79 Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

80 Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

C. The Ad Hoc Bondholders submit that negotiations among them, the Sanjel Group and the Syndicate were a sham conducted by Sanjel to delay the Ad Hoc Bondholders from taking action under Chapter 11 while it finalized the APAs. The Trustee alleges that the SISP has been conducted and the CCAA filing occurred in an atmosphere tainted by manoeuvring for advantage, bad faith, deception, secrecy, artificial haste and excessive deference by the Sanjel Group to the Syndicate.

81 These are serious allegations, but they are not supported by the evidence.

82 As the somewhat lengthy history of negotiations establishes, the Ad Hoc Bondholders had almost three months to present and negotiate restructuring proposals, with access to confidential information afforded to their advisors from January 9, 2016, weeks before the SISP participants. They presented four proposals, the last one after final bids had been received in the SISP. Although the final proposal breached the timelines of the SISP process, and could potentially raise an issue with respect to the integrity of the SISP process, Sanjel, the Syndicate and the prospective purchasers are not pressing that argument, as they take the position that the final offer is inferior at any rate.

83 These proposals received responses from Sanjel and the Syndicate, and counter proposals were received. The evidence discloses that, in all proposals and counter proposals, the parties were far apart on a major issue: the extent to which the Syndicate's debt was to be paid down and how far it was willing to allow a portion to remain at risk.

84 The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc Bondholders were aware of the SISP and that it was progressing at a rapid pace. He says that he urged the Ad Hoc Bondholders to accelerate the pace at which they were advancing their restructuring negotiations.

85 The Ad Hoc Bondholders were aware, or should have been aware, that the Sanjel Group intended a CCAA/Chapter 15 process from at the latest mid-March, 2016. Their representative from A&M was aware of the possibility of a CCAA filing from March 4, 2016. Reference to PWC as Monitor under the CCAA was available through the template APAs from March 4, 2016

86 The Trustee and the Ad Hoc Bondholders submit that the Ad Hoc Bondholders' April 11, 2016 proposal provides superior recovery to the proposed sales generated by the SISP, that it "implies" a purchase price significantly in excess of the values generated by the APAs. The proposal, which was made directly to the Syndicate, was rejected by the Syndicate. It provides less immediate recovery to the Syndicate, and leaves a substantial portion of the Syndicate debt outstanding in a difficult and highly uncertain economic environment. It fails to address previously-expressed concerns about the need for capital going forward. The implied value of the proposal appears to rest on assumptions about improved economic recovery that the Syndicate does not accept or share.

87 In addition, the proposal would require at least six months to execute and leaves a number of questions outstanding, not the least being whether a plan that raises some and not all unsecured debt to secured status would pass muster. The proposal was rejected by the Syndicate for reasonable and defendable justifications.

88 The Ad Hoc Bondholders describe their proposal as a "germ" of a viable plan. While a germ of a viable plan may be sufficient to justify the commencement of a CCAA proceeding, it is not comparable to the proposed sales generated by a reasonably-run and thorough SISP.

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89 The Trustee also submits that the Court should not be deterred by the Syndicate's rejection of the proposal, insisting on its value and citing cases where a creditor's stated intention not to accept a plan did not prevent a CCAA filing from proceeding. This is a different situation: the Ad Hoc Bondholder's proposals are specific proposals with clear risks of timing and certainty. It is not up to this Court to second guess the Syndicate's rejection of such a plan, even if inclined to do so.

90 The Trustee submits that Sanjel did not act in good faith towards the Ad Hoc Bondholders in the period leading up to the filing. The Trustee notes that, contrary to the terms of the Bond Agreement, Sanjel failed to disclose to the bondholders that the Syndicate had issued a demand for payment acceleration and a notice of intention to enforce security pursuant to the terms of the Bankruptcy and Insolvency Act (the "Demand Acceleration and NOI") on March 18, 2016. While this was a contractual breach, the Ad Hoc Bondholders were well aware that Sanjel was in breach of the Bank Credit Facility, and that the Syndicate was taking steps to enforce its rights in negotiations with Sanjel and the Ad Hoc Bondholders. The Syndicate, and the Ad Hoc Bondholders, were both careful to preserve their rights of enforcement in proposals and counter-proposals. In fact, the Syndicate did not exercise its right to set-off, and has allowed Sanjel to continue to have access to liquidity going into the CCAA process.

91 This failure by Sanjel to advise the Trustee, (and other unsecured creditors that had similar provisions in their contracts), of this further step by the Syndicate does not constitute a reason to refuse to approve that APAs.

92 The Trustee submits that Sanjel failed to make full and plain disclosure during the initial hearing because it failed to disclose that in 2015, 62 % of the Sanjel Group's revenue was generated in the United States. Sanjel made extensive disclosure of its corporate structure and the integration of its business in its initial filing, including the fact that the Sanjel Group's "nerve centre", management team and treasury and financial functions are largely based in Calgary. The factors disclosed were more than sufficient to establish jurisdiction for a CCAA filing. The US Court in the Chapter 15 filing found the Sanjel Group's COMI to be in Calgary. The single statistic of 2015 revenue would not have changed the outcome of the Initial Order.

93 The Trustee's most serious allegation, given its implications for the professional reputations of those involved, is that Sanjel and its counsel and the Syndicate and its counsel misled the Trustee and the Ad Hoc Bondholders in their requests for adjournment of the bondholders' meeting, that the correspondence relating to the requests for adjournment created an obligation to negotiate in good faith, and that Sanjel and the Syndicate failed to do so. The Trustee and the Ad Hoc Bondholders allege that Sanjel and the Syndicate were negotiating with the Ad Hoc Bondholders only to gain time to finalize the APAs and file under the CCAA.

94 Again, this serious allegation is not supported by the evidence. The correspondence relating to the adjournment requests discloses no promises to hold off proceedings. The letter of request for the first adjournment for counsel to the Syndicate, while it refers to engaging with the Ad Hoc Bondholders with respect to the March 2, 2016 proposal, stipulates that in requesting the postponement of the meeting, counsel is not promising any course of action and reserves all rights.

95 The request from counsel to Sanjel refers to the dual track of negotiating a financial restructuring and/or sale of assets. It speaks of focusing on negotiations for the balance of the month, instead of "prospective enforcement action as proposed for consideration at the scheduled bondholders meeting," as was threatened by the notice of meeting. The Ad Hoc Bondholders were well-compensated financially for this adjournment.

96 The second request to adjourn the meeting to April 14, 2016 was similarly without any promise to forbear and the acceptance of the request by the Trustee did not impose any conditions nor give any reasons for the acceptance. The representatives of the Ad Hoc Bondholders are knowledgeable and sophisticated with respect to financing and insolvency matters. They cannot be said to have been misled by the language used in the adjournment requests.

97 The Trustee submits that the CCAA process to date has been engineered to effect a foreclosure in favour of the Syndicate "to the serious and material prejudice of the Bondholders" and other unsecured creditors.

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98 The SISP did not disclose any possibility that, in the current economic climate, the disposition of the assets would generate even enough to cover the debt owed to the secured creditors. The proposals made by the Ad Hoc Bondholders did not offer nearly enough to pay out that debt.

99 The views of the Syndicate and its priority rights must be given due consideration: *Windsor Machine & Stamping Limited (Re)*, 2009 CarswellOnt 4471 (SCJ) at para 43.

100 Section 6 of the CCAA requires that any compromise of creditors' rights must be supported by a double majority of the affected creditors. The Syndicate (as the principal secured creditor group) and the Ad Hoc Bondholders (as unsecured creditors with other unsecured creditors) would form separate voting classes for the purposes of a vote on any plan of arrangement. Each class must have a double majority of creditors, representing both two-thirds in value and a majority of number, voting in support of the plan as a condition precedent to court approval. Thus, the Syndicate holds an effective "veto" over the approval of any plan proposed by the Ad Hoc Bondholders: *SemCanada Crude Co, Re*, 2009 ABQB 490at para 22.

101 A noted by the Syndicate, the Ad Hoc Bondholders proposals, including the April 11, 2016 proposal, pose substantial risk to the Syndicate, and it is under no obligation to support them. There is no evidence that the Syndicate is acting unreasonably or unfairly in asserting that it would exercise the statutory protection afforded to a secured creditor under the CCAA; in fact, the evidence is that the Syndicate was willing to consider a less than 100% payout in negotiations with the Ad Hoc Bondholders. There was however no, agreement as to the extent of the payout and the extent to which the Syndicate would agree to remain at risk.

102 The prejudice to the bondholders is that they were unable to persuade the secured creditors to compromise or put its financial interests at risk in order to provide the bondholders with some chance that an improved economic climate may save this enterprise. As noted, the Syndicate had doubts that the Ad Hoc Bondholder's proposals would even provide sufficient operating capital to keep the Sanjel Group operating for the months it would take to implement their proposals.

103 The prejudice, if any, to the Ad Hoc Bondholders is that they were not able to pre-empt the CCAA filing with a filing under Chapter 11 of the *United States Bankruptcy Code*, with an automatic stay that, according to US bankruptcy law, has worldwide effect. A subsequent CCAA filing could be considered a breach of the stay, and provoke a jurisdictional issue that would delay proceedings and prove expensive to the Syndicate, improving the Ad Hoc Bondholders' bargaining position.

104 While there is only hearsay opinion before me with respect to the advantages of a Chapter 11 filing, the Trustee suggests that under such a filing:

(a) the Liberty and Step APAs would have been subject to market test and to higher and better offers;

(b) Sanjel could confirm a plan without the consent of the Syndicate; and

(c) parties in interest and estate fiduciaries could pursue claims and causes of action against Sanjel, the Syndicate, Sanjel's equity holders and MacBain.

105 Sanjel cites academic commentary that the cram-down provisions of Chapter 11 require strict compliance so as not to override the protections and elections available to secured creditors in opposition to a plan that they do not support. Specifically, if a class of creditors is impaired, the plan must be fair and equitable with respect to that class.

106 This is an issue for the US Courts. However, even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current CCAA proceedings would not be terminated and any restructuring in the United States would necessarily have to be coordinated with these CCAA proceedings. Accordingly, the voting requirements for any plan of arrangement or the requirements for approval of a sale under the CCAA could not be avoided.

D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

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107 The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

108 What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

109 The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

110 The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

111 The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

112 I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbably that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

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(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

VI. Postscript

113 On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are "duty bound" to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel's board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

114 The letter asserts the following:

a) There are "substantial and material" connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald's daughter and an employee and "executive in residence" of ARC Financial Corp., STEP's financial sponsor in the sale;

b) Mr. Hooker is "an intimate beneficiary of all that is and all that belongs to the MacDonald family." In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;

c) Mr. Hooker is "the loyal son-in-law and brother-in-law" of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;

d) By reason of Mr. Hooker's relationship with the "MacDonald family", the proposed STEP transaction and the entirety of the SISP process "is tainted and worse". "(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order";

e) "Mr. Hooker's personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel's Canadian assets back into the hands of the MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company".

115 The letter repeats previous allegations that the SISP was "driven by self-interest and self-dealing", "riddled with conflicts of interest," "inappropriate and flawed in every respect", "chilled, inadequate" and "not conducted in good faith and efforts were undertaken to mislead and misdirect the company's stakeholders". It alleges:

a) "That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose."

b) "Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients herby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability."

c) "... the efforts to continue with malfeasance wrapped in the cloak of SISP and CCAA by each and all of you and your clients must stop now. As above, the Courts and others should and must be informed, the failure to do so is and will be a misrepresentation and fraud on the Courts."

