

Court File No.

Ontario
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE
INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT
SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM
COMMERCE LABS INC., INITIUM TRADING AND SOURCING
CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA
INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711
CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

APPLICANTS

BOOK OF AUTHORITIES OF THE APPLICANTS

June 21, 2017

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Tab 1

1992 CarswellOnt 185
Ontario Court of Justice (General Division)

Campeau v. Olympia & York Developments Ltd.

1992 CarswellOnt 185, [1992] O.J. No. 1946, 14 C.B.R. (3d) 303,
14 C.P.C. (3d) 339, 35 A.C.W.S. (3d) 679, 3 W.D.C.P. (2d) 575

**ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and
ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS
LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA**

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle*, for the plaintiffs.

Peter F. C. Howard, for National Bank of Canada.

Yoine Goldstein, for Olympia & York Development Limited and 857408 Ontario Inc.

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

Motion to lift stay under Companies' Creditors Arrangement Act; Motion for stay under Courts of Justice Act.

R.A. Blair J:

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

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

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

Background and Overview

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

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

The Claim against the Olympia & York Defendants

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

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

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

The Claim against National Bank of Canada

8 Similar damages, in the amount of \$1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

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

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

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

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

The Power to Stay

14 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.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 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:

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

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

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

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

17 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.

18 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), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 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)

20 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.

21 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. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

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

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's

general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

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

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

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim*, supra.

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

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

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

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

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Tab 2

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

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

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

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

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

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

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

Deschamps J.:

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

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

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

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

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

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

2. Issues

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

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

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

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

3. Analysis

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

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

3.1 Purpose and Scope of Insolvency Law

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

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

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

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

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

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

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

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

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

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

and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

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

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

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

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

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

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

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

3.2 GST Deemed Trust Under the CCAA

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

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

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

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

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

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

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

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the

time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna

in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

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

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

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

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

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

Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

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

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

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

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

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

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

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

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

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

Fish J. (concurring):

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

227 (4) Trust for moneys deducted — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Extension of trust — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

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

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

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

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

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property

held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 *BCCA* 205, 98 *B.C.L.R.* (4th) 242, [2009] *G.S.T.C.* 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

Abella J. (dissenting):

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11¹ of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails;

and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

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

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the *CCAA*, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the *CCAA*.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

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

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

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

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

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

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

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

- (iii) six months following the court sanction of a compromise or arrangement,
- (iv) the default by the company on any term of a compromise or arrangement, or
- (v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

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

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

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

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

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

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

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

(3) Burden of proof on application — The court shall not make the order unless

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

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

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that

subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

- 1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
- 2 The amendments did not come into force until September 18, 2009.

Tab 3

1988 CarswellAlta 318
Alberta Court of Queen's Bench

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.

1988 CarswellAlta 318, [1989] A.W.L.D. 056, [1989] C.L.D. 154, 12
A.C.W.S. (3d) 334, 63 Alta. L.R. (2d) 361, 72 C.B.R. (N.S.) 1, 92 A.R. 81

**NORCEN ENERGY RESOURCES LIMITED and PRAIRIE OIL
ROYALTIES COMPANY LTD. v. OAKWOOD PETROLEUMS LTD.**

Forsyth J.

Judgment: November 17, 1988
Docket: Calgary No. 8801-14453

Counsel: *J.J. Marshall* and *J.A. Legge*, for Norcen Energy Resources Ltd. and Prairie Oil Royalties Co.
H.L. Kushner, for Attorney General of Alberta.
E.D. Tavender, Q.C., D. Lloyd and *R. Wigham*, for Oakwood Petroleums Ltd.
K.N. Lambrecht, for Attorney General of Canada.
A.L. Friend, for United Energy Inc.
B.D. Newton and *B. Tait*, for Bank of Montreal.
B. O'Leary, for Royal Bank of Canada.
J.L. Ircandia, for Hongkong Bank of Canada and Bank of America, Canada.

Subject: Corporate and Commercial; Insolvency

Application to vary order staying proceedings against respondent pursuant to s. 11 of Companies' Creditors Arrangement Act.

Forsyth J.:

I. The Facts

1 On 7th and 8th November 1988 I heard an application by Norcen Energy Resources Limited ("Norcen") regarding an order that I made on 22nd September 1988, under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 ("C.C.A.A."). It is necessary that I set out the background and the terms of that order in some detail.

2 The order of 22nd September 1988 was granted declaring that Oakwood Petroleums Ltd. ("Oakwood") is a company to which the C.C.A.A. applies. As might be expected, Oakwood asked that a term of the order be a provision that stays proceedings by parties against it until it has had time to formulate a plan of compromise under the C.C.A.A. The exact term at issue in the order is:

3 4. AND THIS COURT FURTHER ORDERS that save and except for the matters referred to in paragraph 11 herein:

4 (a) all proceedings taken or that might be taken by any of Oakwood's creditors under the *Bankruptcy Act*, R.S.C. 1970, c. B-3 and the *Winding-Up Act*, R.S.C. 1970, c. W-10, or either of them shall be stayed until further Order of this Court,

5 (b) that all further proceedings in any action, suit or proceeding against Oakwood, its assets, property, and undertaking shall be restrained until further Order of this Court,

6 (c) that no proceedings shall be proceeded with or commenced against Oakwood, its assets, property and undertaking except with leave of this Court with notice to Oakwood and subject to such terms as this Court may impose, and without limitation to any of the foregoing,

7 i) all persons are enjoined and restrained from realizing upon or otherwise dealing with any security held by that person on the property, assets and undertaking of Oakwood until further Order of this Court, and

8 ii) *all persons, having rights under the terms of any operating agreements with Oakwood are enjoined and restrained from taking proceedings to remove Oakwood as operator of such petroleum and natural gas properties and facilities, notwithstanding any provision contained in the said Agreements to the contrary, until further Order of this Court.* [emphasis added]

9 Paragraph 11, which is referred to in para. 4, is irrelevant with respect to this application. It should be noted that Norcen was not present or represented at the C.C.A.A. application by Oakwood.

10 The crux of the present dispute before me focuses on cl. 4(c)(ii) of the previous passage. Norcen is involved in 20 oil and gas producing properties in the Hays area of Alberta in which Oakwood also has a working interest and is the operator. The terms under which Oakwood performs as operator are contained in the standard Canadian Association of Petroleum Landmen Operating Agreement ("CAPL Agreement"). Some of the properties are covered by agreements under the 1974 CAPL Agreement form while others are dealt with under the 1981 form of the CAPL Agreement. For the purposes of this application, nothing turns on that distinction.

11 Clause 202 of both forms of the CAPL Agreement deals with the replacement of the operator in certain situations. The two versions are substantially similar and it will suffice to set out a portion of the 1981 wording of cl. 202:

202 Replacement Of Operator —

12 (a) The Operator shall be replaced immediately and another Operator appointed pursuant to Clause 206, in any one of the following circumstances:

13 (i) If the Operator becomes *bankrupt or insolvent or commits or suffers any act of bankruptcy or insolvency*, or makes any assignment for the benefit of creditors, or causes any judgement to be registered against its participating interest.

14 (ii) If the Operator assigns or purports or attempts to assign its general powers and responsibilities of supervision and management as Operator hereunder. [emphasis added]

15 Norcen's application in the present matter is an attempt to enforce cl. 202 of the CAPL Agreement and have itself appointed as operator of the 20 wells in the Hays area. A notice of motion dated 4th October 1988 was filed by Norcen, in which the following relief was sought:

16 (a) varying subparagraph 4(c)(ii) of the Order granted and entered in these proceedings the 22nd day of September, 1988 in order to permit the removal of Oakwood Petroleum Ltd. as operator of certain oil and gas properties as described in the Affidavit of Wayne Newhouse, filed herein;

17 (b) granting the Applicants leave to file an Originating Notice of Motion in the form attached as Exhibit "D" to the Affidavit of Wayne Newhouse, filed herein;

18 (c) abridging the time for service of the said Originating Notice of Motion and granting the Applicants leave to proceed with the applications set out therein before the Honourable Mr. Justice G.R. Forsyth immediately after the within applications have been heard and determined; and

19 (d) granting the Applicants costs of the within application.

20 The basic effect is that leave to take appropriate steps to remove Oakwood as operator is sought and the originating notice of motion referred to above is designed to secure a declaratory order that Oakwood is not entitled to remain as operator.

21 Oakwood is not in default on any payments due to Norcen under the operating agreement as a result of carrying on operations for approximately two years under a mixed trust fund account, nor is Oakwood indebted to its trade creditors with respect to its operatorships. I would note that there is an ongoing action between the two parties regarding Norcen's entitlement to the benefits of a settlement wherein Oakwood succeeded in arriving at a compromise of some of its debts with its trade creditors. However, the act of default relied on by Norcen for the purpose of this application is Oakwood's alleged insolvency resulting in the bringing into play of cl. 202(a)(i) of the CAPL Agreement.

II. The Arguments

22 The starting point of Norcen's argument is that it is urged that the mere fact that Oakwood has been found to be a company to which the C.C.A.A. applies means that it is insolvent within the meaning of the CAPL Agreement. As a result, it is argued that cl. 202 is triggered and that Oakwood either has automatically been removed as operator of the Hays properties, or in the alternative, it is now liable to be removed.

23 From that premise, Norcen argues that, firstly, if removal has already occurred, then a "proceeding" is not required to remove Oakwood as operator and, consequently, it merely seeks declaratory relief to that effect. If the removal has not occurred automatically, Norcen further submits that the current stay in place is not of a type that falls within the ambit of the provisions of s. 11 of the C.C.A.A. Accordingly, the argument follows that I did not have the jurisdiction to include cl. 4(c)(ii) in my order of 22nd September 1988. In the further alternative, it is argued that if the C.C.A.A. purports to confer on me the jurisdiction to stay Norcen's attempts to remove Oakwood as operator, then s. 11 is unconstitutional in a division of powers sense as a federal intrusion into the provincial legislative field of property and civil rights under s. 92(13) of the Constitution Act, 1867. Of course, the arguments and their ramifications were flushed out in much greater detail than this, as will become apparent in my resolution of the issues, but I believe that I have fairly set out their basic propositions.

24 In opposition to Norcen's application Oakwood is supported by certain of its lenders and creditors that would be involved in any proposed reorganization plan under the C.C.A.A. Submissions were made by Oakwood, the Bank of Montreal and the Royal Bank of Canada and many of Oakwood's other lenders went on the record as opposing Norcen's application. Varied attacks on the merits of the application were made.

25 Oakwood's submissions, as well as those of the lenders supporting its position, focused on an argument suggesting that the purpose of the C.C.A.A. is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations, including those involving non-creditor third parties. It is argued that the federal insolvency legislative power under s. 91(21) of the Constitution Act, 1867, includes the power to interfere with contractual relations and consequently, it is submitted, no constitutional issue arises.

