward's Ltd., supra, at para.

32; T. Eaton Co. Ltd., supra, at para. 6. In CCAA proceedings, the inherent power to augment the stay should be exercised with caution: Re Woodward's Ltd., supra, at paras. 33, 34.

15 I have concluded that the actions of Dominion Hotel cannot and should not be controlled by a stay of proceedings or order to repay.

16 Dominion Hotel was not a creditor of SNV at October 29, 2001. The actions of Dominion Hotel in respect of the outstanding guest accounts were taken prior to the grant of any order of the Court that might apply to the hotel. Three-quarters of the amounts owing were billed to guests in the latter part of September, considerably in advance of the October 18th initial order. The remaining actions in respect of outstanding guest accounts were taken by Dominion Hotel on October 27, 2001, two days before the initial order was amended by the addition of paragraph 3(k).

17 On October 18th, SNV applied for the protection it thought necessary to facilitate the compromise or arrangement it wished to complete with its creditors. It made no application to stay any proceeding by any person claiming indemnity from a third party in relation to a SNV trade obligation. When it applied for and obtained an amendment on October 29, 2001, SNV did not attempt to extend paragraph 3(k) of the order to anyone other than creditors, nor did it apply to make the order retroactive.

18 The capacity to stay, whether pursuant to s. 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the CCAA or its inherent jurisdiction to compel repayment of an amount alleged to have been obtained in reliance upon a contract in a manner that would amount to adjudication of a claim. The CCAA is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

19 It follows that in this proceeding, I need not be concerned whether there was a binding agreement between any guest and Dominion Hotel obliging the guest to pay the amount of the room charge notwithstanding the presentation of a pre-paid room voucher to the hotel or, if so, whether the contract is in the nature of a guarantee so that the Court might be prohibited from making an order in the nature of a stay by virtue of s. 11.2 of the CCAA. The question whether there was an enforceable agreement between Dominion Hotel and any guest permitting the hotel to recover room charges from the guest is a matter that must be resolved in proceedings taken by the guests against Dominion Hotel and perhaps SNV independent of the CCAA proceedings.

20 Because Dominion Hotel was not a creditor of SNV at October 29, 2001 and because the Court cannot order a stay of proceedings in relation to actions completed before the effective date of an order, Dominion Hotel cannot be in contempt of the order of October 29, 2001 due to the fact that it processed charges to guests.

21 Dominion Hotel is not in contempt of the requirement in paragraph 3(k) of the order requiring repayment of amounts to persons from whom payment has been obtained. Paragraph 3(k) should not be construed to require repayment of amounts received before the effective date of the order. The purpose of paragraph 3(k) is to require repayment where, by virtue of lack of notice of the order that was in place, payment might have been obtained in innocent rather than contemptuous contravention of the stay imposed by paragraph 3(k).

22 Were the Court empowered to make an order requiring Dominion Hotel to undo that which it has done to the guests, I would decline to exercise my discretion to do so.

23 There is insufficient evidence from which I could conclude that repayment would improve the prospects of concluding a compromise or arrangement. I could not conclude that the fact room charges have been collected from the guests will adversely affect, in any substantial respect, the prospect of a compromise or arrangement being concluded.

24 SNV claims that the fact Dominion Hotel has unilaterally collected amounts from guests may affect the willingness of travellers to do business with SNV. There is no circumstantial evidence to indicate that the concern is real, particularly in light of the fact that suppliers to SNV in the post-filing period are insisting upon pre-payment of guest room charges in any event.

25 SNV is concerned that a company called Canadian Affair with which it deals has refused to pay an account of approximately $400,000 because approximately $8,000 of that sum that was ear-marked for payment by SNV to Dominion Hotel has already been collected by the Dominion Hotel through credit card charges to guests. The question whether the agreements among Dominion Hotel, SNV, Canadian Affair and the guests justify the refusal of Canadian Affair to pay any part of its outstanding debt to SNV will have to be determined in independent enforcement proceedings initiated by SNV. The Court's power to stay proceedings cannot assist in the resolution of that dispute.

26 I do not agree with the SNV claim that other creditors who are hotels might attempt to do to guests as Dominion Hotel has done. Other SNV creditors who might claim to be in a position similar to that of Dominion Hotel in respect of guests are precluded from taking any steps to recover amounts directly from guests by credit card charges because of the prospective application of paragraph 3(k) from and after October 29, 2001.

27 In the circumstances the SNV application to find Park Hotel (Edmonton) Ltd. in contempt is dismissed. Because it is unclear whether, having regard for the contractual relationship between SNV and Dominion Hotel, the hotel had an enforceable agreement with guests permitting it to charge them directly, this is an appropriate case for the parties to this application to bear their own costs.

PITFIELD J.

cp/i/qldrk/qlsng/qlcct

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

Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF ALLEN-VANGUARD CORPORATION
(Motion Regarding Extension and Scope of Stay)

LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Ronald G. Slaght, Q.C. (12741A)
Tel: (416) 865-2929
Fax: (416) 865-2862
Email: rslaght@litigate.com
Eli S. Lederman (47189L)
Tel: (416) 865-3555
Fax (416) 865-2872
Email: elederman@litigate.com
Ian MacLeod (60511F)
Tel: (416) 865-2895
Fax (416) 865-3701
Email: imacleod@litigate.com

Lawyers for Allen-Vanguard Corporation