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116 The letter comments that "(w)hen Justice Romaine is in receipt of the information, she will have reason and basis and we believe that Her Ladyship will be constrained, to vacate the order."

117 The Monitor took immediate action to investigate these serious allegations of fraud, misrepresentation, conspiracy and collusion, requesting urgent responses from counsel for Sanjel, the Syndicate, Mr. MacDonald, PJT and CS. Relevant witnesses were contacted and follow-up questions directed. The Monitor was also in contact with Fried Frank to determine the source of the allegations, and what investigation had been undertaken by Fried Frank or the Ad Hoc Bondholders to verify or support their allegations.

118 On Saturday, May 7, 2016, Fried Frank made the further allegation that potential bidders in the SISP were provided with forecasts that were far worse than actual results in order to facilitate the alleged fraud and conspiracy. The Monitor added this allegation to its investigation.

119 The Monitor was satisfied by its rapid but thorough investigations that:

a) Mr. Hooker and Mr. MacDonald have been estranged for the last two and a half-years, and have had no communication on any personal or business matters;

b) Mr. Hooker left Sanjel in March, 2014 and began working for ARC Financial in the fall of 2015 to assist ARC in an unrelated transaction. ARC is a large private investor focussed on energy, which provides financing through a number of funds financed by from third party investors. ARC is the primary financial stakeholder in the STEP acquisition. No one from the MacDonald family has an ownership position in ARC, nor are any of them investors in any ARC funds. Mr. Hooker has no involvement in ARC's fundraising efforts or fund deployment and he has no ownership interest in ARC;

c) Mr. MacDonald had no involvement in the negotiation of the STEP APA, other than attendance as a Sanjel representative at three meetings between November 2015 and January 2016, before the SISP was commenced;

d) Mr. Crilly as CFO of Sanjel (and later CRO) led the SISP process for Sanjel, while Mr. MacDonald concentrated on attempting to find a buyer for the whole company;

e) The senior Mr. MacDonald has not had an active role in Sanjel's management for years, was not involved in the SISP and does not own shares in STEP or ARC;

f) Mr. Hooker's involvement with the SISP and negotiations with STEP was limited to conducting on-site diligence on behalf of STEP;

g) Sanjel has no direct or indirect ownership interest or other financial interest in ARC, STEP, the newly formed company that will be purchasing the cementing assets or any other entity owned or controlled by ARC;

h) No consideration was provided to Mr. Hooker or either Mr. MacDonald in connection with the STEP APA;

i) In the opinion of many of those who provided responses, the relationship between Mr. Hooker and Mr. MacDonald had an adverse effect, if anything, on the merits of the STEP bid. The advisors and the Syndicate repeat their previous position that the STEP offer, in combination with the Liberty offer, was materially superior to any en bloc bid or combination of bids, and was supported on the basis of its economic merits.

120 This information was largely confirmed by a number of sources. The Monitor did not obtain sworn statements, nor conduct any kind of discovery process. It did not present the information in its Sixth Report to the Court as evidence, but as a report on its investigation to determine whether there was any probative value to the Ad Hoc Bondholders' allegations.

121 When the Monitor was unable to find any real evidence to support the allegations, other than the bare fact that Mr. Hooker is an employee of ARC and is married to Mr. MacDonald's sister, it asked the Ad Hoc Bondholders if they had any supporting

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evidence. The substance of counsel to the Ad Hoc Bondholders' response is that there is an appearance of inappropriate dealing (arising from the relationship), and that it was up to the Monitor to investigate this.

122 The Ad Hoc Bondholders instead provided the Monitor with a list of additional questions that they wish the Monitor to investigate through sworn statements subject to cross-examination. These questions appear designed to elicit some evidence that may support the Ad Hoc Bondholder's speculations.

123 The Monitor cannot be faulted for failing to obtain sworn evidence from relevant parties. The allegations were made after approval of the APAs in the context of tight timelines to the closing of the transactions and the risk of losing the recommended sales transactions. If the Monitor had discovered anything that would give any legitimacy to the allegations, or raise any doubt about the integrity of the SISP, it may have been appropriate to direct further investigation, including sworn evidence. However, mere speculation resting on a family relationship is insufficient to require the Monitor to undertake further expensive investigation or to conduct a fishing expedition. This is particularly the case as there is no real evidence that Mr. Hooker's prospective employment will benefit either Mr. MacDonald or Sanjel in any way, or Mr. Hooker himself, other than the offer of employment.

124 This is not a case where evidence that should be presented in affidavit form has been incorporated improperly into a Monitor's report. The Monitor decided, quite properly, that at this stage of the process, a quick investigation to determine whether there was any real basis for the Ad Hoc Bondholders complaint was warranted. This investigation has satisfied the Monitor that, other than the fact that Mr. Hooker is indeed Mr. MacDonald's brother-in-law, there is no evidence of collusion between them, Mr. MacDonald was not involved in the STEP APA, Mr. Hooker was in no position to influence that STEP APA and no evidence that Mr. Hooker or the "MacDonald family" will profit in any way from the STEP APA, other than Mr. Hooker's offer of employment.

125 Given the lack of any indicia that there is any basis for the Ad Hoc Bondholders' speculations of fraud or conspiracy, there is no reason for this Court to require the Monitor to take further steps to investigate the allegations, which appear to be thinly veiled and reckless attempts to delay and obfuscate the process.

126 With respect to the allegations that potential bidders were provided with forecasts far worse than actual results in order to facilitate the alleged fraud and conspiracy, the Monitor has reviewed the forecasts and the variances from the forecasts provided during the SISP to actuals. The Monitor reports that these relate to collection of accounts receivable and payment of accounts payable. The actual collection of receivables was better than forecasted for the months of March and April. However, the Monitor understands that is a temporary timing variance based on earlier collection of receivables and does not represent a permanent improvement in Sanjel's actual cash position.

127 Thus, the Monitor is of the view that the allegations by the Ad Hoc Bondholders with respect to forecasts being far worse than actual results lack merit.

128 I accept the Monitor's advice on this issue.

129 With respect to disclosure, the Monitor was not aware of the connection between STEP and the company alleged in the Fried Frank letter. The Monitor has reported that it did not become aware of anything that would support or substantiate the allegations since its involvement in the SISP process after February 24, 2016.

130 The Ad Hoc Bondholders' allegations are in essence that the SISP was structured to achieve a preferential outcome for the MacDonald family through the familial connections between Mr. Hooker and the MacDonald family. If a sale of assets of a debtor company is to be made to a person related to the debtor, the Court may only approve the sale if it is satisfied that:

> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the debtor company; and

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(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale: CCAA section 36(4).

131 A related party pursuant to section 36(5) is defined to include certain categories of persons, and neither Mr. Hooker, his wife or either Mr. MacDonald fall into these categories.

132 There is no evidence or indication that any member of the "MacDonald family" will benefit from the STEP APA, other than Mr. Hooker's offer of employment. I am therefore satisfied that section 36(3) is not applicable to the STEP or the Liberty transactions and that no disclosure of any relationship was necessary before the APAs were approved.

133 Even if disclosure had been made, given the evidence before me with respect to the SISP process and the offers received, I would have been satisfied the requirements of section 36(3) were met.

134 In conclusion, the allegations of the Ad Hoc Bondholders do not change my decision with respect to approval of the APAs. I see no reason why the Monitor should continue its investigation.

135 The issue of who should bear the cost of the investigation into these allegations is reserved.

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TAB 8

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re 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 THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for 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 Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

Farley J.:

1 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;

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(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 titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 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 issues 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 Vermögensverwaltung 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.

3 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.

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(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 may be 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 Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *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. Zevenberger (Trustee of)* (sub nom. *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.

5 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; *Reference re Companies' Creditors Arrangement Act*, [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*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R.

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(2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 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)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , 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 Developments Inc. v. Toronto Dominion Bank* , 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 *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.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. 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 BIA 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 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . 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 *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 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.

9 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,

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(*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.

10 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 affected 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 Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , 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 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , 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.

11 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 *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (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 *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). 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 Corp. v. Bank of Nova Scotia* (1991), 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 *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 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 *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik*

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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 [at p. 159]:

> 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.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> 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.)

14 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 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

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, 137 D.L.R. (3d) 287 (Ont. 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, c. C.43, which provides as follows:

> 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 discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [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 r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

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.

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In this respect it has been observed that the C.C.A.A. 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, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (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 (C.A.) at p. 113 [B.C.L.R.].

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 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 [C.P.C.]. 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 v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] 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 v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 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, (sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .
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> 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.]:

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> 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.

16 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-à-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. [Appendix omitted.] 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.

17 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. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 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.

18 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.

19 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. (London: Sweet & Maxwell,

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1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (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 A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. 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, as am.] 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.

20 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) 71 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. 524-525. 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-à-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.

21 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. It 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.

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

Application allowed.

Footnotes

* As amended by the court.

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TAB 9

2006 ABQB 153
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2006 CarswellAlta 446, 2006 ABQB 153, [2006] A.W.L.D. 1915, [2006] A.J. No. 412, 152 A.C.W.S. (3d) 833, 19 C.B.R. (5th) 187

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

In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

Romaine J.

Judgment: February 24, 2006
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean F. Collins, Derek Kearl for Applicants / Cross Respondents
Joseph Pasquariello, Jay A. Carfagnin for Applicants / Cross Respondents
Douglas S. Nishimura for Respondents / Cross Applicants, Pengrowth Corporation and Progress Energy Ltd.
Patrick McCarthy, Q.C., Joseph Krueger for Monitor

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

MOTION by partnership for declaration that stay of proceedings contained in order applied to agreement.

Romaine J.:

Introduction

1 The issues in this application and cross-application are:

a) whether a Call on Production ("COP") Agreement between Pengrowth Corporation and Calpine Canada Natural Gas Partnership is an "eligible financial contract" within the meaning of Section 11.1 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, and

b) whether the stay imposed with respect to the Calpine Energy Services Canada Partnership by the initial order under the *Companies' Creditors Arrangement Act* should be removed or lifted because this entity is a partnership and not a corporation.

2 I have decided that the COP Agreement is not an eligible financial contract and thereby is stayed by the initial order. I declined to lift the stay on the partnership. These are my reasons.

A. Is the COP Agreement an eligible financial contract within the meaning of Section 11.1 of the CCAA?

Facts

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3 By agreement effective September 14, 2002, the Calpine Canada Natural Gas Partnership (the "CCNG Partnership") sold certain oil and natural gas rights and assets located on lands in British Columbia to Pengrowth. It was a term of the purchase and sale agreement that Pengrowth and the CCNG Partnership would enter into a COP Agreement upon closing of the purchase and sale. The COP Agreement is dated October 1, 2000.

4 The COP Agreement provides the CCNG Partnership with a reoccurring right of first refusal to purchase any portion of the gas or oil produced from the lands that were sold on market terms and conditions. The agreement remains in force for as long as gas and oil are produced from the lands, unless terminated sooner by the parties. It provides for a fixed delivery point and a price for the production spelled out by reference to current market prices. It does not compel Pengrowth to produce gas or oil from the lands. The CCNG Partnership has the right to reduce the volumes of production it is entitled to purchase on notice to Pengrowth, and thereafter Pengrowth may market such released volumes elsewhere.

5 On the same date the COP Agreement was executed, the Calpine Energy Services Canada Partnership (the "CESCA Partnership") replaced the CCNG Partnership as purchaser of the gas and oil, and shortly after that, Progress Energy Ltd. was partially novated into the agreement by Pengrowth with the consent of the CCNG Partnership.

6 On December 20, 2005, the Calpine applicants sought, and were granted, an initial order under the CCAA which, together with other relief, restrained persons from terminating or suspending their obligations under agreements with the applicants during the term of the order, as long as the applicants paid the normal prices for the goods and services provided under such agreements.