26 Supporting lenders also focused on the meaning of insolvency under the CAPL Agreement, arguing that Oakwood is commercially solvent with respect to day-to-day matters and that it is only commercial insolvency which is contemplated by the agreement.

27 Finally, helpful submissions were made by both the Attorney General of Canada and the Attorney General of Alberta. These submissions were of assistance in delineating the constitutional issue before the court. The provincial position supported a narrow reading of s. 11 of the C.C.A.A. and, as a result, the Attorney General of Alberta supported Norcen's interpretation while federal submissions were supportive of Oakwood's construction of s. 11.

III The Issues

28 It is necessary that I begin by dealing with preliminary issues under the CAPL Agreement to determine whether the circumstances surrounding this application are such that cl. 202 is applicable. In effect I must deal with the question of whether Oakwood is insolvent in the context of this particular application. If I arrive at the conclusion that Oakwood is insolvent, I must then consider the parties' statutory construction and constitutional arguments.

29 In that regard, this application raises a most interesting problem that is analogous to the traditional "chicken or the egg" scenario. It must be decided whether one should approach the constitutional issue or the statutory construction issue first. In my opinion, the constitutional issue cannot be approached in a vacuum. It can be helpful to use the constitutional issue as an aid to statutory construction in borderline cases, but it must first be decided whether we are dealing with such a case. If the meaning of s. 11 of the C.C.A.A. can be determined without resort to constitutional aids to construction, that meaning must then be scrutinized for its constitutional validity. Embarking on a constitutional inquiry too early in the analysis clouds the issues and detracts from the proper construction of the statute.

30 Section 11 of the C.C.A.A. provides as follows:

31 11. Notwithstanding anything in the *Bankruptcy Act* or in 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 such notice to any other person, or without notice as it may see fit, make an order staying until such time as the court may prescribe or until further order all proceedings taken or that might be taken in respect of such company under the *Bankruptcy Act* and the *Winding-up Act* or either of them, and the court may restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit, and the court may also 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.

32 I accordingly must embark on a two-step analysis in considering the section. The first step involves a rigorous construction of s. 11. If the section has a narrow meaning as contended by Norcen, it follows that I did not have the jurisdiction to include cl. 4(c)(ii) in my order of 22nd September 1988 because s. 11 of the C.C.A.A. would then entitle me only to interfere with debtor and creditor relationships in the terms of my stay order. Norcen, as a non-creditor, would then be free to take whatever steps it feels are necessary to have Oakwood removed as operator if Oakwood is insolvent within the terms of the CAPL Agreement. Of course, it is possible that equitable relief of some sort might be available to Oakwood in such circumstances but that issue was not argued directly before me in this application. If the section, properly construed, is to be given a wider meaning, then Norcen would be stayed in its attempts to have Oakwood removed as operator as a result of my order of 22nd September 1988. This interpretation would involve my finding that s. 11 of the C.C.A.A. is broad enough in its terms to affect the contractual rights of non-creditors. In that case, it would then be necessary to carefully consider the constitutional validity of s. 11 of the C.C.A.A. in that it would purport to affect the contractual rights of parties that are not creditors of Oakwood. That analysis constitutes the second step in the inquiry.

33 Only if I cannot arrive at a clear meaning for s. 11 will the presumption of constitutionality enter into the picture. If that is the case, I may then turn to the so-called "presumption of constitutionality" to assist me in my interpretive task: see *Duplain v. Cameron*, [1961] S.C.R. 693 at 709, 36 W.W.R. 490, 30 D.L.R. (2d) 348 [Sask.]. I hesitate, however, to rely on that assistance too early in my interpretation of s. 11 lest it taint the proper meaning of the words of the section on their face.

34 With that approach in mind, I now turn to consider the issues before me.

IV. Resolution Of The Issues

A. Preliminary issues under the CAPL agreement

35 I begin with the broad issue of whether a default has occurred under the terms of the CAPL Agreement which might entitle Norcen to relief.

36 In that regard, the first issue is whether Oakwood is "insolvent" within the meaning of the CAPL Agreement. I am of the opinion that it is. In *Tri-Star Resources Ltd. v. J.C. Int. Petroleum Ltd.*, 48 Alta. L.R. (2d) 355, [1987] 2 W.W.R. 141 (Q.B.), Chief Justice Moore held at p. 146:

37 In my view there is no issue to be tried on the question of "insolvency". The company, by Mr. Cole's own admission as stated in his affidavit of 22nd July, was unable to meet its obligations and was insolvent. Black's Law Dictionary defines "insolvency" as an "inability to pay one's debts". Surely when the president of the company under oath states the company is unable to pay its debts there can be no further argument on the question.

38 In the present case, the affidavit of Douglas Nolan Blades, executive vice-president of Oakwood, dated 21st September 1988, contains numerous admissions that Oakwood is unable to pay its debts. In addition, the C.C.A.A. applies only to a "debtor company" and that term as defined in the Act amounts essentially to insolvency. It reads in part as follows:

39 "debtor company" means any company that is bankrupt or insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or is deemed insolvent within the meaning of the *Winding-up Act* ...

40 It seems difficult to me to argue on one date that you are insolvent and that you deserve the protection of the C.C.A.A. for one purpose yet argue on another day, for another purpose, that you are not insolvent within the meaning of the CAPL agreement.

41 The Royal Bank in its submissions argues that Oakwood is commercially solvent even though it may be legally insolvent and it further asserts that the CAPL Agreement contemplates commercial solvency in cl. 202. In my opinion, the CAPL Agreement requires that insolvency be given its normal meaning. It cannot be interpreted as relating only to the meeting of day-to-day expenses and paying the joint operators as contended by the Royal Bank. Under cl. 306 of the CAPL Agreement, one of the duties of the operator is to pay all trade debts. Under cl. 605 there is an obligation placed on the operator to distribute income from the well to parties entitled to it. Both requirements are functions and duties of the operator. Under cl. 202(b)(ii) the operator is liable to be removed for default on any of its duties or obligations under the CAPL Agreement. The particular situations cited and relied upon by the Royal Bank as indicia of "commercial insolvency" are specifically dealt with under these other provisions in the CAPL Agreement. The state of insolvency stands alone as a reason for removal. For that reason, I am accordingly of the view that "insolvency" in the context of the CAPL Agreement should be given its normal meaning and not the more restricted meaning urged by counsel for the Royal Bank. It follows on the facts of this case that by the bringing of its C.C.A.A. application, Oakwood has declared itself insolvent and thus cl. 202 of its operating agreement comes into play.

42 This brings me to the second preliminary issue. That issue is whether insolvency creates an automatic ejection of Oakwood from its operatorship or whether some further action is required on Norcen's part.

43 Norcen argues that the terms of the CAPL Agreement provide a formula for the automatic ejection of Oakwood and that they select Norcen as the operator by default and, in that regard, it relies upon cl. 206. The clause is a lengthy one but, since the issue is critical to the disposition of this application, it is essential that I set it out in full:

206. Appointment Of New Operator —

44 (a) If an Operator resigns or is to be replaced, an Operator shall be appointed by the affirmative vote of two (2) or more parties representing a majority of the participating interests, provided if there are only two (2) Joint-Operators to this Operating Procedure and the Operator that resigned or is to be replaced is one (1) of the Joint-Operators, then, notwithstanding the foregoing, *the other Joint-Operator shall have the right to become the Operator.*

45 (b) No party shall be appointed Operator hereunder unless it has given its written consent to the appointment; provided that if the parties fail to appoint a replacing Operator or if any appointed Operator fails to carry out its duties hereunder, the party having the greatest participating interest shall act as Operator pro tem, with the right, should a similar situation re-occur after a new Operator has been appointed, to require the party having the next greatest participating interest to act as Operator pro tem and so on as occasion demands.

46 (c) No provision of this Article shall be construed to re-appoint as next-succeeding Operator an Operator who has been replaced under Clause 202, except with the unanimous consent of the parties.

47 (d) Except as provided in Subclause (a) of Clause 202 (*in which case the Operator shall be replaced immediately*), every replacement of Operator shall take effect at eight (8:00) o'clock a.m. on the first (1st) day of the calendar month following the expiration of any period of notice effecting a change of Operator, notwithstanding anything hereinbefore contained. [emphasis added]

48 Norcen relies on the italicized portion of cl. 206(d) in its argument that Oakwood has already been removed as operator. In my opinion, however, that portion of the clause simply provides for a situation where a party is not forced to wait a period of time, which could be up to a month less a day, for replacement in circumstances of insolvency.

49 I have chosen to emphasize the words in italics. In particular, I note that cl. 206(a) reads in part "shall have the right to become the Operator". It appears to be worded in the future tense suggesting that at some point following insolvency another party may become the operator if appropriate measures are taken. There is some positive election required on Norcen's part indicating that it wants to exercise its right to become the operator.

50 Oakwood has functioned as operator for approximately two years since its difficult financial situation began. It has performed its duties and responsibilities over that entire period of time. It seems to me to be difficult to now assert that Norcen has been the operator for the last two years. It may have had a right to become the operator, but until that right is exercised, Oakwood remains in control.

51 In summary, Oakwood is an insolvent operator as that term is used in the CAPL Agreement. The present set of circumstances is one in which cl. 202 is applicable.

52 The final preliminary point that I must deal with is the argument made by Norcen that their action should be permitted because insolvency under the CAPL Agreement is not curable and consequently an action to remove Oakwood as operator under the Hays agreements is inevitable in any event. In the alternative, it is suggested that if insolvency is curable, a current stay may be permanently affecting Norcen's future right to become operator in that if Oakwood becomes solvent, Norcen's right to remove it as operator will have been defeated as a result of my order.

53 The point of whether or not insolvency is a curable state under the CAPL Agreement is not directly before me on the facts of this case at this time. I do recognize the possibility that Norcen's rights may be permanently affected by the current stay. However, the issue of curability is one that is better decided when a fact situation comes before the court in which insolvency has actually been cured. I emphasize that although I do not decide the issue here, I am cognizant of the potential for future prejudice to Norcen's rights and, accordingly, I must interpret the situation as something more than a mere suspension of its rights as contended by the Bank of Montreal.

54 With these conclusions regarding the effect of the relevant provisions of the CAPL Agreement in mind, I now consider the statutory construction and constitutional arguments raised by the parties.

B. The proper construction of s. 11 of the Companies' Creditors Arrangement Act

55 The wording of s. 11 is extraordinarily broad. It is quite capable of sustaining both meanings argued by the parties to this application. For example, the long title of the C.C.A.A. can be used to support either meaning. One can argue that "An Act to facilitate compromises and arrangements between companies and their creditors" suggests that the C.C.A.A.

is only designed to affect creditors. One can equally argue that the use of the word "facilitates" means that the Act encompasses a broader scope that includes potentially affecting all parties that may threaten a compromise arrangement.

56 I note that the debtor and creditor theme is recurrent throughout the C.C.A.A. In fact the only place that the theme is conspicuously absent is in the wording of s. 11 itself. I do not, however, regard this absence of the C.C.A.A.'s general theme from s. 11 as conclusive in any way as to the types of relations that may be interfered with in a stay under the section. The conclusion that I do draw, however, is that at least the wording of s. 11 itself is capable of sustaining the broad meaning that is argued by Oakwood and its supporters.

57 Norcen argues that its rights are affected without it being given the same vote concerning a plan of compromise that is granted to creditors. Surely, however, third parties whose rights are affected by the compromise agreement are entitled to make submissions when the time comes for the debtor company to seek the approval of the court for its plan. In addition, it should be emphasized that the stay power under s. 11 is a discretionary one. There is much room in the terms of s. 11 to refuse a stay when third party rights will be seriously prejudiced by its terms.

58 In construing a statute, one must always keep in mind the objects that the piece of legislation is designed to achieve. This principle is emphasized in Driedger, *Construction of Statutes*, 2nd ed. (1983), at p. 74:

59 The comprehension of legislation is, in a sense, the reverse of the drafting process. The reader begins with the words of the Act as a whole and from a reading of these words in their setting, deduces the intention of Parliament as a whole, the legislative scheme, and the object of the Act, and then makes construction of the particular enactment harmoniously with the words, framework and object of the Act.

60 The authorities are of some assistance in arriving at a determination of the purpose of the C.C.A.A. Illustrative are the words of Wachowich J. in *Meridian Dev. Inc. v. T.D. Bank*; *Meridian Dev. Inc. v. Nu-West Ltd.*, 32 Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109 at 114, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.):

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

62 *Re Feifer and Frame Mfg. Corp.*, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.), must also be considered because it involves a fact situation that can at least be analogized to the present one. The facts were that a lease of premises contained a clause permitting eviction on insolvency. The debtor tenant availed itself of the protections offered by the C.C.A.A. After the compromise proposed by the company was approved by the court, the landlord sought to rely on its eviction clause. As was illustrated during arguments on this case, that case is a difficult one from which to extract a ratio. The difficulty arises in part from the fact that four different judgments were rendered. The general holding was that the landlord was not permitted to rely on the eviction clause.

63 I must rely on an English translation of the decision of the Quebec Court of Appeal that was included in the briefs of several of the parties that made submissions. At p. 11 of the translation, St-Germain J., in his judgment, held:

64 In effect, if, on the one hand, one must admit that recourse by a debtor to this law of arrangement constitutes in itself an act of bankruptcy, and if, on the other hand, a termination clause like that which is the subject of the present action permits a lessor to terminate his lease with a lessee, what good is it to the lessee to have recourse to this Act to make an arrangement with its non-secured creditors, if he must by that very act expose himself to the chance of his lease being terminated?

65 It seems to me that that line of thinking is particularly relevant in the case at bar. The affidavit of Douglas Nolan Blades, dated 4th November 1988, deposes that the effect of the removal of Oakwood as operator would likely be fatal

to attempts to restructure the company. A temporary stay of proceedings must apply to working partners in addition to creditors if the C.C.A.A. is to be of any protection at all.

66 This particular application may relate to only 20 wells but the evidence is that Oakwood is the operator in approximately 800 wells when its entire undertaking is considered. It would be difficult to grant Norcen's application without granting similar orders in the future to other holders of working interests of which Oakwood is the operator with the result being a marked reduction in the probability of success for Oakwood in its efforts to negotiate an acceptable plan of compromise with its lenders.

67 Attempts to distinguish the *Feifer* case were made on several grounds. The first is that there was a wartime ordinance in effect at the time of *Feifer* which made eviction clauses of the type considered in *Feifer* illegal. Clearly that fact materially affects the ratio of the case, but even if the passages regarding the scope of the C.C.A.A. are obiter, they are nevertheless supportive of a broad interpretation of s. 11. The second ground on which Norcen seeks to distinguish the case is on the basis that there are references in *Feifer* to the landlord as a creditor and in the present case Norcen is clearly not claiming in a capacity as a creditor. The difficulty, however, is that the purported eviction in *Feifer* took place after a binding compromise had been made. My reading of the decision is that the reference to the landlord as a "creditor" was perhaps merely a recognition of its former status. The fact is that both *Feifer* and the case at bar deal with situations under a federal statute where the company availing itself of the protections of the C.C.A.A. does not owe the party claiming contractual rights money at the time of the court hearing. It is irrelevant whether the claiming party is given the name "creditor" or some other label. The critical point is that the applicant is not owed money in either case.

68 Norcen also relies on the decision of Chief Justice Moore in *Tri-Star Resources Ltd. v. J.C. Int. Petroleum*, supra. While that case is very helpful on the issue of insolvency, it is readily distinguishable on the stay issue. In *Tri-Star*, the operator of certain oil and gas properties filed a proposal under the Bankruptcy Act, R.S.C. 1970, c. B-3. Another party having a working interest successfully brought an application to have the operator removed summarily notwithstanding the stay provision in s. 49 of the Bankruptcy Act. The *Tri-Star* case is clearly distinguishable because of the fact that it was concerned with a proposal under the Bankruptcy Act. The stay power under s. 49 refers only to a stay against claims provable in bankruptcy while the C.C.A.A. provision, as already noted, is worded in a much broader fashion.

69 For these reasons, I am drawn to the conclusion that s. 11 must be interpreted in the fashion suggested by Oakwood and its supporting creditors in order that the C.C.A.A. be permitted to accomplish its legislative purpose. The section grants the jurisdiction to a court to stay proceedings such as those contemplated here by Norcen. This type of action is a proceeding within the terms of s. 11.

C. The constitutionality of a broad interpretation of s. 11

70 Given that I am of the opinion that the proper statutory construction of s. 11 of the C.C.A.A. is a broad one, it becomes necessary to consider whether such an interpretation is constitutionally valid under the division of powers set out in ss. 91 and 92 of the Constitution Act, 1867.

71 Section 91(21) of the Constitution Act, 1867, grants to the Parliament of Canada legislative jurisdiction in the fields of "bankruptcy and insolvency" while s. 92(13) assigns exclusive legislative jurisdiction to the provinces in the fields of "property and civil rights". Clearly, we may be treading on marginal constitutional ground in the case at bar. If we are doing so, there is the possibility of reading the C.C.A.A. in a less offensive fashion by reading the statute down as argued by the province of Alberta and Norcen. I begin my analysis, however, on the footing that the proper statutory construction of s. 11 of the C.C.A.A. is a wide one.

72 Given that fact, it must be asked whether interference with contractual rights such as Norcen's is constitutionally valid. Although there is no argument made that the C.C.A.A. itself is constitutionally invalid, the basic starting point must be the decision in *Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que.*, [1934] S.C.R. 659, 16 C.B.R.

1, [1934] 4 D.L.R. 75. It was held in that case that the Act was valid as relating to bankruptcy and insolvency rather than property and civil rights. At p. 664, Cannon J. held:

73 Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation ...

74 The C.C.A.A. is an Act designed to continue, rather than liquidate, companies. In upholding the C.C.A.A., the Supreme Court of Canada must be taken as having extended the meaning of the term "insolvency" to include dealing with insolvent companies outside of a liquidation setting. The critical part of the decision is that federal legislation pertaining to assisting in the continuing operation of companies is constitutionally valid. In effect the Supreme Court of Canada has given the term "insolvency" a broad meaning in the constitutional sense by bringing within that term an Act designed to promote the continuation of an insolvent company.

75 Accordingly, if promoting the continuance of insolvent companies is constitutionally valid as insolvency legislation, it follows that a stay which happens to affect some non-creditors in pursuit of that end is valid. Surely a necessary part of promoting the continuance of a company is to give that company some time to stop and gather its faculties without interference from affected parties for a brief period of time. In my opinion, the distinction between creditors' contractual rights and the contractual rights of non-creditor third parties that Norcen asks me to draw is not a helpful one in these circumstances. Continuance of a company involves more than consideration of creditor claims. For that reason, I am of the opinion that s. 11 of the C.C.A.A. can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. I add, however, that in my judgment, such interference in the interest of fairness to all parties should be effective only for a relatively short period of time.

76 If I am wrong in my conclusion that a wide reading of the C.C.A.A. is permissible as a valid exercise of Parliament's powers in the field of insolvency law, the wide reading can also be supported on the basis of another constitutional argument. The "necessarily incidental" or "ancillary" constitutional doctrine can be used to arrive at the same conclusion: see Hogg, *Constitutional Law of Canada*, 2nd ed. (1985), pp. 334-37.

77 On either of the two tests cited by Professor Hogg for use of the ancillary doctrine, it seems that the constitutional validity of a wide reading of s. 11 of the C.C.A.A. can be upheld. Under the "rational, functional connection" test that was approved in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.], there is obviously a clear connection between permitting Oakwood to remain as operator for the time being and continuance of the insolvent company. Under the more restrictive "limited to what is truly necessary for the effective exercise of Parliament's legislative authority" test as set out in *R. v. Thomas Fuller Const. Co. (1958) Ltd.*, [1980] 1 S.C.R. 695 at 713, 12 C.P.C. 248, 106 D.L.R. (3d) 193, (sub nom. *Foundation Co. of Can. v. Can.*) 30 N.R. 249 [Fed.], a strong argument can be made that it is necessary to occasionally interfere with contractual relations in order to pursue the legislative objective of assisting companies in struggling through difficult times.

V. Conclusions

78 I emphasize my conclusions here. I have found that a default under cl. 202 of the CAPL Agreement has taken place and as a result Norcen would normally be entitled to pursue the remedies that it is entitled to under its operating agreement. A proper interpretation of s. 11 of the Companies' Creditors Arrangement Act, however, permits that a temporary stay be imposed restraining Norcen from proceeding. I have also concluded that a wide reading of the provisions of the C.C.A.A. is constitutionally valid.

79 I am mindful that my interpretation of s. 11 is that I still retain a discretion to not grant a stay in circumstances where it would be unfair to stop a party from pursuing its contractual rights. I am unable to grant such relief on these facts. The stay remains in force until only 30th November. During that short period of time, perhaps Oakwood can restructure itself. If it is successful in its restructuring efforts, Norcen still has its incurability argument as well as other CAPL Agreement provisions available to it should it wish to see Oakwood removed as operator. If it is unsuccessful, removal of Oakwood by Norcen may well result in any event. For the time being it is essential that the status quo be maintained in order to give effect to the purpose of the C.C.A.A. Accordingly, my order of 22nd September 1988 shall stand unamended to its present termination date of 30th November 1988, or until further order of this court.

80 Application dismissed.

Application dismissed.

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Tab 4

2015 ONSC 124
Ontario Superior Court of Justice [Commercial List]

4519922 Canada Inc., Re

2015 CarswellOnt 178, 2015 ONSC 124, 22 C.B.R. (6th) 44, 249 A.C.W.S. (3d) 508

**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 4519922 Canada Inc.

Newbould J.