7 On December 21, 2005, Pengrowth provided notice to the CESCA Partnership that, effective December 23, 2005, it would suspend delivery of natural gas to the CESCA Partnership under the COP Agreement. In that notice, Pengrowth took the position that Calpine's filing for protection under the CCAA constituted a "Triggering Event" as defined in the COP Agreement that allowed suspension and termination of the agreement as of December 27, 2005. In another letter later the same day, Pengrowth alleged that the COP Agreement was an eligible financial contract, and thus exempt from the application of the stay set out in paragraph 9(d) of the initial order.

8 The Calpine applicants brought a motion for a declaration that the stay of proceedings contained in the initial order applies to the COP Agreement, that this agreement is not an eligible financial contract within the meaning of the CCAA, and for damages against Pengrowth and Progress as a result of their improper termination of services under the agreement. Pengrowth and Progress in turn brought an application to vary the initial order by removing or lifting the stay with respect to the CESCA Partnership on the basis that the CCAA does not apply to partnerships. The question of damages against Pengrowth and Progress was not addressed at the hearing of these motions.

Analysis

9 The Alberta Court of Appeal considered the definition of "eligible financial contract" under the CCAA in the case of *Blue Range Resource Corp., Re*, [2000] A.J. No. 1032 (Alta. C.A.). In that case, the first to consider the definition, there were seven contracts at issue involving Blue Range, which was then under the protection of the CCAA. Two of them were "master agreements" that contemplated that the parties would enter into gas purchase and sale agreements from time to time, to be evidenced at the time of specific sales by confirmation letters. The other agreements were gas purchase and sale agreements between third parties and the wholly-owned subsidiary of Blue Range and guarantees by Blue Range of its subsidiary's obligations under these contracts. According to the Court of Appeal, all of these agreements contained netting out or set-off provisions, although subsequent commentary on the case suggests that some of these provisions were limited. The Court characterized the key issue as whether the long term gas purchase and sale contracts in the case were forward commodity contracts, as it was conceded in the appeal that, if they were, the master agreements and guarantees would be caught by the language of subsections 11.1(k) and (m) of the Act.

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10 Fruman, J.A. started her analysis by describing the agreements in question in general terms, noting that the sellers were looking for price certainty and limited downside exposure, predicting that the market price for gas would decline, and that the buyers were gambling that the price would rise such that on delivery they would purchase gas at a price that was below market value. She described at paragraphs 18 to 20 how, at any particular time, the contract might be "in the money" when the market price of gas exceeded the purchase price specified in the contract, or "out of the money" when the market price was less than the purchase price. She described this as the contract being "marked to market", assigning a positive or negative value to the contract. As she noted, gas producers, to hedge risk, might enter into a series of such contracts at different prices for delivery on different dates, some of which would be "in the money" and others of which would be "out of the money". As she stated, "(t)ermination and netting out or set-off provisions permit the purchaser to terminate all the agreements upon a triggering event", thereby allowing the calculation of a termination amount payable by one party to the other. She comments further at paragraph 23:

> Forward commodity contracts and other derivatives have a financial value that can readily be calculated; they are commercial hedging contracts that can be used to manage various types of risk, including changes in commodity prices, exchange rates, interest rates and market risks.

11 Fruman, J.A. rejected the distinction between physically-settled and financially-settled contracts in determining whether a contract falls within the definition of eligible financial contracts: at para. 36. However, she also recognized that if the term "forward commodity" contract was interpreted to include physically-settled transactions, it could potentially include every contract to buy or sell on a future date, any "thing produced for use or sale": para. 39. As the Court of Appeal recognized at para. 39, interpreting the term "eligible financial contract" so broadly would defeat the very purpose of the CCAA, to provide an insolvent corporation with the time and opportunity to reorganize its affairs as a viable operation. Fruman, J.A. concluded, at para. 39:

> Section 11.1(1) is an exception to a statutory protection which must "be interpreted in light of [the] underlying rationale and not used to undermine the broad purpose of the legislation...": Driedger, 3rd ed., at 369-70. See *National Trustco v. Mead* (1990), 71 D.L.R. 4th 488 at 497-99 (S.C.C.). This dictates a narrower construction of provisions which are excepted from a stay order: *Re Smith Brothers Contracting Ltd.* (1998) 53 B.C.L.R. (3d) 264 at 272 (S.C.).

12 The Court found a narrower construction of the term "forward commodity contract" in the concept of "commodity", which it defined as being interchangeable and:

> ...readily identifiable as fungible commodities capable of being traded on a futures exchange or as the underlying asset of an over-the-counter derivative transaction. Commodities must trade in a volatile market, with a sufficient trading volume to ensure a competitive trading price, in order that forward commodity contracts may be "marked to market" and their value determined. [*Blue Range Resource Corp., Re* at para.45]

Even so, the Court recognized that not every contract involving the purchase and sale of gas was a forward commodity contract within the meaning of the exception set out in Section 11.1 of the CCAA: at para. 50.

13 Fruman, J.A. referred to industry and expert definitions of forward commodity contracts to aid her in her analysis. Specifically, she focussed on two definitions, as follows:

> [Mark E.] Haedicke and [Alan B.] Aronowitz, ["Gas Commodity Markets" in Energy Law and Transactions Vol. IV (New York: Matthew Bender & Co. Inc., 1999)] at 88:74-75 define a "forward contract" for the energy industry as:
>
> > A customized contract to buy or sell a commodity for delivery at a certain future time for a certain price. It is customized by individual negotiations between two parties, rather than standardised and traded on a board of trade. The parties to the forward contract usually know each other, and in most cases the contract is settled by actual delivery of the commodity.

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James Joyce, a specialist in energy risk assessment who provided an expert report in this case, identified the key elements of a forward commodity contract in the natural gas industry to include:

> a) a buyer of natural gas;
>
> b) a seller of natural gas;
>
> c) a defined contract term longer than the next day;
>
> d) a defined volume of natural gas;
>
> e) a defined delivery and receipt point (including any transportation requirements, as applicable); and;
>
> f) a defined price or pricing mechanism.

[*Blue Range Resource Corp., Re* at paras. 48 and 49]

14 As the Court noted, the Joyce definition would not capture standard gas utility contracts that do not commit a purchaser to a specific volume of gas for a specified price. However, the contracts at issue in the Blue Range appeal met all of the elements of both the *Haedicke* and *Joyce* definitions, and the Court of Appeal found that they were therefore forward commodity contracts: at paras. 50 and 51.

15 Fruman, J.A. indicated that there is a final test - the fairness of the result. In her analysis of the Blue Range contracts, she found that both parties were fairly treated even though the appellants were allowed to terminate the contracts: *Blue Range Resource Corp., Re*, at paras. 52-53.

16 Fruman, J.A.'s approach was accepted by the Ontario Court of Appeal in the next case to consider the definitions eligible financial contracts, *Androscoggin Energy LLC, Re*, [2005] O.J. No. 592 (Ont. C.A.), in which that Court also rejected the distinction between "physically-settled" and "financial settled" contracts adopted by both the Alberta and Ontario chambers judges.

17 In the Ontario case, the appellants had entered into long term contracts to supply gas to Androscoggin, a corporation under CCAA protection. Androscoggin operated a gas-fuelled co-generation plant. The contract price at which the appellants had agreed to supply gas was below the current market price of gas. The Court of Appeal agreed with the chambers judge that the contracts should not be characterized as eligible financial contracts, but on a different basis, stating:

> The contracts in issue before Fruman J.A. served a financial purpose unrelated to the physical settlement of the contracts. The reasons in *Blue Range Resource Corp.* indicate that the contracts Fruman J.A. examined enabled the parties to manage the risk of a commodity that fluctuated in price by allowing the counterparty to terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position. Unlike the contracts found to be EFCs in *Blue Range Resource Corp., supra*, the contracts in issue here possess none of these hallmarks and cannot be characterized as EFCs. However, mere *pro forma* insertion of such terms into a contract will not result in its automatic characterization as an EFC. Regard must be had to the contract as a whole to determine its character. [emphasis added]
>
> *Androscoggin*, at para. 15.

18 Analysing the COP Agreement as a whole, it is clear that it lacks the characteristics or hallmarks of an eligible financial contract. It does not fall within the definitions of "forward commodity contracts" cited by Fruman, J.A. in *Blue Range Resource Corp., Re* when the terms "certain price" and "defined price" in those definitions are read as synonymous

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with "pre-determined" or "fixed" (as I believe is the intent), rather than the broader "able to be determined" meaning submitted by Pengrowth. It is clear that the COP Agreement does not meet the fixed price requirement, but instead depends upon market pricing. In the same vein, the term of the contract is uncertain, not "defined" as required by the Joyce definition, and the volume of gas to be produced, and therefore purchased under the COP Agreement cannot be defined in any real sense. Moreover, although in a sense the COP Agreement gives the CESCA Partnership some certainty of source of supply, Pengrowth is neither obliged to produce, nor obliged to produce at any specific rate.

19 The COP Agreement, due to its nature, cannot be "marked to market", which is contrary to the characteristic noted at paragraph 46 of *Blue Range Resource Corp., Re* that "(f)orward gas contracts ... have a calculable cash equivalent". The COP Agreement, again due to its nature, has no offsetting or netting provisions. Both the *Blue Range Resource Corp., Re* and *Androscoggin Energy LLC, Re* decisions refer extensively to the importance of such netting-out provisions to the concept of eligible financial contracts: *Blue Range Resource Corp., Re* at paras. 8, 9, 13, 20, 21, 27, 30 and 53; *Androscoggin Energy LLC, Re* at para. 15. Without suggesting that such provisions are necessary in every case before a contract is found to be an eligible financial contract, or that every contract that includes such provisions must be a priori be an eligible financial contract, the importance of such provisions to the determination of whether the contract is truly a derivative or risk management instrument cannot be overemphasized.

20 The price of gas under the COP Agreement is the current market price as determined by various industry measurements, less toll charges. This is not a predetermined, fixed price that in the normal course could prudently be hedged by an off-setting contract. The respondents did not adduce evidence of any hedging of the COP Agreement. While tey certainly had no obligation to do so, the lack of such evidence tends to support the conclusion that the COP Agreement is not the type of contract that is part of the forward contract trade.

21 The history or context of the COP Agreement is also note worthy. It was entered into as a condition of the purchase and sale of the lands, an obligation upon Pengrowth that would always be burdensome to it and valuable to the Calpine applicants, given the toll "kicker" in favour of the CCNG Partnership. In that sense, the COP Agreement forms part of the consideration for the sale of the lands, and is not just a stand-alone supply contract.

22 The COP Agreement in its essential terms is analogous to the type of contract specifically exempted from the category of eligible financial contract by Fruman, J.A. at para. 50 in *Blue Range Resource Corp., Re*, a standard gas utility contract. The demand, price and quantity of gas to be purchased is based solely upon the purchaser's needs from time to time at prices that fluctuate.

23 Pengrowth and Progress also submit that the COP Agreement can be characterized as a series of spot contracts for the supply of gas, and that since spot contracts are also listed in s. 11.1(1)(h) of the *Act*, the COP Agreement qualifies as an eligible financial contract even if it is not a forward commodity contract. However, in the same way that all forward commodity contracts are not eligible financial contracts given the underlying purpose of the CCAA, neither are all spot contracts. As noted at para. 36, footnote 14 in *Blue Range Resource Corp., Re*, spot contracts contemplate only immediate, physical delivery and have no financial character. While spot contracts because of their nature are unlikely to be an important issue in a CCAA context, their inclusion in the list of types of contracts referred to in s. 11.1(1) highlights the importance of the Ontario Court of Appeal's direction to have regard to the contract as a whole when determining its character.