Heard: December 8, 2014; January 6, 2015

Judgment: January 12, 2015

Docket: CV-1410791-00CL

Counsel: Robert I. Thornton, John T. Porter, Lee M. Nicholson, Asim Iqbal for Applicant
Harry M. Fogul for 22, former CLCA partners
Orestes Pasparakis, Evan Cobb for Insurers
Avram Fishman, Mark Meland for German and Canadian Bank Groups, Widdrington Estate and Trustee of Castor Holdings Limited
James H. Grout for 22, former CLCA partners
Chris Reed for 8, former CLCA partners
Andrew Kent for 5, former CLCA partners
Richard B. Jones for one, former CLCA partne
John MacDonald for Pricewaterhouse Coopers LLP
James A. Woods, Sylvain Vauclair, Bogdan Catanu, Neil Peden for Chrysler Canada Inc. and CIBC Mellon Trust Company
Jay A. Swartz for proposed Monitor Ernst & Young Inc.

Subject: Insolvency

MOTION by creditor of insolvent accounting firm to set aside or vary initial order issued under *Companies' Creditors Arrangement Act*; MOTION by partner of accounting firm to extend stay contained in initial order to include insurers of accounting firm.

Newbould J.:

1 On December 8, 2014 the applicant 4519922 Canada Inc. ("451"), applied for an Initial Order granting it protection under the *Companies' Creditors Arrangement Act* ("CCAA"), extending the protection of the Initial Order to the partnership Coopers & Lybrand Chartered Accounts ("CLCA"), of which it is a partner and to CLCA's insurers, and to stay the outstanding litigation in the Quebec Superior Court relating to Castor Holdings Limited ("Castor") during the pendency of these proceedings. The relief was supported by the Canadian and German bank groups who are plaintiffs in the Quebec litigation, by the Widdrington Estate that has a final judgment against CLCA, by the insurers of CLCA and by 22 former CLCA partners who appeared on the application.

2 The material in the application included a term sheet which the applicant wishes to use as a basis of a plan and which provides for an injection of approximately \$220 million in return for a release from any further litigation. The term sheet was supported by all parties who appeared.

3 I granted the order with a stay to January 7, 2015 for reasons to follow, but in light of the fact that Chrysler Canada Inc., with a very large claim against CLCA in the litigation, had not been given notice of the application, ordered that Chrysler be given notice to make any submissions regarding the Initial Order if it wished to do so.

4 Chrysler has now moved to set aside the Initial Order, or in the alternative to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. On the return of Chrysler's motion, a number of other former CLCA partners and PricewaterhouseCoopers appeared in support of the granting of the Initial Order.

Structure of Coopers & Lybrand Chartered Accounts

5 The applicant 451 is a corporation continued pursuant to the provisions of the *Canada Business Corporations Act*, and its registered head office is in Toronto, Ontario. It and 4519931 Canada Inc. ("4519931") are the only partners of CLCA.

6 CLCA is a partnership governed by the *Partnerships Act (Ontario)* with its registered head office located in Toronto, Ontario. It was originally established in 1980 under the name of "Coopers & Lybrand" and was engaged in the accountancy profession. On September 2, 1985, the name "Coopers & Lybrand" was changed to "Coopers & Lybrand Chartered Accountants" and the partnership continued in the accountancy profession operating under the new name. Until 1998, CLCA was a national firm of chartered accountants that provided audit and accounting services from offices located across Canada and was a member of a global network of professional firms.

7 In order to comply with the requirements of the various provincial Institutes of Chartered Accountants across Canada, many of which restricted chartered accountants providing audit services from being partners with persons who were not chartered accountants, Coopers & Lybrand Consulting Group ("CLCG") was established under the *Partnerships Act (Ontario)* in September 1985 to provide management consulting services. Concurrent with the formation of CLCG, Coopers & Lybrand ("OpCo") was established as a partnership of CLCA, CLCG and two other parties to develop and manage the CLCA audit and CLCG management consulting practices that had to remain separate. Until 1998, OpCo owned most of the operating assets of CLCA and CLCG. OpCo is governed by the *Partnerships Act (Ontario)* and its registered head office is in Toronto.

8 In 1998, the member firms of the global networks of each of Coopers & Lybrand and Price Waterhouse agreed upon a business combination of the two franchises. To effect the transaction in Canada, substantially all of CLCA's and CLCG's business assets were sold to PricewaterhouseCoopers LLP ("PwC"), which entity combined the operations of the Coopers & Lybrand entities and Price Waterhouse entities, and the partners of CLCA and CLCG at that time became partners of PwC. Subsequent to the closing of the PwC transaction, CLCA continued for the purpose of winding up its obligations and CLCA and CLCG retained their partnership interests in OpCo. By 2006, all individual CLCA partners had resigned and been replaced by two corporate partners to ensure CLCA's continued existence to deal with the continuing claims and obligations.

9 Since 1998, OpCo has administered the wind up of CLCA and CLCG's affairs, in addition to its own affairs, including satisfying outstanding legacy obligations, liquidating assets and administering CLCA's defence in the Castor litigation. In conjunction with OpCo, 451 and 4519931 have overseen the continued wind up of CLCA's affairs. The sole shareholders of 451 and 4519931 are two former CLCA partners. 451 and 4519931 have no assets or interests aside from their partnership interests in CLCA.

Castor Holdings litigation

10 Commencing in 1993, 96 plaintiffs commenced negligence actions against CLCA and 311 of its individual partners claiming approximately \$1 billion in damages. The claims arose from financial statements prepared by Castor and audited by CLCA, as well as certain share valuation letters and certificates for "legal for life" opinions. The claims are

for losses relating to investments in or loans made to Castor in the period 1988 to 1991. A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

11 Fifty-six claims have either been settled or discontinued. Currently, with interest, the plaintiffs in the Castor litigation collectively claim in excess of \$1.5 billion.

12 Due to the commonality of the negligence issues raised in the actions, it was decided that a single case, brought by Peter Widdrington claiming damages in the amount of \$2,672,960, would proceed to trial and all other actions in the Castor litigation would be suspended pending the outcome of the Widdrington trial. All plaintiffs in the Castor litigation were given status in the Widdrington trial on the issues common to the various claims and the determination regarding common issues, including the issues of negligence and applicable law, was to be binding in all other cases.

13 The first trial in the Widdrington action commenced in September 1998, but ultimately was aborted in 2006 due to the presiding judge's illness and subsequent retirement. The new trial commenced in January 2008 before Madam Justice St. Pierre. A decision was rendered in April 2011 in which she held that Castor's audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to Castor during that period. She noted that the overwhelming majority of CLCA's partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.

14 The decision in the Widdrington action was appealed to the Quebec Court of Appeal which on the common issues largely upheld the lower court's judgment. The only common issue that was overturned was the nature of the defendant partners' liability. The Quebec Court of Appeal held that under Quebec law, the defendant partners were severally liable. As such, each individual defendant partner is potentially and contingently responsible for his or her several share of the damages suffered by each plaintiff in each action in the Castor litigation for the period that he or she was a partner in the years of the negligence.

15 On January 9, 2014, the defendants' application for leave to appeal the Widdrington decision to the Supreme Court of Canada was dismissed.

16 The Widdrington action has resulted in a judgment in the amount of \$4,978,897.51, inclusive of interest, a cost award in the amount of \$15,896,297.26 plus interest, a special fee cost award in the amount of \$2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.

17 There remain 26 separate actions representing 40 claims that have not yet been tried. Including interest, the remaining plaintiffs now claim more than \$1.5 billion in damages. Issues of causation, reliance, contributory negligence and damages are involved in them.

18 The Castor Litigation has given rise to additional related litigation:

(a) Castor's trustee in bankruptcy has challenged the transfer in 1998 of substantially all of the assets used in CLCA's business to PwC under the provisions of Quebec's bulk sales legislation. As part of the PwC transaction, CLCA, OpCo and CLCG agreed to indemnify PwC from any losses that it may suffer arising from any failure on the part of CLCA, OpCo or CLCG to comply with the requirements of any bulk sales legislation applicable to the PwC transaction. In the event that PwC suffers any loss arising from the bulk sales action, it has the right to assert an indemnity claim against CLCA, OpCo and CLCG.

(b) Certain of the plaintiffs have brought an action against 51 insurers of CLCA. They seek a declaration that the policies issued by the insurers are subject to Quebec law. The action would determine whether the insurance coverage is costs-inclusive (i.e. defence costs and other expenses are counted towards the total insurance coverage) or costs-in-addition (i.e. amounts paid for the defence of claims do not erode the policy limits). The insurers assert that any insurance coverage is costs-inclusive and has been exhausted. If the insurers succeed,

there will be no more insurance to cover claims. If the insurers do not succeed and the insurance policies are deemed to be costs-in-addition, the insurers may assert claims against CLCA for further premiums resulting from the more extensive coverage.

(c) The claim against the insurers was set to proceed to trial in mid-January 2015 for approximately six months. CLCA is participating in the litigation as a mis-en-cause and it has all the rights of a defendant to contest the action and is bound by the result. As a result of the stay in the Initial Order, the trial has been put off.

(d) There have been eight actions brought in the Quebec Superior Court challenging transactions undertaken by certain partners and parties related to them (typically a spouse) (the "Paulian Actions").

(e) There is a pending appeal to the Quebec Court of Appeal involving an order authorizing the examination after judgment in the Widdrington action of Mr. David W. Smith.

19 The next trial to proceed against CLCA and the individual partners will be in respect of claims made by three German banks. It is not expected to start until at the least the fall of 2015 and a final determination is unlikely until 2017 at the earliest, with any appeals taking longer. It is anticipated that the next trial after the three German banks trial will be in respect of Chrysler's claim. Mr. Woods, who acts for Chrysler, anticipates that it will not start until 2017 with a trial decision perhaps being given in 2019 or 2020, with any appeals taking longer. The remaining claims will not proceed until after the Chrysler trial.

20 The fees incurred by OpCo and CLCA in the defence of the Widdrington action are already in excess of \$70 million. The total spent by all parties already amounts to at least \$150 million. There is evidence before me of various judges in Quebec being critical of the way in which the defence of the Widdrington action has been conducted in a "scorched earth" manner.

Individual partner defendants

21 Of the original 311 defendant partners, twenty-seven are now deceased. Over one hundred and fifty are over sixty-five years of age, and sixty-five more will reach sixty-five years of age within five years. There is a dispute about the number of defendant partners who were partners of CLCA at the material time. CLCA believes that twenty-six were wrongly named in the Castor litigation (and most have now been removed), a further three were named in actions that were subsequently discontinued, some were partners for only a portion of the 1988-1991 period and some were named in certain actions but not others. Six of the defendant partners have already made assignments in bankruptcy.