24 Given that the CCAA's predominate purpose as a remedial statute dictates a narrower construction of section 11.1(1) than the mere enquiry if a contract could fall within one of its "comprehensive and intimidating" list of categories, (*Blue Range Resource Corp., Re*, at para. 10), and given the ingenuity and innovation of those who deal in the derivatives market, there can be no "bright-line" definition that will determine whether a contract falls within the exception set out in the CCAA. While some contracts clearly will fall within the exception, either by their nature or by reason of existing case law, there are others that do not fit so clearly and that may necessitate a more searching analysis by CCAA parties and the court.

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25 The respondents point out that the COP Agreement contains a provision for termination upon an insolvency of CESCP, Calpine Corporation or any general partner of CESCP. They submit that this is a critical hallmark of a eligible financial contract which was notably missing in *Androscoggin Energy LLC, Re*, but is present here. The lack of a termination-upon-insolvency provision in *Androscoggin Energy LLC, Re* was a secondary ground for both the chambers and appeal courts to find that the CCAA stay should not be lifted, because the terms of the contracts in that case did not entitle the applicants to terminate except for non-payment. This finding did not make the presence or absence of a termination-upon-insolvency provision a necessary hallmark of an eligible financial contract. The presence of such a provision in this case does not outweigh the other factors to which I have referred.

26 The respondents also point out that intermediary Calpine entities are involved in the process of transporting the gas, or its equivalent volume, to an eventual end-user, and that some of these intermediaries may be characterized as risk management and gas marketing companies. That being said, they concede that a Calpine entity is likely the end-user of the gas, to the extent that this concept has meaning in the complex business of gas transportation. It is not unexpected that Calpine has risk management subsidiaries, as do most fully integrated gas and electricity companies. The characterization of the purchaser as a forward contract merchant, or not, is not determinative of the Canadian definition of eligible financial contracts, as it is in the United States. As pointed out by Rupert H. Chantrand and Robin B. Schwill in "Shades of Blue: Derivatives in Re *Blue Range Resource Corp.*, 16 B.F.L.R. 427 at p. 431, gas purchasers rarely if ever are the direct end-users of the gas they purchase, whether or not their contract provides for physical settlement.

27 There may well be criticism of a broad spectrum approach to the determination of whether a contract that is otherwise on a strict interpretation of section 11.1(1) an eligible financial contract is in reality such a contract in character and in the context of the CCAA itself. Such an approach may lead to uncertainty and a greater risk of litigation, at least until a body of case law is established. With respect to such concerns, a simple test that allows the purpose of the CCAA to be undermined with respect to certain types of commodity producers and those who deal with them is not the answer. In the absence of a more refined definition of eligible financial contract, the courts and CCAA parties will have to continue to deal with the difficult nature of the issue.

28 The last part of the analysis directed by the Court of Appeal in *Blue Range Resource Corp., Re* is the fairness of result test. While this test is not always easy to apply, it appears clearer in this situation than in many. If the respondents were allowed to terminate the COP Agreement, they would derive a benefit from being able to enter into long-term, fixed price contracts for the gas produced from the lands, or selling in the spot market without the burden of transportation costs. The Calpine applicants would derive no benefit from the termination. Although the COP Agreement has value to the Calpine applicants, no amount would be payable to the CESCA Partnership on its termination. They would lose a valuable contractual asset without compensation. Moreover, the COP Agreement was part of the consideration extracted when Calpine sold the lands to Pengrowth. Therefore, termination of the contract would deprive the Calpine applicants and their creditors of the ongoing benefit of the sale of the lands. Finally, the CESCA Partnership would lose a relatively secure supply of gas at market price.

29 On balance, termination would not meet the fairness of result test. If, however, termination of the COP Agreement remains stayed, the respondents are no worse off than other suppliers of goods and services to the Calpine applicants. The respondents have not adduced evidence that a failure to be able to terminate the contract will cause any prejudice to their hedging strategy. Calpine's creditors as a group will benefit from the value of this contractual asset.

B. Should the stay imposed by the Initial Order extend to the Calpine Energy Services Canada Partnership?

30 The initial order of December 20, 2005 grants the usual stay of proceedings sought in CCAA applications for the benefit of, not only the corporate Calpine entities that applied, but also the CESCA Partnership, CCNG Partnership and the Calpine Canadian Saltend Limited Partnership. Pengrowth and Progress apply pursuant to the come-back provision of the initial order to vary it with respect to the CESCA Partnership. The onus is on the Calpine applicants to justify the extension of the stay to the CESCA Partnership.

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31 At the time of the initial application, the Calpine applicants provided an overview of the Calpine group that made it clear that, at least from a corporate organizational prospective, the business affairs of the partnerships are significantly inter-twined with the Calpine corporations and, in some cases, with each other. Calpine submitted that the partnerships are important to the value of the Canadian operations of the Calpine group, and that their value and their key contractual assets should be preserved during the reorganization of the Canadian operations.

32 Currently, the Monitor and Calpine are working together to prepare an analysis of intercorporate debt which will enable the court and Calpine's creditors to better evaluate a proposed plan of restructuring. As indicated by Farley, J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at page 4, "(o)ne 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". While it is early in this CCAA proceeding to make the determination that this is the case with certainty, the evidence adduced so far by Calpine appears to indicate that the treatment of the Calpine group as an integrated system will result in greater value.

33 Although the CCAA does not give a court the power to stay proceedings against noncorporate entities, this court has the inherent jurisdiction to grant a stay of proceedings where it is just and convenient to do so: *Lehndorff General Partner Ltd., Re*, supra at pg. 7; *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 (Ont. Gen. Div.), at pp. 4-7.

34 It is clear that Calpine has a more than arguable case that a stay involving the Partnerships is necessary and appropriate. It is also likely, given the extremely complex corporate and debt structure of the Calpine group, the cross-border nature of these proceedings, and the evidence I have heard so far in the proceedings of the value of partnership assets, that irreparable harm may accrue to the Calpine group if the stay is not granted. The balance of convenience certainly favours a stay. I find that it is just, reasonable and appropriate in this case to exercise this court's inherent jurisdiction to stay proceedings against the Calpine partnerships.

C. Future Sales or Credit

35 Although relief under this heading was not sought in their Notice of Motion, Pengrowth and Progress have asked for a direction that they are not obliged to deliver gas to the CESCA Partnership on credit and are entitled to immediate payment for any gas delivered after the date of the initial order.

36 This application is premature, and I adjourn consideration of the issue until the parties have had time to discuss the implications of my decisions relating to the COP Agreement.

Motion granted.

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TAB 10

Clerk's Stamp:

CLERK OF THE COURT
FILED
NOV 28 2012
JUDICIAL CENTRE
OF CALGARY

COURT FILE NUMBER	1201-14864
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
ACTION	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9 AND IN THE MATTER OF SKOPE ENERGY PARTNERS, SKOPE ENERGY INC. and SKOPE ENERGY INTERNATIONAL INC.
DOCUMENT	**INITIAL ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Burnet, Duckworth & Palmer LLP 2400, 525 – 8th Avenue SW Calgary, Alberta T2P 1G1 Lawyer: Douglas S. Nishimura/Trevor Batty Phone Number: 403-260-0269/403-260-0263 Fax Number: 403-260-0332 Email Address: dsn@bdplaw.com/ tbatty@bdplaw.com File No. 68768-12

DATE ON WHICH ORDER WAS PRONOUNCED:	**November 27, 2012**
NAME OF JUSTICE WHO MADE THIS ORDER:	**Mr. Justice MacLeod**

INITIAL ORDER

UPON the application of Skope Energy Partners ("**Skope Partners**"), a partnership, and its two partners, Skope Energy Inc. ("**Skope Energy**") and Skope Energy International Inc. ("**Skope International**") (collectively, the "**Applicants**"), AND UPON having read the Originating Notice, the Affidavit of Henry Cohen, sworn November 26, 2012 (the "**Cohen Affidavit**"); AND UPON reading the consent of Ernst & Young Inc. ("**E&Y**" or the "**Monitor**") to Act as Monitor and upon noting that the

I hereby certify this to be a true copy of the original Order
Dated this 28 day of NOV, 2012
for Clerk of the Court

secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and consent to the within Order; AND UPON hearing counsel for the Applicants and counsel for Pine Cliff Energy Ltd. ("**Pine Cliff**"); IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order is hereby abridged, as necessary, and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are "affiliated debtor companies" within the meaning of the *Companies' Creditors Arrangement Act* ("**CCAA**") and the CCAA applies to both of the Applicants.

PLAN OF ARRANGEMENT

3. The Applicants and Pine Cliff shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property; and

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

I hereby certify this to be a true copy of the original ORDER

Dated this 28 day of Aug 2015

for Clerk of the Court

Clerk's stamp:

COURT FILE NUMBER	1501 09807
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COGI LIMITED PARTNERSHIP AND CANADIAN OIL & GAS INTERNATIONAL INC.**
APPLICANTS	**COGI LIMITED PARTNERSHIP AND CANADIAN OIL & GAS INTERNATIONAL INC.**
DOCUMENT	**INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Field LLP 400 - 604 1 ST SW Calgary AB T2P 1M7 Lawyer: Douglas S. Nishimura Phone Number: (403) 260-8548 Fax Number: (403) 264-7084 Email Address: dnishimura@fieldlaw.com File No. 60811-1

DATE ON WHICH ORDER WAS PRONOUNCED: Friday, August 28, 2015

NAME OF JUSTICE WHO MADE THIS ORDER: Madam Justice B.E.C. Romaine

LOCATION OF HEARING: Calgary, Alberta

UPON the Application of COGI Limited Partnership and Canadian Oil & Gas International Inc. (collectively referred to as the **"Applicants"**); **AND UPON** having read the Originating Application, the Affidavit of David Crombie sworn August 25, 2015, filed; **AND UPON** reading the consent of MNP Ltd. to act as Monitor and upon noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of

this Application and either do not oppose or alternatively consent to the within Order; **AND UPON** hearing counsel for the Applicants, the Monitor, Alberta Treasury Branches ("**ATB**"), the senior secured lender to the Applicants under a credit agreement made as of August 30, 2013 and amended and restated as of December 23, 2014 (the "**Credit Agreement**") and other interested parties; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the Application for this Order is hereby abridged and deemed good and sufficient and dispensing with service of the Application on any other parties.

APPLICATION

2. Canadian Oil & Gas International Inc. is a company to which the *Companies' Creditors Arrangement Act* "**CCAA**") applies and COGI Limited Partnership shall further enjoy the benefits of the protections provided by this Order.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

   (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property; and

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to

COURT FILE NUMBER	1501- 00570
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, *RSC 1985*, c. C-36, AS AMENDED AND IN THE MATTER OF SOUTHERN PACIFIC RESOURCE CORP. AND IN THE MATTER OF SOUTHERN PACIFIC ENERGY LTD., 1614789 ALBERTA LTD., 1717712 ALBERTA LTD., and SOUTHERN PACIFIC RESOURCE PARTNERSHIP
DOCUMENT	**CCAA INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA Phone: +1 403.267.8222 Fax: +1 403.264.5973 Attention: Howard A. Gorman Q.C. / Gunnar Benediktsson File No. 01140052-0001 **Box No. 39**

Clerk's Stamp

CLERK OF THE COURT
FILED
JAN 22 2015
JUDICIAL CENTRE OF CALGARY

DATE ON WHICH ORDER WAS PRONOUNCED: January 21, 2015

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice K.D. Yamauchi

LOCATION OF HEARING: Calgary, Alberta

UPON the application of **Southern Pacific Resource Corp, and its wholly-owned subsidiaries Southern Pacific Energy Ltd., 1614789 Alberta Ltd., 1717712 Alberta Ltd. and Southern Pacific Resource Partnership** (the "**Applicants**"); **AND UPON** having read the Originating Application, the Affidavit of Byron Lutes dated January 20th, 2015, and the Confidential Affidavit of Byron Lutes dated January 20th, 2015; **AND UPON** reading the consent of PricewaterhouseCoopers to act as Monitor and upon noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the within Order; **AND UPON** hearing counsel for the Applicants, counsel for the agent for the First Lien Term Loan, and counsel for an *ad hoc* Noteholder committee; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. Each of the corporate Applicants is a company to which the CCAA applies, and the relief set out herein is extended to apply to the partnership applicant.

PLAN OF ARRANGEMENT

3. The Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicant shall:

   (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property; and

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

COURT FILE NO.	1603-09338
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ALLARCO ENTERTAINMENT 2008 INC. AND ALLARCO ENTERTAINMENT LIMITED PARTNERSHIP
DEFENDANTS	
DOCUMENT	CCAA INITIAL ORDER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Charles P. Russell, Q.C. Telephone: (780) 482-9115 Fax: (780) 482-9102 Email: crussell@mross.com File No.: 291540

Date ON WHICH ORDER WAS PRONOUNCED:	MAY 26, 2016
NAME OF JUDGE WHO MADE THIS ORDER:	MR. JUSTICE R.P. BELZIL
LOCATION OF HEARING:	Law Courts, 1A Sir Winston Churchill Square, Edmonton, AB T5J 0R2

UPON the application of Allarco Entertainment 2008 Inc. and Allarco Entertainment Limited Partnership (collectively, the "Applicant"); **AND UPON** having read the Originating Application, the Affidavit of Donald McDonald, filed; **AND UPON** reading the consent of PricewaterhouseCoopers Inc. to act as Monitor and upon noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the within Order]; AND UPON hearing counsel for the Applicant and the proposed Monitor; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicant Allarco Entertainment 2008 Inc. is a company to which the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 as amended (the "CCAA") applies, and the Applicant Allarco Entertainment Limited Partnership is a necessary party to these proceedings.

PLAN OF ARRANGEMENT

3. The Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicant shall:

   (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property; and

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. To the extent permitted by law, the Applicant shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

   (b) the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges.

6. Except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account

TAB 11

2004 CarswellOnt 2397
Ontario Superior Court of Justice [Commercial List]

Ivaco Inc., Re

2004 CarswellOnt 2397, [2004] O.J. No. 2483, [2004] O.T.C. 499, 131 A.C.W.S. (3d) 802, 3 C.B.R. (5th) 33

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

Cumming J.

Heard: June 9, 2004
Judgment: June 10, 2004
Docket: 03-CL-5145

Counsel: M.P. Gottlieb for Applicants
Michael E. Barrack, Geoff R. Hall for QIT
E. Lamek for National Bank of Canada
Peter Howard for Monitor, Ernst & Young Inc.
D.V. MacDonald for Bank of Nova Scotia
J.T. Porter for UBS
Ken Rosenberg for United Steel Workers of Canada

Subject: Insolvency

RULING regarding arrangement under *Companies' Creditors Arrangement Act*.

Cumming J.:

The Motion

1 The moving party Applicants, Ivaco Rolling Mills Limited Partnership, comprising some eight affiliated corporations ("IRM"), seek directions from the Court in respect of the sales process for its business under the *Companies' Creditors Arrangement Act* ("*CCAA*"). The motion raises an important issue relating to the respective roles of the Monitor and Chief Restructuring Officer in that process. The Court provided a decision at the conclusion of the hearing, with reasons to follow.

Background

2 IRM is engaged in the steel manufacturing and processing business in Canada. QIT-Fer Et Titane Inc. ("QIT") is a major supplier to IRM of steel billets pursuant to a long-standing supply agreement. QIT is also a major unsecured creditor of IRM, being owed some $62 million.

3 The Applicants obtained an Initial Order under the *CCAA* September 16, 2003. A Chief Restructuring Officer ("CRO") was appointed October 24, 2003.

4 On December 11, 2003 this Court authorized IRM to pursue a dual-track restructuring process: one track is a stand-alone restructuring plan; the second track is the pursuit of a sales process.

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5 The Monitor, the CRO and the unsecured creditors of IRM have a concern that QIT seeks a way whereby it will be paid the monies owing to it by IRM outside the parameter of the *CCAA* proceeding. The record gives some force to this concern.

6 A Court Order dated March 22, 2004 authorized a limited number of prospective purchasers to submit offers for the assets of one or more of the Applicants. Some four bidders have now submitted proposals in this regard. Understandably, it is a condition of the proposals that the bidders be able to satisfy themselves as to the nature and status of the historical and existing relationship between QIT and IRM and the nature of any relationship for the future between a buyer of IRM's business and QIT.

7 The concern that has been raised by the Monitor, CRO and a number of IRM's creditors is that QIT may seek to enter into a relationship with a bidder whereby QIT could achieve some recovery of IRM's pre-filing debt of $62 million at the expense of other unsecured creditors.

8 Any purchaser of IRM requires a supply contract with QIT as there are no apparent competitors for its product sold to IRM. The concern is that QIT could insist upon a supply arrangement with the bidder at an unreasonably high price with the bidder offering an unreasonably low price for the assets of IRM. The creditors, Monitor, and the Applicants are concerned that QIT might enter into a supply arrangement with a bidder at the expense of IRM by virtue of the price for IRM's assets being lower than would otherwise be the case in a normal market transaction.

9 Meetings have been set up to take place between the bidders, the Applicants through the CRO, the Monitor and QIT with a view to determining whether any one or more bidder can achieve a supply agreement with QIT within a context of a satisfactory unconditional bid by that bidder for the assets of one or more of the Applicants.

The Issue

10 Several issues raised at the outset of the motion were settled by agreement as discussions progressed. It is not necessary to discuss these settled issues. The settled position provides that the Monitor can observe the negotiations to take place between QIT and each bidder. The settled position also provides that disclosure can be made to bidders of the existing supply agreement between IRM and QIT.

11 A single issue remained for determination by the Court at the conclusion of the hearing, being whether or not the CRO was to be part of the sales process. QIT took the position that the CRO should not be part of the process. The Applicants, the Monitor and the other major unsecured creditors all took the position that the CRO should be part of the sales process. Only QIT, supported by the United Steel Workers of Canada, took the contrary view.

12 The only support for QIT came from the United Steel Workers of Canada, being the Union representing the workers of IRM through a collective bargaining agreement. The position expressed by counsel for the Union was that the continuity of IRM's business is critical to the direct welfare of its employees and is of indirect benefit to the community at large. There is a clear public interest in the welfare of the workers. Undoubtedly, that is a correct, and important observation.

13 Thus, counsel for the Union argued further, the Court should accede to the position of QIT even though it might result in a failure to maximize the value of the IRM assets through the *CAA* proceeding. In my view, the Union's quite proper concern for the welfare of the workers cannot justify trumping the concern of creditors that they be treated fairly. Nor would it ever be in the broader notion of the public interest to allow a sales process perceived to be unfair to go forward. The public policy underlying the *CCAA* and its objectives would be undermined. Indeed, it might well be that any proposed sale would not then garner the requisite support of creditors required for approval under the *CCAA*. It might be that the business of IRM is more likely to fail, to the ultimate disadvantage of its workers, through a compromise to the integrity of the sales process. In any event, the Court could not sanction a proposed plan of compromise that was the result of an unfair process.

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14 QIT professes that if the CRO takes part in the negotiations between the bidders and QIT that this will necessarily inhibit the sales process. QIT claims this will be so because bidders will be reluctant to provide confidential information to QIT, and vice-versa, while recognizing that the CRO may then use that information to enhance an alternative stand-alone restructuring plan and consequentially advise against acceptance of the bidder's proposal.

Disposition

15 There are certain fundamentals to a *CCAA* proceeding relevant to a determination of the issue at hand. First, there cannot be a sales process whereby one unsecured creditor secures a secret benefit or advantage over the other unsecured creditors. Such a result would be the equivalent of providing a preference for that creditor. Fairness to all the creditors is a prerequisite to a satisfactory sales process. Second, the sales process must be seen to be fair. That is, there must be transparency.

16 Third, the sales process is to be determined by the Court after considering the advice of the Monitor and the position of the Applicants and their creditors. The sales process is not dictated by a supplier *qua* supplier. It may be the supplier does not wish to participate in the sales process given the nature of the process. That is for the supplier to determine in its own self-interest. In the situation at hand, QIT conceivably might say that it would rather lose its supplier relationship with IRM or a successor, to its apparent significant economic detriment, than proceed in the sales process.

17 The CRO's attendance and participation in the sales process is critical because he is the independent party who must understand all the various bids and weigh each against the possibility of a stand-alone restructuring. He must ultimately make recommendations that engender confidence as being advanced on the best information and advice possible. The CRO is an active part of the negotiations in the sales process. He is not involved as a relatively passive observer in the manner of the Monitor.

18 The sales process has been determined by the Applicants with the approval of the Court. The CRO represents the Applicants in that process. The intended sales process is one of trilateral negotiations. If QIT, IRM or any bidder wishes to discontinue such negotiations at any time that is, of course, that party's right. It is in the obvious self-interest of IRM, QIT, and any bidder to maintain the existing QIT to IRM (or successor) supply relationship. It would seem to be a win — win — win situation to come to a tripartite agreement. While no one can be ordered to enter into any new agreement every participant is required to engage in a sales process that is fair and is seen to be fair. The CRO is involved with the purpose of achieving the best result for the Applicants and a result which will be approved by the requisite number of creditors.

19 Turning to the instant situation, there are a number of Applicants with different unsecured creditors for different Applicants. It is necessary that any negotiated sale (or restructuring) take into account such complexities so that fairness is achieved for all the creditors (and is seen to be achieved.)

20 QIT proposed that the CRO would be excluded from the negotiations unless his presence was requested by either a bidder or by QIT. I disagree. In my view, the CRO has the right to attend and participate throughout the entirety of the negotiations in the sales process. In the event that a discrete issue arises in the context of a particular bidder's negotiations with QIT, such that there is disagreement as to whether the Monitor or CRO should be absent, then the further direction of the Court can be sought in the context of that specific issue. This will allow for QIT's expressed concerns for bidders in the negotiation process to be taken into account, should this be necessary. It is noted incidentally that no bidder has come forward in the hearing at hand to support QIT in respect of its expressed concerns about the sales process.

21 Absent some compelling, exceptional factor to the contrary (not seen here), in my view, the Court should accept an applicant's proposed sales process under the *CCAA*, when it has been recommended by the Monitor and is supported by the disinterested major creditors. The Court has the discretion to stipulate a variation to such a proposed sales process plan. However, the exercising of such discretion would seem appropriate in only very exceptional circumstances.

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22 An Order will issue in the form attached hereto as Annex "A". There are no costs granted to any party.

Order accordingly.

ANNEX — "A"

Court File No. 03-CL-5145

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE CUMMING

WEDNESDAY, THE 9th DAY OF JUNE, 2004

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

ORDER

THIS MOTION, made by the Applicants for directions with respect to the sales process in respect of discussions involving QIT Fer et Titane Inc. ("QIT"), was heard this day at 393 University, Toronto.