Analysis

(i) Applicability of the CCAA

22 Section 3(1) of the CCAA provides that it applies to a debtor company where the total claims against the debtor company exceed \$5 million. By virtue of section 2(1)(a), a debtor company includes a company that is insolvent. Chrysler contends that the applicant has not established that it is insolvent.

23 The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* is commonly referred to for guidance although the BIA definition is given an expanded meaning under the CCAA. See Holden, Morawetz & Sarra, *the 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell) at N§12 and *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) (per Farley J.); leave to appeal to the C of A refused 2004 CarswellOnt 2936 (Ont. C.A.).

24 The BIA defines "insolvent person" as follows:

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

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

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

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

25 The applicant submits that it is insolvent under all of these tests.

26 The applicant 451 is a debtor company. It is a partner of CLCA and is liable as a principal for the partnership's debts incurred while it is a partner.

27 At present, CLCA's outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately \$6.25 million (the "Pre-71 Entitlements"); (ii) \$16,026,189 payable to OpCo on account of a loan advanced by OpCo on October 17, 2011 to allow CLCA to pay certain defence costs relating to the Castor litigation; (iii) the Widdrington costs award in the amount of \$18,783,761.66, inclusive of interest as at December 1, 2014, which became due and payable to the plaintiff's counsel on November 27, 2014; (iv) the special fee in the amount of \$2,675,000, inclusive of interest as at December 1, 2014, awarded to the plaintiff's counsel in the Widdrington action; and (v) contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately \$1.5 billion.

28 The only asset of the applicant 451 on its balance sheet is its investment of \$100 in CLCA. The applicant is a partner in CLCA which in turn is a partner in OpCo. At the time of the granting of the Initial Order, Ernst & Young Inc., the proposed Monitor, stated in its report that the applicant was insolvent based on its review of the financial affairs of the applicant, CLCA and OpCo.

29 Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some \$39 million in realizable assets against liabilities of some \$21 million, leaving some \$18 million in what he said were liquid assets. Therefore he concluded that these assets of \$18 million are available to take care of the liabilities of 451.

30 I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out amounts, one of some \$6.5 million owing to pre-1971 retired partners, and one of some \$16 million owing by CLCA to OpCo for defence costs funded by OpCo. He did not consider the contingent claims against the \$6.5 million under the indemnity provided to PWC, nor did he consider that the \$16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.

31 This analysis also ignored the contingent \$1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Stelco Inc., Re, supra*, Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account. See also *Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54* (Ont. S.C.J. [Commercial List]) (per Farley J.).

32 It is obvious in this case that if the litigation continues, the defence costs for which the applicant 451 will have liability alone will continue and will more than eat up whatever cash OpCo may have. As well, the contingent liabilities of CLCA in the remaining \$1.5 billion in claims cannot be ignored just because CLCA has entered defences in all of them.

The negligence of CLCA has been established for all of these remaining cases in the Widdrington test case. The term sheet provides that the claims of the German and Canadian banks, approximately \$720 million in total, and the claim of the Trustee of CLCA of approximately \$108 million, will be accepted for voting and distribution purposes in a plan of arrangement. While there is no evidence before me at this stage what has led to the decision of CLCA and its former partners to now accept these claims, I can only conclude that in the circumstances it was considered by these defendants that there was exceptional risk in the actions succeeding. I hesitate to say a great deal about this as the agreement in the term sheet to accept these claims for voting and distribution purposes will no doubt be the subject of further debate in these proceedings at the appropriate time.

33 As stated, the balance sheet of the applicant 451 lists as its sole asset its investment of \$100 in CLCA. The notes to the financial statements state that CLCA was indebted to OpCo at the time, being June 30, 2014, for approximately \$16 million and that its only asset available to satisfy that liability was its investment in OpCo on which it was highly likely that there would be no recovery. As a result 451 would not have assets to support its liabilities to OpCo.

34 For this reason, as well as the contingent risks of liability of CLCA in the remaining claims of \$1.5 billion, it is highly likely that the \$100 investment of the applicant 451 in CLCA is worthless and unable to fund the current and future obligations of the applicant caused by the CLCA litigation.

35 I accept the conclusion of Ernst & Young Inc. that the applicant 451 is insolvent. I find that the applicant has established its insolvency at the time of the commencement of this CCAA proceeding.

(ii) Should an Initial Order be made and if so should it extend to CLCA?

36 The applicant moved for a stay in its favour and moved as well to extend the stay to CLCA and all of the outstanding Castor litigation. I granted that relief in the Initial Order. Chrysler contends that there should be no stay of any kind. It has not expressly argued that if a stay is granted against the applicant it should not be extended to CLCA, but the tenor of its arguments would encompass that.

37 I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Priszm Income Fund, Re* (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and has been followed in several cases, including *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) per Pepall J. (as she then was) and *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) per Romaine J.

38 The applicant 451's sole asset is its partnership interest in the CLCA partnership and its liabilities are derived solely from that interest. The affairs of the applicant and CLCA are clearly intertwined. Not extending the stay to CLCA and the Castor litigation would significantly impair the effectiveness of the stay in respect of 451. It would in fact denude it of any force at all as the litigation costs would mount and it would in all likelihood destroy any ability to achieve a global settlement of the litigation. CLCA is a necessary party to achieve a resolution of the outstanding litigation, and significant contributions from its interest in OpCo and from its former partners are anticipated under the term sheet in exchange for releases to be provided to them.

39 Chrysler relies on the principle that if the technical requirements for a CCAA application are met, there is discretion in a court to deny the application, and contends that for several reasons the equities in this case require the application

to be met. It says that there is no business being carried on by the applicant or by CLCA and that there is no need for a CCAA proceeding to effect a sale of any assets as a going concern. It says there will be no restructuring of a business.

40 Cases under the CCAA have progressed since the earlier cases such as *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) which expressed the purpose of the CCAA to be to permit insolvent companies to emerge and continue in business. The CCAA is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para. 33 (per Brown J. as he then was). There are numerous cases in which CCAA proceedings were permitted without any business being conducted.

41 To cite a few, in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) the applicants sought relief under the CCAA principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the CCAA application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 3777 (Que. Bkcty.) arising out of the Lac-Mégant train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the CCAA proceedings. The CCAA proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp., Re*, 2011 ONSC 7701 (Ont. S.C.J. [Commercial List]) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

42 Chrysler contends, as stated in its factum, that the pith and substance of this case is not about the rescue of a business; it is to shield the former partners of CLCA from their liabilities in a manner that should not be approved by this court. Chrysler refers to several statements by judges beginning in 2006 in the Castor litigation who have been critical of the way in which the Widdrington test case has been defended, using such phrases as "a procedural war of attrition" and "scorched earth" strategies. Chrysler contends that now that the insurance proceeds have run out and the former partners face the prospect of bearing the cost of litigation which that plaintiffs have had to bear throughout the 22-year war of attrition, the former partners have convinced the German and Canadian banks to agree to the compromise set out in the term sheet. To grant them relief now would, it is contended, reward their improper conduct.

43 Chrysler refers to a recent decision in Alberta, *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) in which a CCAA application was denied and a receiver appointed at the request of its first secured creditor. In that case Justice Thomas referred to a statement of Justice Romaine in *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 ABQB 432 (Alta. Q.B.) in which she stated that an applicant had to establish that it has acted and is acting in good faith and with due diligence. Justice Thomas referred to past failures of the applicant to act with due diligence in resolving its financial issues and on that ground denied the CCAA application. Chrysler likens that to the manner in which the Widdrington test case was defended by CLCA.

44 I am not entirely sure what Justice Romaine precisely had in mind in referring to the need for an applicant to establish that "it has acted and is acting with good faith and with due diligence" but I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection.

45 I do understand that need for an applicant to act in the CCAA process with due diligence and good faith, but I would be reluctant to lay down any fixed rule as to how an applicant's actions prior to the CCAA application should be considered. I agree with the statement of Farley J. in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) that it is the good faith of an applicant in the CCAA proceedings that is the issue:

Allegations ... of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

46 There is no issue as to the good faith of the applicant in this CCAA proceeding. I would not set aside the Initial Order and dismiss the application on the basis of the defence tactics in the Widdrington test case.

47 The Castor litigation has embroiled CLCA and the individual partners for over 20 years. If the litigation is not settled, it will take many more years. Chrysler concedes that it likely will take at least until 2020 for the trial process on its claim to play out and then several more years for the appellate process to take its course. Other claims will follow the Chrysler claim. The costs have been enormous and will continue to escalate.

48 OpCo has dedicated all of its resources to the defence of the Castor litigation and it will continue to do so. OpCo has ceased distributions to its partners, including CLCA, in order to preserve funds for the purpose of funding the defence of the litigation. If the Castor litigation continues, further legal and other costs will be incurred by OpCo and judgments may be rendered against CLCA and its partners. If so, those costs and judgments will have to be paid by OpCo through advances from OpCo to CLCA. Since CLCA has no sources of revenue or cash inflow other than OpCo, the liabilities of CLCA, and therefore the applicant, will only increase.

49 If the litigation is not settled, CLCA's only option will be to continue in its defence of the various actions until either it has completely depleted its current assets (thereby exposing the defendant partners to future capital calls), or a satisfactory settlement or judicial determination has been reached. If no such settlement or final determination is achieved, the cost of the defence of the actions could fall to the defendant partners in their personal capacities. If a resolution cannot be reached, the amount that will be available for settlement will continue to decrease due to ongoing legal costs and other factors while at the same time, the damages claimed by the plaintiffs will continue to increase due to accruing interest. With the commencement of further trials, the rate of decrease of assets by funding legal costs will accelerate.

50 After a final determination had been reached on the merits in the Widdrington action, CLCA's board of directors created a committee comprised of certain of its members to consider the next steps in dealing with CLCA's affairs given that, with the passage of time, the defendant partners may ultimately be liable in respect of negligence arising from the Castor audits without a settlement.

51 Over the course of several months, the committee and the defendant partners evaluated many possible settlement structures and alternatives and after conferring with counsel for various plaintiffs in the Castor litigation, the parties agreed to participate in a further mediation. Multiple attempts had earlier been made to mediate a settlement. Most recently, over the course of four weeks in September and October 2014, the parties attended mediation sessions, both plenary and individually. Chrysler participated in the mediation.

52 Although a settlement could not be reached, the applicant and others supporting the applicant believe that significant progress was achieved in the mediation. In light of this momentum, the applicant and CLCA continued settlement discussions with certain plaintiffs willing to engage in negotiations. These discussions culminated with the execution of a term sheet outlining a plan of arrangement under the CCAA that could achieve a global resolution to the outstanding litigation.

53 A CCAA proceeding will permit the applicant and its stakeholders a means of attempting to arrive at a global settlement of all claims. If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation.

54 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 is also intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors

for the benefit of both. 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. Without a stay, 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 would succeed. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) per Farley J.

55 In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a possibility is the case of *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re* which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc., Re*.

56 In this case, the term sheet that the applicant anticipates will form the basis of a proposed Plan includes, among other elements:

- (a) the monetization of all assets of CLCA and its partnership OpCo to maximize the net proceeds available to fund the plan, including all applicable insurance entitlements that are payable or may become payable, which proceeds will be available to satisfy the determined or agreed claims of valid creditors;
- (b) contributions from a significant majority of the defendant partners;
- (c) contributions from non-defendant partners of CLCA and CLCG exposed under the PwC indemnity;
- (d) contributions from CLCA's insurers and other defendants in the outstanding litigation;
- (e) the appointment of Ernst & Young Inc. as Monitor to oversee the implementation of the plan, including to assist with the realization and monetization of assets and to oversee (i) the capital calls to be made upon the defendant partners, (ii) a claims process, and (iii) the distribution of the aggregate proceeds in accordance with the plan; and
- (f) provision to all parties who contribute amounts under the plan, of a court-approved full and final release from and bar order against any and all claims, both present and future, of any kind or nature arising from or in any way related to Castor.

57 This term sheet is supported by the overwhelming number of creditors, including 13 German banks, 8 Canadian banks, over 100 creditors of Castor represented by the Trustee in bankruptcy of Castor and the Widdrington estate. It is also supported by the insurers. The plaintiffs other than Chrysler, representing approximately 71.2% of the face value of contingent claims asserted in the outstanding litigation against CLCA, either support, do not oppose or take no position in respect of the granting of the Initial Order. Chrysler represents approximately 28.8% of the face value of the claims.

58 Counsel for the German and Canadian banks points out that it has been counsel to them in the Castor claims and was counsel for the Widdrington estate in its successful action. The German and Canadian banks in their factum agree that during the course of the outstanding litigation over the past 20 years, they have been subjected to a "scorched earth", "war of attrition" litigation strategy adopted by CLCA and its former legal counsel. Where they seriously part company with Chrysler is that they vigorously disagree that such historical misconduct should prevent the CLCA group from using the CCAA to try to achieve the proposed global settlement with their creditors in order to finally put an end to this war of attrition and to enable all valid creditors to finally receive some measure of recovery for their losses.

59 It is argued by the banks and others that if Chrysler is successful in defeating the CCAA proceedings, the consequence would be to punish all remaining Castor plaintiffs and to deprive them of the opportunity of arriving at a global settlement, thus exacerbating the prejudice which they have already suffered. Chrysler, as only one creditor of the CLCA group, is seeking to impose its will on all other creditors by attempting to prevent them from voting on the

proposed Plan; essentially, the tyranny of the minority over the majority. I think the banks have a point. The court's primary concern under the CCAA must be for the debtor and all of its creditors. While it is understandable that an individual creditor may seek to obtain as much leverage as possible to enhance its negotiating position, the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor. See *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 (Alta. C.A. [In Chambers]), at para 38, per O'Brien J.A.

60 The German and Canadian banks deny that their resolve has finally been broken by the CLCA in its defence of the Castor litigation. On the contrary, they state a belief that due to litigation successes achieved to date, the time is now ripe to seek to resolve the outstanding litigation and to prevent any further dissipation of the assets of those stakeholders funding the global settlement. Their counsel expressed their believe that if the litigation continues as suggested by Chrysler, the former partners will likely end up bankrupt and unable to put in to the plan what is now proposed by them. They see a change in the attitude of CLCA by the appointment of a new committee of partners to oversee this application and the appointment of new CCAA counsel in whom they perceive an attitude to come to a resolution. They see CLCA as now acting in good faith.

61 Whether the banks are correct in their judgments and whether they will succeed in this attempt remains to be seen, but they should not be prevented from trying. I see no prejudice to Chrysler. Chrysler's contingent claim is not scheduled to be tried until 2017 at the earliest, and it will likely still proceed to trial as scheduled if a global resolution cannot be achieved in the course of this CCAA proceeding. Further, since Chrysler has not obtained a judgment or settlement in respect of its contingent claim, the Initial Order has not stayed any immediate right available to Chrysler. The parties next scheduled to proceed to trial in the outstanding litigation who have appeared, the insurers and then the three German banks, which are arguably the most affected by the issuance of a stay of proceedings, have indicated their support for this CCAA proceeding and Initial Order, including the stay of proceedings.

62 What exactly Chrysler seeks in preventing this CCAA application from proceeding is not clear. It is hard to think that it wants another 10 years of hard fought litigation before its claim is finally dealt with. During argument, Mr. Vauclair did say that Chrysler participated in the unsuccessful mediation and that it has been willing to negotiate. That remains to be seen, but this CCAA process will give it that opportunity.

63 Chrysler raises issues with the term sheet, including the provision that the claims of the German and Canadian banks and the Trustee of Castor will be accepted but that the Chrysler claim will be determined in a claims process. Chrysler raises issues regarding the proposed claims process and whether the individual CLCA former partners should be required to disclose all of their assets. These issues are premature and can be dealt with later in the proceedings as required.

64 Mr. Kent, who represents a number of former CLCA partners, said in argument that the situation cries out for settlement and that there are many victims other than the creditors, namely the vast majority of the former CLCA partners throughout Canada who had nothing to do with the actions of the few who were engaged in the Castor audit. The trial judge noted that the main CLCA partner who was complicit in the Castor Ponzi scheme hid from his partners his relationships with the perpetrators of the scheme.

65 Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

1 Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

66 At the conclusion of her decision, she stated:

3637 Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to remember that litigating all the other files is only one of multiple options. Now that the litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

67 In my view the CCAA is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the CCAA application is dismissed.

(iii) Should the stay be extended to the insurers?

68 The applicant 451 moves as well to extend the stay to the insurers of CLCA. This is supported by the insurers. The trial against the insurers was scheduled to commence on January 12, 2015 but after the Initial Order was made, it was adjourned pending the outcome of the motion by Chrysler to set aside the Initial Order. Chrysler has made no argument that if the Initial Order is permitted to stand that it should be amended to remove the stay of the action against the insurers.

69 Under the term sheet intended to form the basis of a plan to be proposed by the applicant, the insurers have agreed to contribute a substantial amount towards a global settlement. It could not be expected that they would be prepared to do so if the litigation were permitted to proceed against them with all of the costs and risks associated with that litigation. Moreover, it could well have an effect on the other stakeholders who are prepared to contribute towards a settlement.

70 A stay is in the inherent jurisdiction of a court if it is in the interests of justice to do so. While many third party stays have been in favour of partners to applicant corporations, the principle is not limited to that situation. It could not be as the interests of justice will vary depending on the particulars of any case.

71 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, Castonguay, J.C.S. stayed litigation against the insurers of the railway. In doing so, he referred to the exceptional circumstances and the multiplicity of proceedings already instituted and concluded it was in the interests of sound administration of justice to stay the proceedings, stating:

En raison des circonstances exceptionnelles de la présente affaire et devant la multiplicité des recours déjà intentés et de ceux qui le seront sous peu, il est dans l'intérêt d'une saine administration de la justice d'accorder cette demande de MMA et d'étendre la suspension des recours à XL.

72 In my view, it is in the interests of justice that the stay of proceedings extend to the action against the insurers.

(iv) Should a creditors' committee be ordered and its fees paid by CLCA?

73 The Initial Order provides for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the Trustee in bankruptcy of Castor. It also provides that CLCA shall be entitled to pay the reasonable fees and disbursements of legal counsel to the creditors' committee. Chrysler opposes these provisions.

74 The essential argument of Chrysler is that a creditors' committee is not necessary as the same law firm represents all of the banks and the Trustee of Castor. Counsel for the banks and the Trustee state that the German bank group consists of 13 distinct financial institutions and the Canadian bank group consists of 8 distinct financial institutions and that there is no evidence in the record to the effect that their interests do not diverge on material issues. As for the Castor Trustee, it represents the interests of more than 100 creditors of Castor, including Chrysler, the German and Canadian bank groups, and various other creditors. They say that a creditors' committee brings order and allows for effective communication with all creditors.

75 CCAA courts routinely recognize and accept *ad hoc* creditors' committees. It is common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a CCAA filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the CCAA proceedings. See Robert J. Chadwick & Derek R. Bulas, "Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World", in Janis P. Sarra, ed, Annual Review of Insolvency Law 2011 (Toronto:Thomson Carswell) 119 at pp 120-121.

76 Chrysler refers to the fact that it is not to be a member of the creditors' committee. It does not ask to be one. Mr. Meland, counsel for the two bank groups and for the Trustee of Castor said during argument that they have no objection if Chrysler wants to join the committee. If Chrysler wished to join the committee, however, it would need to be considered as to whether antagonism, if any, with other members would rob the committee of any benefit.

77 Chrysler also takes exception to what it says is a faulty claims process proposed in the term sheet involving the creditors' committee. Whether Chrysler is right or not in its concern, that would not be a reason to deny the existence of the committee but rather would be a matter for discussion when a proposed claims process came before the court for approval.

78 The creditors' committee in this case is the result of an intensely negotiated term sheet that forms the foundation of a plan. The creditors' committee was involved in negotiating the term sheet. Altering the terms of the term sheet by removing the creditors' committee could frustrate the applicant's ability to develop a viable plan and could jeopardize the existing support from the majority of claimants. I would not accede to Chrysler's request to remove the Creditors' committee.

79 So far as the costs of the committee are concerned, I see this as mainly a final *cri de couer* from Chrysler. The costs in relation to the amounts at stake will no doubt be relatively minimal. Chrysler says it is galling to see it having to pay 28% (the size of its claim relative to the other claims) to a committee that it thinks will work against its interests. Whether the committee will work against its interests is unknown. I would note that it is not yet Chrysler's money, but CLCA's. If there is no successful outcome to the CCAA process, the costs of the committee will have been borne by CLCA. If the plan is successful on its present terms, there will be \$220 million available to pay claims, none of which will have come from Chrysler. I would not change the Initial Order and deny the right of CLCA to pay the costs of the creditors' committee.

80 Finally, Chrysler asks that if the costs are permitted to be paid by CLCA, a special detailed budget should be made and provided to Chrysler along with the amounts actually paid. I see no need for any particular order. The budget for these fees is and will be continued to be contained in the cash flow forecast provided by the Monitor and comparisons of actual to budget will be provided by the Monitor in the future in the normal course.

Conclusion

81 The motion of Chrysler is dismissed. The terms of the Initial Order are continued.

Order accordingly.