ON READING the Notice of Motion, the Tenth Report of the Monitor, Ernst & Young Inc., the Affidavit of Randall C. Benson, the Affidavit of Gary A. O'Brien, and the Supplementary Affidavit of Randall C. Benson, and on hearing the submissions of counsel for the Applicants, the Monitor, QIT, the Informal Committee of Noteholders, the United Steelworkers of America, the Bank of Nova Scotia, the National Bank of Canada and UBS Securities LLC:

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is abridged so that the motion is properly returnable today, and that any requirement for service of the Notice of Motion and of the Motion Record upon any party not served is dispensed with.

2. THIS COURT ORDERS that the sales process in respect of discussions involving QIT shall be governed by the following procedure:

(a) QIT shall have seven days from the date of this Order to meet with the bidders who have submitted final proposals in the second round of the sales process authorized by order of this court dated March 22, 2004. The Monitor and CRO shall have the right to attend and participate in all such meetings. At the conclusion of the seven day period, QIT shall inform the Monitor of those bidders with whom it is prepared to conduct further negotiations. After considering the views of QIT and the Applicants, the Monitor shall identify to the Applicants and QIT the bidders with whom further negotiations shall occur (the "Bidders"). If either QIT or the Applicants disagree with the Monitor then they may apply to the court for directions.

(b) After the Bidders have been identified, QIT shall disclose relevant portions of the long-term supply agreement dated April 15, 1999 between QIT and Ivaco Rolling Mills Limited Partnership ("IRM") which QIT claims has been terminated and which the Applicants claim has not been terminated (the "Agreement") to the Bidders, under appropriate confidentiality arrangements. QIT and the Monitor shall have discussions to determine what portions of the Agreement are relevant and to determine appropriate confidentiality arrangements. If they cannot agree, they shall seek further directions from the court. Further, if the Applicants do not agree with the determination of QIT and the Monitor as to what portions of the Agreement are relevant, they shall be at liberty to apply to the court for further directions regarding

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the disclosure of the Agreement. This order shall be without prejudice to the Applicants' position that the Agreement is not confidential and that it may disclose the entire Agreement.

(c) QIT shall then undertake negotiations with the Bidders. The Monitor and CRO shall be entitled to attend and participate in these negotiations so as to be in a position to report to the court on the outcome of them. No other parties shall participate in the negotiations, except that at the request of either QIT or a Bidder technical personnel from the Applicants will be entitled to participate in order to give necessary technical assistance. If the parties cannot agree on the appropriate participation of additional persons they shall seek further directions from the court. At the request of QIT and a Bidder, the Monitor may in its discretion absent itself from parts of negotiations which it considers best to proceed privately. If the Monitor refuses such request, QIT or the Bidder may apply to the court for directions. At the request of QIT or a Bidder, the CRO may in his discretion absent himself from parts of negotiations which he considers best to proceed privately. If the CRO refuses such request, QIT or the Bidder may apply to the court for directions.

(d) The negotiations and meetings referred to shall be conducted under appropriate confidentiality arrangements.

SCHEDULE — "A"

APPLICANTS FILING FOR CCAA

1. Ivaco Inc.

2. Ivaco Rolling Mills Inc.

3. Ifastgroupe Inc.

4. IFC (Fasteners) Inc.

5. Ifastgroupe Realty Inc.

6. Docap (1985) Corporation

7. Florida Sub One Holdings, Inc.

8. 3632610 Canada Inc.

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TAB 12

2012 ONSC 506
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 1263, 2012 ONSC 506, [2012] O.J. No. 472, 217 A.C.W.S. (3d) 12, 85 C.B.R. (5th) 169, 95 C.C.P.B. 48

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

In the Matter of a Plan of Compromise or Arrangement of
Timminco Limited and Bécancour Silicon Inc. (Applicants)

Morawetz J.

Heard: January 12, 2012
Judgment: February 2, 2012
Docket: CV-12-9539-00CL

Counsel: A.J. Taylor, M. Konyukhova, K. Esaw, for Applicants
D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada
C. Sinclair, for United Steelworkers' Union
K. Peters, for AMG Advance Metallurgical Group NV
M. Bailey, for Superintendent of Financial Services (Ontario)
S. Weisz, for FTI Consulting Canada Inc.
A. Kauffman, for Investissement Quebec

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Labour; Employment; Public

MOTION by insolvent companies for order suspending obligations to make special payments to pension plans, granting super priority to two charges, approving key employee retention plans, and sealing confidential supplement to monitor's report.

Morawetz J.:

1 This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

> Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

2 These are those reasons.

Background

3 On January 3, 2012, Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") applied for and obtained relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

4 In my endorsement of January 3, 2012, (*Timminco Ltd., Re*, 2012 ONSC 106 (Ont. S.C.J. [Commercial List])), I stated at [11]: "I am satisfied that the record establishes that the Timminco Entities are insolvent and are 'debtor companies' to which the CCAA applies".

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5 On the initial motion, the Applicants also requested an "Administration Charge" and a "Directors. and Officers. Charge" ("D&O Charge"), both of which were granted.

6 The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the "PBA") or the *Quebec Supplemental Pensions Plans Act* (the "QSPPA") (collectively, the "Encumbrances") in favour of any persons that have not been served with this application.

7 IQ had been served and did not object to the Administration Charge and the D&O Charge.

8 At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

9 The Timminco Entities now bring this motion for an order:

(a) suspending the Timminco Entities. obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administration Charge and the D&O Charge;

(c) approving key employee retention plans (the "KERPs") offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities. obligations under the KERPs (the "KERP Charge"); and

(d) sealing the confidential supplement (the "Confidential Supplement") to the First Report of FTI Consulting Canada Inc. (the "Monitor").

10 If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of $1 million;
- second, the KERP Charge (in the maximum amount of $269,000); and
- third, the D&O Charge (in the maximum amount of $400,000).

11 The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers. Union of Canada ("CEP"). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers. Union ("USW").

12 The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L.Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

13 Counsel to the Applicants identified the issues on the motion as follows:

(a) Should this court grant increased priority to the Administration Charge and the D&O Charge?

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(b) Should this court grant an order suspending the Timminco Entities. obligations to make the pension contributions with respect to the pension plans?

(c) Should this court approve the KERPs and grant the KERPs Charge?

(d) Should this court seal the Confidential Supplement?

14 It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

15 The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

14. The Timminco Entities sponsor the following three pension plans (collectively, the "**Pension Plans**"):

(a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the "**Haley Pension Plan**");

(b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the "**Bécancour Non-Union Pension Plan**"); and

(c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the "**Bécancour Union Pension Plan**").

Haley Pension Plan

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco's magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the "**PBA**"), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario ("**FSCO**") detailing the plan's funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of $5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of $3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling $4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be $1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan's actuaries, despite Timminco having made contributions of approximately $4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is $3,102,900.

Bécancour Non-Union Pension Plan

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit ("**DB**") and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

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20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was $3,239,600.

21. In 2011, normal cost contributions payable to this plan totaled approximately $9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately $41,710 per month. All contributions in respect of the plan were paid when due in accordance with the Québec *Supplemental Pension Plans Act* (the "**QSPPA**") and regulations.

Bécancour Union Pension Plan

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was $7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately $7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately $95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Boctor of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

Pension Plan Deficiencies and the Timminco Entities' CCAA Proceedings

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were $1,598,500 for 2010, $1,397,000 for 2011 and $1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to $1,728,700 for each of 2011 and 2012.

Suspension of Certain Pension Contributions

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the "**Normal Cost Contributions**"). Timminco currently owes approximately $1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately $140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the "**Pension Contributions**"),

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they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

The Position of CEP and USW

16 Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

17 In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation "would frustrate the company's ability to restructure and avoid bankruptcy". (See *Indalex Ltd., Re*, 2011 ONCA 265 (Ont. C.A.) at para. 181.)

18 Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no reason to believe that their interests will be protected through the issuance of the orders being sought.

19 Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must "wear two hats" and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex Ltd., Re*, *supra*, at para. 129.)

20 Counsel to CEP goes on to submit that, where the "two hats" gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex Ltd., Re*, *supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex Ltd., Re*, *supra*, at paras. 140 and 207.)

21 In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities. fiduciary duties to the pension plans, the super priority charge ought not to be granted.

22 Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (See *Indalex Ltd., Re*, *supra*, at paras. 179 and 189.)

23 In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

24 CEP also takes the position that the Timminco Entities. obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

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25 In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex Ltd., Re, supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

26 In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of $95,300 per month to the Bécancour Union Pension Plan, and of $47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities. request to suspend the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

27 Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

28 With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

29 Counsel to CEP's final submission is that, in the event the KERPs are approved, they should not be sealed, but rather should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

The Position of the Timminco Entities

30 At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

31 I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities. employees, pensioners, suppliers and customers.

32 As at December 31, 2011, the Timminco Entities. cash balance was approximately $2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately $5.5 million and total operating disbursements of approximately $7.7 million for net cash outflow of approximately $2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated $157,000.

33 The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two thirdparty lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility. [1]

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34 The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

35 There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

36 The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

37 Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

38 The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities. restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

39 Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

> 11.52(1) Court may order security or charge to cover certain costs — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

40 Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities. liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

41 Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

> 11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

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

(3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

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

Analysis

(i) Administration Charge and D&O Charge

42 It seems apparent that the position of the unions. is in direct conflict with the Applicants. positions.

43 The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

44 Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

45 Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

46 It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timmico Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

47 The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

48 Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corp., Re*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

49 It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge

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> and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

50 Further, as I indicated in *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

51 The Court of Appeal in *Indalex Ltd., Re* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

> The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...
>
> . . .
>
> What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

52 The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

53 Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

54 Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities. CCAA proceedings.

55 The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

56 The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater inc., Re* (2009), 57 C.B.R. (5th) 285 (C.S. Que.); *Collins & Aikman Automotive Canada Inc., Re* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc., Re* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Commercial List]).

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57 I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

58 The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

> Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

59 Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex Ltd., Re, supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

60 Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

61 The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

62 On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

63 In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corp., Re*).

64 In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

65 There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

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66 In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

67 If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

68 For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

69 I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities. obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

70 I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities. failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

71 Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

72 In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities. CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is $269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corp., Re*, [2009] O.J. No. 1044 (Ont. S.C.J. [Commercial List]), *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]), and *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]).

73 In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

74 The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

75 I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

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76 The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

77 CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

78 In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

79 In the result, the motion is granted. An order shall issue:

(a) suspending the Timminco Entities. obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administrative Charge and the D&O Charge;

(c) approving the KERPs and the grant of the KERP Charge;

(d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

Motion granted.

Footnotes

1 In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

End of Document

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TAB 13

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

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

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

Pepall J.:

Reasons for Decision

Introduction

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

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

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

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

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

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

Background Facts

(i) Financial Difficulties

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

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

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

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance

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agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

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

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

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

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

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

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

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

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

(iii) LP Entities' Response to Financial Difficulties

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

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

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

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

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

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

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

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

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

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and

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

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

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

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

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

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

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

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

Proposed Monitor

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

Proposed Order

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

(a) Threshold Issues

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

(b) Limited Partnership

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

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared

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services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

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

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

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

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

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

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

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

(D) DIP Financing

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

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

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

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

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

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

(e) Critical Suppliers

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

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

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> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

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

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities'

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business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order. [13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

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

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

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

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

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

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

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conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

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

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

(h) Management Incentive Plan and Special Arrangements

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

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

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

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

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

(i) Confidential Information

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

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

65 In *Canwest Global Communications Corp., Re* [19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

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

Application granted.

Footnotes

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

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

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3 Subject to certain assumptions and qualifications.