Tab 5

I.I.C. Ct. Filing 387297538004

Angiotech Pharmaceuticals, Inc. and the other Petitioners Listed on Schedule "A" — Court File No. S110587
23. — **Order, January 28, 2011**

Angiotech Pharmaceuticals, Inc. and the other Petitioners Listed on Schedule "A", Court File No. S110587 (Supreme Court of British Columbia)

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 and In the Matter of Angiotech Pharmaceuticals, Inc. and the Other Petitioners Listed on Schedule "A" Petitioners

IN THE SUPREME COURT OF BRITISH COLUMBIA

Order

BEFORE THE HONOURABLE) FRIDAY, THE 28th DAY
)
MR. JUSTICE WALKER) OF JANUARY, 2011

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 28th day of January, 2011 (the "*Order Date*"); AND ON HEARING Jeremy Dacks and Marc Wasserman, counsel for the Petitioners and those other counsel listed on Schedule "B" hereto; AND UPON READING the material filed, including the First Affidavit of K. Thomas Bailey sworn January 28, 2011 (the "*Bailey Affidavit*"), the consent of Alvarez & Marsal Canada Inc. to act as Monitor and the Pre-Filing Report of Alvarez & Marsal Canada Inc.; AND UPON BEING ADVISED that the secured creditors who are likely to be affected by the charges created herein were given notice; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "*CCAA*"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court:

Service

1. THIS COURT ORDERS that the time for service of the Petition is hereby abridged and validated so that this Petition is properly returnable today and hereby dispenses with further service thereof.

Jurisdiction

2. THIS COURT ORDERS AND DECLARES that the Petitioners are companies to which the CCAA applies.

Petition Hearing

3. THIS COURT ORDERS that the hearing of the Petition in this proceeding be held at the Courthouse at 800 Smithe Street, Vancouver, British Columbia at 10:00 a.m. on Tuesday, the 17th day of February, 2011, provided that the service referred to in paragraph 61 of this Order occur no later than February 2, 2011.

4. THIS COURT ORDERS that all of the relief provided for in the subsequent paragraphs of this Order is granted to the Petitioners on an interim basis only, and that the relief made in the subsequent paragraphs will expire at 11:59 p.m. (local Vancouver time) on February 17, 2011, unless extended by this Court at the hearing of the Petition on that date.

Plan of Arrangement

5. THIS COURT ORDERS that the Petitioners, or any one of them, 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

6. THIS COURT ORDERS that, subject to this Order and any further Order of this Court, the Petitioners shall 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*"), and continue to carry on their business (the "*Business*") in the ordinary course and in a manner consistent with the preservation of the Business and the Property. The Petitioners shall 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 carrying out the terms of this Order.

7. THIS COURT ORDERS that the Petitioners shall be entitled to continue to utilize the central cash management system currently in place as described in the Bailey Affidavit or, with the consent of the DIP Lender (as defined below), replace it with another substantially similar central cash management system, including any modifications required in connection with the DIP Facility (as defined below) (the "*Cash Management System*"), and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Petitioners of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Petitioners, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

8. THIS COURT ORDERS that, subject to the terms and conditions of and availability under the DIP Facility and subject to the applicable cash flow budget approved by the DIP Lenders pursuant to the DIP Facility and the Consenting Noteholders' Advisors (as hereinafter defined) pursuant to the Recapitalization Support Agreement (each as defined in the Bailey Affidavit) (the "*Cash Flow Budget*"), the Petitioners shall be entitled, but not required, to pay the following expenses whether incurred prior to, on or after the Order Date:

(a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), bonuses (including payments made pursuant to the Annual Bonus Program and Sales Incentive Program, both as defined in the Bailey Affidavit), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred (collectively "*Wages*");

(b) payments made to employees' Registered Retirement Savings Plans and pursuant to the 401k Program, as defined in the Bailey Affidavit;

(c) the fees and disbursements of any Assistants retained or employed by the Petitioners which are related to the Petitioners' restructuring, at their standard rates and charges, including payment of the fees and disbursements of legal counsel retained by the Petitioners, whenever and wherever incurred, in respect of:

(i) these proceedings or any other similar proceedings in other jurisdictions in which the Petitioners or any subsidiaries or affiliated companies of the Petitioners are domiciled;

(ii) any litigation in which the Petitioners are named as party or parties or are otherwise involved, whether commenced before or after the Order Date;

(iii) services rendered in connection with the registration or maintenance of the Petitioners' worldwide patents, patent-equivalents or other intellectual property; and

- (iv) any related corporate, tax, employee benefit or other similar matters.
- (d) with the written consent of the Monitor:
 - (i) pay the entire amount of their obligations to any creditor if the amount of such obligations, as agreed between the Petitioners and the creditor, is \$1,000 or less as at the Order Date;
 - (ii) pay an amount agreed to by the Petitioners and any other creditor to which the outstanding obligations of the Petitioners are greater than \$1,000 as at the Order Date, provided such creditor agrees to accept that amount in full satisfaction of all obligations of the Petitioners to such creditor as at the Order Date;
 - (iii) pay amounts owing to creditors who hold valid and enforceable possessory or statutory liens against any asset of the Petitioners where the value of such asset exceeds the amount of the possessory or statutory liens or where the asset is deemed critical by the Petitioners and the Monitor to the business operations of the Petitioners; and
 - (iv) pay amounts outstanding to creditors for goods and services provided prior to the Order Date where expressly authorized by this Order or any further Order of this Court; and
- (e) any and all amounts due and owing to American Express (as defined in the Bailey Affidavit) in connection with the employee credit card programs described in the Bailey Affidavit.

8A THIS COURT ORDERS that, for the period commencing on the date of this Order and ending on the date that the DIP Credit Agreement (as defined below) is executed by the parties thereto, all references to the Cash Flow Budget as it pertains to the DIP Lender, shall refer to the Budget as agreed to between the Petitioners and the DIP Lender and shall be subject to the same allowable variances to the Cash Flow Budget that will be included in the DIP Credit Agreement.

9. THIS COURT ORDERS that, notwithstanding any other provision of this Order, and subject to the terms and conditions of and availability under the DIP Facility and subject to the Cash Flow Budget, Angiotech U.S. (as defined in the Bailey Affidavit) are hereby authorized but not required to make payments or otherwise satisfy their obligations to creditors, suppliers, employees, taxing authorities and other persons whether incurred prior to or after the Order Date.

10. THIS COURT ORDERS that, subject to the terms and conditions of and availability under the DIP Facility and subject to the Cash Flow Budget, and except as otherwise provided herein, the Petitioners shall be entitled but not required to pay all expenses reasonably incurred by the Petitioners in carrying on the Business in the ordinary course following the Order Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably incurred and which are necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services;
- (b) all obligations incurred by the Petitioners after the Order Date, including without limitation, with respect to goods and services actually supplied to the Petitioners following the Order Date (including those under purchase orders outstanding at the Order Date but excluding any interest on the Petitioners' obligations incurred prior to the Order Date); and
- (c) fees and disbursements of the kind referred to in paragraph 8(b) which may be incurred after the Order Date.

11. THIS COURT ORDERS that the Petitioners are authorized to remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority in any other jurisdiction which are required to be deducted from Wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes or any such claims which are to be paid pursuant to Section 6(3) of the CCAA;

(b) all goods and services or other applicable sales and value added taxes (collectively, "*Sales Taxes*") required to be remitted by the Petitioners in connection with the sale of goods and services by the Petitioners, but only where such Sales Taxes accrue or are collected after the Order Date, or where such Sales Taxes accrued or were collected prior to the Order Date but not required to be remitted until on or after the Order Date; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof, any local, state or federal taxation or other authority in any other jurisdiction in respect of municipal property taxes, municipal business taxes or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors.

12. THIS COURT ORDERS that until such time as a real property lease is disclaimed in accordance with the CCAA, Angiotech Canada (as defined in the Bailey Affidavit) shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated between Angiotech Canada and the landlord from time to time ("*Rent*"), for the period commencing from and including the Order Date, twice-monthly in equal payments on the first and fifteenth day of the month in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including Order Date shall also be paid.

13. THIS COURT ORDERS that, except as specifically permitted herein and subject to the Cash Flow Budget and the terms and conditions of the DIP Facility, the Petitioners are hereby directed, until further Order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Petitioners to any of their creditors as of the Order Date except as authorized by this Order, provided however that the Petitioners are hereby authorized and directed to make all such payments under the Wells Fargo Credit Agreement as required pursuant to the terms of the Definitive Documents (as defined below) and contemplated by the Cash Flow Budget, until paid in full in accordance with the terms of the DIP Facility;

(b) to make no payments in respect of any financing leases which create security interests;

(c) to grant no security interests, trust, mortgages, liens, charges or encumbrances upon or in respect of any of their Property, nor become a guarantor or surety, nor otherwise become liable in any manner with respect to any other person or entity except as authorized by this Order;

(d) to not grant credit except in the ordinary course of the Business only to their customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Petitioners to such customers as of the Order Date; and

(e) to not incur liabilities except in the ordinary course of Business.

14. THIS COURT ORDERS that notwithstanding any other provision in this Order, but subject to the terms and conditions of and availability under the DIP Facility and subject to the Cash Flow Budget, or with the consent of the DIP Lender, the Petitioners are hereby authorized to continue to make scheduled interest payments on their US\$325 million senior floating rate notes due 2013 (the "*Floating Rate Notes*") as such payments come due.

Restructuring

15. THIS COURT ORDERS that, subject to such requirements as are imposed by the CCAA and the terms of the Recapitalization Support Agreement and the FRN Support Agreement (as defined in the Bailey Affidavit), and such covenants as may be contained in the Definitive Documents (as hereinafter defined), the Petitioners shall have the right to:

(a) permanently or temporarily cease, downsize or shut down all or any part of their Business or operations and commence marketing efforts in respect of any of their redundant or non-material assets and to dispose of redundant or non-material assets not exceeding \$500,000 in any one transaction or \$2,000,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate;

(c) in accordance with paragraphs 16 and 17, with the prior consent of the Monitor or further Order of the Court, vacate, abandon or quit the whole but not part of any leased premises and/or disclaim any real property lease and any ancillary agreements relating to any leased premises, in accordance with Section 32 of the CCAA, on such terms as may be agreed upon between the Petitioners and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan;

(d) disclaim, in whole or in part, with the prior consent of the Monitor or further Order of the Court, such of their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Petitioners deem appropriate, in accordance with Section 32 of the CCAA, with such disclaimers to be on such terms as may be agreed upon between the Petitioners and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; and

(e) pursue all avenues of refinancing for their Business or Property, in whole or part;

all of the foregoing to permit the Petitioners to proceed with an orderly restructuring of the Business (the "*Restructuring*").

16. THIS COURT ORDERS that Angiotech Pharmaceuticals, Inc. ("*ANPI*") may, in accordance with the terms of the lease and on prior notice to the landlord, assign the False Creek Research Park lease to a legal entity affiliated or associated with ANPI (including, without limitation a new entity incorporated by any of the Petitioners), as part of or in connection with the corporate reorganization of ANPI's affairs under the CCAA, and the consequences of the release and discharge of ANPI or any assignor in respect of such assignment shall be dealt with in the Plan.