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

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

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

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

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

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

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

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

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

19 Supra, note 7 at para. 52.

End of Document

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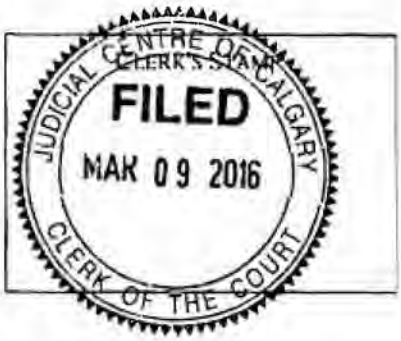
TAB 14

I hereby certify this to be a true copy of
the original order
dated this 9 day of March 2016
for Clerk of the Court



COURT FILE NUMBER	1601 – 03113
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended **AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF QUICKSILVER RESOURCES CANADA INC., 0942065 B.C. LTD. and 0942069 B.C. LTD.**
DOCUMENT	**CCAA INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500, 855 – 2nd Street S.W. Calgary, Alberta T2P 4K7 Attention: Chris Simard / Kevin Zych Tel No.: 403-298-4485 / 416-777-5738 Fax No.: 403-265-7219 / 416-863-1716 Client File No. 39944-88
DATE ON WHICH ORDER WAS PRONOUNCED:	March 8, 2016
LOCATION WHERE ORDER WAS PRONOUNCED:	Calgary
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Mr. Justice D.B. Nixon

appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on their part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

31. The Monitor, counsel to the Monitor, counsel to the Applicants, the Financial Advisor and the Agent's Advisors shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and the Agent's Advisors on a bi-weekly basis and, in addition, the Applicants are hereby authorized to pay the Monitor and counsel to the Applicants, retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

32. The Monitor and their legal counsel shall pass their accounts from time to time.

33. The Monitor, counsel to the Monitor, the Applicants' counsel, the Financial Advisor and the Agent's Advisors, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,500,000 as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 42 and 44 hereof.

LNG CO INTERIM FINANCING

34. After the date of this Order, the Applicant LNG Co is hereby authorized and empowered to obtain and borrow from Quicksilver Canada (in this context, Quicksilver Canada is referred to as the "**LNG Co Interim Lender**"), in order to finance LNG Co's working capital requirements and other general corporate purposes and capital expenditures,

COURT FILE NUMBER	1501- 00570
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, *RSC 1985*, c. C-36, AS AMENDED AND IN THE MATTER OF SOUTHERN PACIFIC RESOURCE CORP. AND IN THE MATTER OF SOUTHERN PACIFIC ENERGY LTD., 1614789 ALBERTA LTD., 1717712 ALBERTA LTD., and SOUTHERN PACIFIC RESOURCE PARTNERSHIP
DOCUMENT	**CCAA INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA Phone: +1 403.267.8222 Fax: +1 403.264.5973 Attention: Howard A. Gorman Q.C. / Gunnar Benediktsson File No. 01140052-0001 **Box No. 39**

Clerk's Stamp

CLERK OF THE COURT
FILED
JAN 22 2015
JUDICIAL CENTRE OF CALGARY

DATE ON WHICH ORDER WAS PRONOUNCED:	January 21, 2015
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Mr. Justice K.D. Yamauchi
LOCATION OF HEARING:	Calgary, Alberta

27. The Monitor shall provide any creditor of the Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

28. The Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

29. The Monitor, counsel to the Monitor, counsel to the Applicant and counsel to the Board of Directors shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a bi-weekly basis and, in addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicant, retainers in the respective amounts of **$250,000.00**, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

30. The Monitor and its legal counsel shall pass their accounts from time to time.

31. The Monitor, counsel to the Monitor, if any, the Applicant's counsel, and the Financial Advisor, as security for the professional fees, disbursements and indemnities incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of **$3,000,000.00**, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor, such counsel, and the Financial Advisor both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 35 and 37 hereof.

INTERIM FINANCING

32. The Applicants reserve their right to reapply to this Court for a priority Interim Financing facility should it deem it necessary to do so.

CLERK'S STAMP

JUDICIAL CENTRE OF CALGARY
FILED
APR 04 2016
CLERK OF THE COURT

FORM 49
[RULE 13.19]

COURT FILE NUMBER	1601 – 03143
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

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

I hereby certify this to be a true copy of the original Order
Dated this 4 day of April 16
for Clerk of the Court

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF SANJEL CORPORATION, SANJEL CANADA LTD., TERRACOR GROUP LTD., SURETECH GROUP LTD., SURETECH COMPLETIONS CANADA LTD., SANJEL ENERGY SERVICES (USA) INC., SANJEL (USA) INC., SURETECH COMPLETIONS (USA) INC., SANJEL CAPITAL (USA) INC., TERRACOR (USA) INC., TERRACOR RESOURCES (USA) INC., TERRACOR LOGISTICS (USA) INC., SANJEL MIDDLE EAST LTD., SANJEL LATIN AMERICA LIMITED and SANJEL ENERGY SERVICES DMCC

DOCUMENT **CCAA INITIAL ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

BENNETT JONES LLP
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7

Attention: Chris Simard
Tel No.: 403-298-4485
Fax No.: 403-265-7219
Client File No. 22681.375

DATE ON WHICH ORDER WAS PRONOUNCED: April 4, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mme. Justice B. E. Romaine

37. The Monitor, counsel to the Monitor, the CRO, the Applicants' counsel, EY, and counsel to the Syndicate as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,000,000 as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 48 and 50 hereof.

ENHANCED POWERS OF THE MONITOR

38. In addition to and in no way derogating from the powers and duties of the Monitor as otherwise set out in this Initial Order and in the CCAA, the Monitor is hereby granted the following enhanced powers, to be exercised in its discretion as and when it deems appropriate, after giving one day's written notice of such intention to the Syndicate, the CRO and the Applicants, which notice may be waived in writing by the Syndicate, the CRO and the Applicants:

(a) to exercise the restructuring powers set out in paragraph 11(d) of this Order, including filing a Plan;

(b) to disclaim or resiliate agreements to which the Applicants are parties, pursuant to s. 32 of the CCAA without the agreement or consent of the Applicants, including, without limitation, taking all ancillary and necessary steps in relation to such disclaimers or resiliations;

(c) to continue, implement, conduct and complete the SISP (as defined in the Crilly Affidavit) without the agreement or consent of the Applicants, including without limitation taking all ancillary and necessary steps in relation to the SISP such as evaluating offers, negotiating and executing agreements on behalf of the Applicants and applying for court orders related to the SISP;

TAB 15

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

Pepall J.:

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.* [1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./ Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

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3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act* [2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian

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television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility

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and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are

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able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*[5]; *Smurfit-Stone Container Canada Inc., Re*[6]; and *Calpine Canada Energy Ltd, Re*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*[8] and *Global Light Telecommunications Inc., Re*[9]

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in

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the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

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34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

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40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants'

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request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re* [10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances

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and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re* [11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)* [12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section

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106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

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

2 R.S.C. 1985, c.C.44.

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

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

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8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522 (S.C.C.).

End of Document

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TAB 16

2013 ONSC 2223
Ontario Superior Court of Justice [Commercial List]

iMarketing Solutions Group Inc., Re

2013 CarswellOnt 4465, 2013 ONSC 2223, 227 A.C.W.S. (3d) 314

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

And In the Matter of a Plan of Compromise or Arrangement of iMarketing Solutions Group Inc. and the Companies referred to in Schedule "A" (the "Applicants")

Newbould J.

Heard: April 12, 2012
Judgment: April 15, 2013
Docket: CV-13-10067-00CL

Counsel: Robert I. Thornton, Danny M. Nunes for Applicants
Matthew P. Gottlieb for Duff & Phelps Canada Restructuring Inc.
Virginie Gauthier, Daniel Pearlman for Shotgun Fund Limited Partnership III
Clifton P. Prophet for Canadian Imperial Bank of Commerce

Subject: Insolvency; Civil Practice and Procedure

APPLICATION by insolvent corporation and subsidiaries for protection under *Companies' Creditors Arrangement Act*.

Newbould J.:

1 iMarketing Solutions Group Inc. ("IMSG") and a number of subsidiary corporations applied on April 12, 2002 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

2 Prior to December 3, 2012, IMSG was a publicly traded company listed on the TSX Venture Exchange. On that date, IMSG voluntarily delisted its common shares from the TSX-V and began listing its common shares on the Canadian National Stock Exchange.

3 IMSG is the direct or indirect parent company of twenty-two subsidiaries ("IMSG Group"). Seventeen of the subsidiaries along with IMSG comprise the Applicants in these proceedings.

4 The applicants are one of the largest participants in the telemarketing and fundraising industry in North America. The applicants provide direct marketing solutions for not-for-profit organizations, political organizations and professional associations. The IMSG Group's core businesses include: (i) tele-fundraising and outreach; (ii) data development; (iii) direct mail fundraising and outreach; (iv) data management; (v) publishing; (vi) social media; (vii) secure caging (an industry term for the process or act of collecting donations, processing donor mail and depositing contributions to customer accounts); and (viii) marketing list rentals (the renting of donor lists to third parties in exchange for a fee).

5 The IMSG Group's Canadian operations are located in the provinces of Ontario, British Columbia, Alberta, Manitoba, Quebec and New Brunswick. The IMSG Group's U.S. operations are located in the states of Wisconsin, Colorado, Pennsylvania, Missouri, Virginia, New Mexico and Florida. For the nine months ended September 30, 2012, the IMSG Group's Canadian operations accounted for approximately 57% of the applicants' gross margin while U.S.

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operations accounted for the remaining 43%. In 2013, the applicants' Canadian operations were expected to account for 53% of the total gross margin.

6 As at April 5, 2013, the applicants employed approximately 1,143 employees (662 active employees and 481 on layoff) almost evenly divided between Canada and the U.S. The applicants' employees are not unionized and there are no pension plans in place.

7 The applicants have a $2 million loan facility with CIBC made to The Responsive Marketing Group Inc. ("RMG"), which is one of the applicants. That loan has been fully advanced. It is secured against the assets of IRMG and guaranteed by other subsidiaries.

8 On October 12, 2012, IMSG obtained bridge loan financing in the amount of $1.5 million. The bridge loan was provided by Shotgun Fund Limited Partnership III ("SF LP III") controlled by, among others, Michael Davis, a director and officer of IMSG. The purpose of the bridge loan was to address short-term liquidity issues and to improve IMSG's financial position. The net proceeds from the bridge loan were used for general working capital and operational restructuring purposes.

9 On December 4, 2012, IMSG completed a private placement offering of a secured convertible promissory note. The gross proceeds from the offering were $3.5 million and the sole subscriber was SF LP III. The convertible note has a maturity date of December 4, 2015. IMSG granted SF LP III a security interest in all of its assets. The amount owing under the convertible promissory note is approximately $3.8 million. The proceeds from the offering were used to repay the bridge loan and to fund the applicants' general working capital requirements.

10 As at April 5, 2013, the most significant liabilities of the applicants, other than their indebtedness to CIBC, approximately $2.0 million, and SF LP III, approximately $3.8 million, are as follows:

	($millions)
Unpaid Statutory Withholdings	$0.2
Tax Authorities	$1.2
Trade Creditors	$4.3
Estimated Severance Obligations (as at April 5, 2013)	$0.9
Estimated Future Obligations Relating to Abandoned Facilities	$0.8
Rental Arrears	*$0.4*
	$7.8

Insolvency and Stay

11 The evidentiary record establishes that the IMSG Group is facing an intense liquidity challenge such that it cannot pay all liabilities as they become due, which liabilities include ongoing operating costs, as well as legacy costs incurred as a result of previous operational restructuring initiatives already undertaken. These initiatives were implemented with a view to returning the business of the IMSG Group to profitability.

12 The record also establishes that without an immediate stay of proceedings, the applicants' businesses cannot survive. The applicants are under increasing pressure from their creditors to pay outstanding accounts, including certain suppliers of goods and services that are critical to the ongoing operation of the applicants' businesses, and under constant threat from their landlords and critical suppliers who threaten to take enforcement actions to bar the applicants from their business premises and to discontinue the supply of goods and services necessary for the applicants to operate their businesses.

13 While the IMSG Group has historically been profitable, generating positive net income of approximately $2.3 million and $232,000 as recently as the fiscal years ending December 31, 2009 and 2010, over the most recent twenty-four month period it has generally incurred significant losses and, at present, the applicants lack sufficient liquidity

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to continue operating their businesses. For the three months ended September 30, 2012, the IMSG Group generated a loss of $3.3 million and negative EBITDA from continuing operations of $2.4 million. For the nine months ending September 30, 2012, the loss generated was $4.7 million and the negative EBITDA from continuing operations was $3.0 million. Although the IMSG Group has not finalized its audited financial statements for the year ending December 31, 2012, it expects to report continued material losses from ongoing operations as well as additional restructuring costs and losses from discontinued operations. For the first quarter of 2013, it expects that the IMSG Group will continue to show negative EBITDA and net losses, although the magnitude of such losses is expected to be materially lower than the quarterly results in 2012. It is expected that the IMSG Group will generate positive cash flow from ongoing operations shortly following the commencement of these proceedings.

14 Over the past two years, the applicants have taken steps to address the challenges facing them by implementing a number of initiatives to lower operating costs through process efficiencies and higher productivity. They commenced the implementation of a restructuring plan that was intended to transform their business and called for significant changes to the applicants' corporate structure, operations and management to bring these together under a single operating model. The applicants' restructuring plan has taken longer than expected to implement and anticipated operating results have not been achieved, resulting in the applicants' costs being higher than expected and savings being delayed.

15 I am satisfied from the record, including the report from the proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made. The applicants request that the stay apply as well to limited partnerships which form part of their business in light of the integrated nature of the business. Although the CCAA applies to corporations, there is authority that the stay may in appropriate circumstances be ordered to apply to limited partnership interests, particularly where the business interests of the applicant corporations are intertwined with the limited partnerships. See *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]). Such is the case with the applicants, and the stay requested is ordered.

16 It is to be noted that CIBC is subject to the stay. There is an issue, however, between the applicants and CIBC that needs to be addressed quickly and I understand that the parties are dealing with it. That has a do with whether the CIBC loan, once reduced by payments being made directly to CIBC by customers of one or more of the applicants, is to be increased to $2 million. I understand that the applicants do not intend to compromise the rights of CIBC, including its security and collateral position, as result the proceedings and that the parties are working towards a mutually acceptable arrangement to the effect that intention. In the circumstances CIBC has reserved its rights concerning the Initial Order, which it has not opposed based upon this understanding.

DIP financing

17 The record indicates that the IMSG Group will require additional emergency funding in order to implement this restructuring. SF LP III has agreed to provide debtor in possession financing to the applicants up to the aggregate amount of $1.0 million, subject to the applicants obtaining an Initial Order in this proceeding on the terms requested granting the DIP Lender a charge over all of the property, assets and undertaking of the applicants in priority to all creditors except CIBC. The cash flow forecasts for the period April 15, 2013 to August 2, 2013 indicate that in the absence of the DIP financing, the applicants have insufficient cash to continue to operate and operations will cease immediately. This is the view of both the applicants and the proposed Monitor.

18 After considering the factors set out in section 11.2 (4) of the CCAA, it appears that the DIP financing and charge appears reasonable and they are approved.

Administration Charge

19 The applicants propose an Administration Charge of $300,000 to secure payment of the fees and expenses of the applicants' counsel, the Monitor and its counsel and the CRO and its counsel. The proposed Monitor is of the view that

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the proposed charge is reasonable. It appears to me relatively modest and is approved. This charge will rank after the CIBC security and before the other charges approved in the Initial Order, including the DIP charge.

Director's charge

20 The applicants also propose a Directors' Charge of $1.3 million for any liabilities the directors and officers may incur after the commencement of these proceedings. The applicants estimate that the post-filing priority payables in respect of which the directors would have personal liability are approximately $1.3 million based on payroll, payroll remittances, vacation pay and sales taxes and determination or severance payments that may be owing. The proposed Monitor has reviewed the calculations and is of the view that the Directors' Charge is reasonable in relation to the quantum of the estimated potential liability. The Directors' Charge is approved.

Chief Restructuring Officer

21 The applicants propose that Mr. Upkar Arora CA, ICD.D, co-founder and Managing Director of Illumina, be appointed Chief Restructuring Officer. Illumina is an independent financial advisory firm that provides financial, operational and strategic advisory services to mid-sized businesses. IMSG retained Mr. Arora on September 24, 2012 as interim CFO upon the resignation of IMSG's previous CFO. It was expected that Mr. Arora's appointment would last for three months during which time he would, among other things, assist IMSG's board of directors in selecting a new CFO. Mr. Arora has remained in the position of interim CFO and, in that capacity, currently oversees the financial affairs of the applicants both in Canada and the U.S.

22 Mr. Arora has intimate knowledge of the Applicants' operations, financial status and efforts that have been undertaken by the applicants to restructure their business. The applicants believe that Mr. Arora's knowledge and experience will be an asset to them and will be of great assistance to the proposed Monitor in guiding the applicants through this restructuring process. A fee of $75,000 per month has been agreed, plus a success fee on terms to be negotiated subject to court approval. The proposed Monitor believes that the monthly fee for Mr. Arora is reasonable and that absent his retention, professional fees would increase by at least the monthly fee payable to him. Mr. Arora is appointed as CRO and as an officer of the Court on the terms agreed between the applicants and Mr. Arora.

Cash management system

23 The IMSG Group operates an extensive centralized cash management system integrated among the various entities and centrally managed from IMSG's head office in Toronto. Cash is transferred daily, as needed, among some 120 bank accounts of the operating entities at multiple financial institutions its uses in Canada and the U.S. as well as customer accounts controlled by the IMSG Group. The applicants wish to continue this method of financing the various businesses on a daily basis. The proposed Monitor believes that it is necessary that this existing cash management system be continued as doing so would avoid (i) delays in accounts receivable collections and accounts payable payments until new bank and credit card accounts were established; (ii) a distraction of management's limited resources and (iii) payroll payment disruptions. It would also reduce administrative costs and expenses. The proposed Monitor points out that the cash flow projections do not consider the impact of cash flow delays and such delays would result in a need for increased funding which is not presently available.

24 The Initial Order will contain a provision that subject to the terms of the DIP facility, IMSG is authorized to make loans, advances or transfers of funds to any of the other IMSG Group entities in accordance with the cash management system and the DIP facility and the subsidiaries are authorized to repay funds previously advanced to them by IMSG from time to time in accordance with the cash management system and DIP facility. As well, there shall be an Inter-Company Charge on the property of IMSG Group.

Critical Suppliers and customers

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25 The applicants have identified certain critical suppliers who provide goods and services critical to the applicants' ongoing operations. As well there are customers who to whom remittances were not made as required. The applicants have proposed in the Initial Order authority to make payments to these customers and critical suppliers for pre-filing indebtedness in consultation with the Monitor as it is believed that without making such payments their businesses cannot survive. The monitor believes the payments are appropriate and necessary for a number of reasons, including the fact that customers regularly engage on a per-contract or per-service basis and would be expected to terminate or not renew their contracts if payment obligations to them were not honoured. The cash flow projections indicate that the applicants will have sufficient liquidity to make these payments over the next several weeks.

26 The authorization to pay pre-filing amounts to critical suppliers is codified in section 11.4 of the CCAA. Pursuant to this section, the Court has the discretion to:

> (a) declare a person to be a critical supplier, if it is satisfied the person is a supplier of goods or services to the company and the goods or services are critical to the company's continued operations (s. 11.4(1));
>
> (b) make an order requiring the "critical supplier" to supply any goods or services specified by the Court to the company on any terms and conditions that are consistent with the supply relationship or the Court considers appropriate (s. 11.4(2)).

27 The rationale for the enactment of section 11.4 is explained in the Industry Canada Clause by Clause Briefing Book as follows:

> Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

28 The critical suppliers have been identified in the affidavit material of the applicants.

29 It is appropriate that the Initial Order contain a provision that the IMSG Group will be permitted to make such pre-filing payments owing to customers and to suppliers as determined by the IMSG Group in consultation with the Monitor to be necessary to permit them to proceed with the restructuring.

Chapter 15 proceedings

30 IMSG Group intends to commence proceedings under Chapter 15 of the U.S. *Bankruptcy Code* pursuant to which they will seek to have these CCAA proceedings recognized as a foreign main proceeding and the Initial Order enforced in the US. IMSG will be named as the Foreign Representative in respect of the application. This would appear appropriate in light of the cross-border scope of the business, assets and operations of the applicants. The applicants are of the view that the center of main interests of the IMSG Group is in Ontario for a number of reasons set out in paragraph 21 of the affidavit of Mr. Langhorne. The proposed Monitor shares that view. They may well be correct, but it must be recognized that it is the function of the receiving court in the United States to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15. See *Cinram International Inc., Re* (2012), 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]), per Morawetz J.

31 The Initial Order signed on April 12, 2013 contains the provisions discussed in this endorsement.

Application granted.

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TAB 17

2009 CarswellOnt 4699
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2009 CarswellOnt 4699, [2009] O.J. No. 3344, 179 A.C.W.S. (3d) 517, 57 C.B.R. (5th) 128

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (Applicants)

Newbould J.

Heard: August 6, 2009
Judgment: August 11, 2009
Docket: CV-09-8247-00CL

Counsel: A. Duncan Grace for GE Canada Leasing Services Company
Daniel R. Dowdall, Jane O. Dietrich for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP
Sean Dunphy, Katherine Mah for Monitor, Ernst & Young Inc.
Kevin McElcheran for Toronto-Dominion Bank
Stuart Brotman for Independent Directors

Subject: Insolvency

MOTION by creditor for order to delete employee retention plan provisions in initial order.

Newbould J.:

1 KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

2 GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

3 The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members

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of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

4 The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

5 Grant Forest has total funded debt obligations of approximately $550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately $400 million. The second lien lenders are owed approximately $150 million.

6 Grant Forest has unsecured trade creditors of over $4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. $6.5 million.

7 The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately $50 million for debt financing provided to the business.

Analysis

8 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

9 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

10 I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

11 The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view

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that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

12 Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

13 It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.). In that case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from *Warehouse Drug Store Ltd., Re*, [2006] O.J. No. 3416 (Ont. S.C.J.), that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

14 I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Nortel Networks Corp., Re*, [2009] O.J. No. 1188 (Ont. S.C.J. [Commercial List]), Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

15 In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

16 It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the

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event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

17 It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

> When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

20 The first lien security holders owed approximately $400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

21 With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately $400 million are consenting and the second lien lenders owed approximately $150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately $50 million, supports the KERP provisions for Mr. Lynch.

22 In his work, *Canadian Insolvency in Canada*, *supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement

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should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

23 In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

24 I have been referred to the case of *MEI Computer Technology Group Inc., Re* (2005), 19 C.B.R. (5th) 257 (C.S. Que.), a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

25 The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

Motion dismissed.

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TAB 18