17. THIS COURT ORDERS that the Petitioners shall provide each of the relevant landlords with notice of the Petitioners' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Petitioners' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors who claim a security interest in the fixtures, such landlord and the Petitioners, or by further Order of this Court upon application by the Petitioners, the landlord or the applicable secured creditors on at least two (2) clear days' notice to the other parties. If the Petitioners disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any dispute concerning such fixtures (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Petitioners' claim to the fixtures in dispute.

18. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then: (a) during the period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours on giving the Petitioners and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer, the landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims the landlord may have against the Petitioners, or any other rights

the landlord might have, in respect of such lease or leased premises and the landlord shall be entitled to notify the Petitioners of the basis on which it is taking possession and gain possession of and re-lease such leased premises to any third party or parties on such terms as the landlord considers advisable, provided that nothing herein shall relieve the landlord of its obligation to mitigate any damages claimed in connection therewith.

19. THIS COURT DECLARES that, pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronics Documents Act*, S.C. 2000, c. 5 and Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, and any regulations promulgated under authority of either Act, as applicable (the "*Relevant Enactment*"), the Petitioners, in the course of these proceedings, are permitted to, and hereby shall, disclose personal information of identifiable individuals in their possession or control to stakeholders, their advisors, prospective investors, financiers, buyers or strategic partners (collectively, "*Third Parties*"), but only to the extent desirable or required to negotiate and complete the Restructuring or to prepare and implement the Plan or transactions for that purpose; provided that the Third Parties to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners binding them in the same manner and to the same extent with respect to the collection, use and disclosure of that information as if they were an organization as defined under the Relevant Enactment, and limiting the use of such information to the extent desirable or required to negotiate or complete the Restructuring or to prepare and implement the Plan or transactions for that purpose, and attorning to the jurisdiction of this Court for the purposes of that agreement. Upon the completion of the use of personal information for the limited purposes set out herein, the Third Parties shall, upon the request of the Petitioners, return the personal information to the Petitioners or destroy it. If the Third Parties acquire personal information as part of the Restructuring or the preparation and implementation of the Plan or transactions in furtherance thereof, such Third Parties may, subject to this paragraph and any Relevant Enactment, continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners.

20. THIS COURT ORDERS that the Petitioners are hereby authorized to (i) take such steps as are required to implement the Recapitalization Transaction (as defined in the Bailey Affidavit) and (ii) comply with the Recapitalization Support Agreement.

21. THIS COURT ORDERS that, notwithstanding any other provision in this Order, the Petitioners are hereby authorized to (i) take such steps as are required to implement the FRN Exchange Offer (as defined in the Bailey Affidavit) and (ii) comply with the FRN Support Agreement.

22. THIS COURT ORDERS that the counterparties to the Recapitalization Support Agreement and the FRN Support Agreement shall be required to obtain the permission of this Court prior to exercising any rights or remedies they may have against the Petitioners under or in respect of the Recapitalization Support Agreement and/or the FRN Support Agreement, other than in respect of contractual termination rights, which termination rights may be exercised without further permission of this Court.

Stay of Proceedings, Rights and Remedies

23. THIS COURT ORDERS that until and including February 17, 2011, or such later date as this Court may order (the "*Stay Period*"), no action, suit or proceeding in any court or tribunal (each, a "*Proceeding*") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of the Petitioners and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

24. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "*Persons*" and each being a "*Person*") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Petitioners and the Monitor or leave of this Court.

25. THIS COURT ORDERS that, nothing in this Order, including paragraphs 23 and 24, shall: (i) empower the Petitioners to carry on any business which the Petitioners are not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a mortgage, charge or security interest (subject to the provisions of Section 18.5 of the CCAA relating to the priority of statutory Crown securities); or (iv) prevent the registration or filing of a lien or claim for lien or the commencement of a Proceeding to protect lien or other rights that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such lien, claim for lien or Proceeding except for service of the initiating documentation on the Petitioners.

No Interference with Rights

26. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Petitioners, except with the written consent of the Petitioners and the Monitor or leave of this Court.

Continuation of Services

27. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Petitioners or mandates under an enactment for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Petitioners, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Petitioners, and that the Petitioners shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Order Date are paid by the Petitioners in accordance with normal payment practices of the Petitioners or such other practices as may be agreed upon by the supplier or service provider and the Petitioners and the Monitor, or as may be ordered by this Court.

Non-Derogation of Rights

28. THIS COURT ORDERS that, notwithstanding any provision in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the Order Date, nor shall any Person be under any obligation to advance or re-advance any monies or otherwise extend any credit to the Petitioners on or after the Order Date. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

Proceedings Against Directors and Officers

29. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Petitioners with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Petitioners whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Petitioners, if one is filed, is sanctioned by this Court or these proceedings under the CCAA are terminated. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of the Petitioners that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

Directors and Officers Indemnification and Charge

30. THIS COURT ORDERS that the Petitioners shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Petitioners, including the members of the Independent Committee (as defined in the Bailey Affidavit) after the commencement of the within proceedings, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

31. THIS COURT ORDERS that the directors and officers of the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "*Directors' Charge*") on the Property, which charge shall not exceed an aggregate amount of \$2,000,000, as security for the indemnity provided in paragraph 30 of this Order. The Directors' Charge shall have the priority set out in paragraphs 54 and 56 herein.

32. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Petitioners' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 30 of this Order.

Appointment of Monitor

33. THIS COURT ORDERS that Alvarez & Marsal Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Petitioners with the powers and obligations set out in the CCAA or set forth herein, and that the Petitioners and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Petitioners pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

34. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Petitioners' receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist the Petitioners, to the extent required by the Petitioners, in their dissemination to the DIP Lender (as hereinafter defined), its counsel and other advisors and the Consenting Noteholders' Advisors of financial and other information as agreed to between the Petitioners and the DIP Lender or the holders of the Subordinated Notes that executed the Recapitalization Support Agreement and that are represented by Goodmans LLP (the "*Consenting Noteholders*"), as applicable, which may be used in these proceedings, including reporting on a basis to be agreed with the DIP Lender and as agreed with the Consenting Noteholders;
- (d) advise the Petitioners in their preparation of the Petitioners' cash flow statements and reporting required by the DIP Lender and the Consenting Noteholders, which information shall be reviewed with the Monitor and delivered to the DIP Lender, its counsel and other advisors and the Consenting Noteholders' Advisors on a periodic basis as agreed to by the DIP Lender and the Consenting Noteholders, as applicable;
- (e) advise the Petitioners in their development of the Plan and any amendments to the Plan and, to the extent required by the Petitioners, in their negotiations with creditors, customers, suppliers and other interested Persons;
- (f) assist the Petitioners, to the extent required by the Petitioners, with the holding and administering of creditors' meetings for voting on the Plan;

- (g) assist the Petitioners, to the extent required by the Petitioners, in dealing with their respective creditors, customers, suppliers and other interested Persons;
- (h) assist the Petitioners, to the extent required by the Petitioners, with their financing and restructuring activities;
- (i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Petitioners, to the extent that is necessary to adequately assess the Petitioners' business and financial affairs or to perform its duties arising under this Order;
- (j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and
- (k) perform such other duties as are required by this Order or by this Court from time to time.

35. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall be construed as resulting in the Monitor being an employer or a successor employer, within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

36. THIS COURT ORDERS that nothing herein contained shall require or allow the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "*Possession*") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Fisheries Act*, the *British Columbia Environmental Management Act*, the *British Columbia Fish Protection Act* and regulations thereunder (the "*Environmental Legislation*"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. For greater certainty, the Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

37. THIS COURT ORDERS that the Monitor shall provide any creditor of the Petitioners, the DIP Lender and the Consenting Noteholders' Advisors with information provided by the Petitioners in response to reasonable requests for information made in writing by such creditor or such creditors' advisors 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 Petitioners 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 Petitioners may agree.

38. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, 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 rights and protections afforded the Monitor by the CCAA or any applicable legislation.

Administration Charge

39. THIS COURT ORDERS that the Monitor, Canadian and U.S. counsel to the Monitor, Canadian and U.S. counsel and the financial advisor to the Petitioners, counsel and the financial advisor to the Consenting Noteholders

(the "*Consenting Noteholders' Advisors*") and counsel and the financial advisor to the Independent Committee shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Petitioners as part of the cost of these proceedings. The Petitioners are hereby authorized and directed to pay the accounts of the Monitor, Canadian and U.S. counsel to the Monitor, Canadian and U.S. counsel and the financial advisor to the Petitioners, the Consenting Noteholders' Advisors and counsel and the financial advisor to the Independent Committee on a periodic basis and, in addition, the Petitioners are hereby authorized to pay to the Monitor, counsel to the Independent Committee, Canadian and U.S. counsel to the Monitor and Canadian and U.S. counsel to the Petitioners retainers collectively in the amount of \$1,200,000 to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

40. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the British Columbia Supreme Court and may be heard on a summary basis.

41. THIS COURT ORDERS that the Monitor, Canadian and U.S. counsel to the Monitor, Canadian and U.S. counsel and the financial advisor to the Petitioners, the Consenting Noteholders' Advisors and counsel and the financial advisor to the Independent Committee shall be entitled to the benefit 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 respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel and advisors, both before and after the making of this Order which are related to the Petitioners' restructuring. For greater certainty, in respect of the fees and disbursements of the financial advisors to the Petitioners and the Consenting Noteholders, the authorization granted in paragraph 39 herein and the scope of the Administration Charge shall refer to and include only obligations relating to monthly work fees and not the payment of any success fees or other bonuses triggered upon implementation of the Recapitalization Transaction or any alternative restructuring transaction. The Administration Charge shall have the priority set out in paragraphs 52 and 54 hereof.

DIP Financing

42. THIS COURT ORDERS that the Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility (the "*DIP Facility*") from Wells Fargo Capital Finance, LLC, as agent, and as lender, and certain other lenders (collectively, the "*DIP Lender*") in order to finance the Petitioners' working capital requirements and other general corporate purposes, provided that borrowings under such credit facility shall not exceed \$28,000,000 unless permitted by further Order of this Court.

43. THIS COURT ORDERS THAT such credit facility shall be on substantially the same terms and subject to the conditions set forth in the draft credit agreement, by and among the Petitioners and the DIP Lender dated as of January 28, 2011 (the "*DIP Credit Agreement*"), provided to the Court by counsel to the Petitioners, as the terms of such DIP Credit Agreement may be amended by the Petitioners and the DIP Lender with the consent of the Monitor. Such draft credit agreement shall be referred to herein as the "*Draft Credit Agreement*".

44. THIS COURT ORDERS that the DIP Facility and the DIP Credit Agreement be and are hereby approved.

45. THIS COURT ORDERS that the Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "*Definitive Documents*"), as are contemplated by the DIP Credit Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Credit Agreement and the Definitive Documents, including, but not limited to the fees and expenses of the DIP Lender's Canadian and U.S. counsel, and other advisors, as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

46. THIS COURT ORDERS that the Petitioners shall notify the Consenting Noteholders' Advisors of any borrowings or repayments under the DIP Facility.

47. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "*DIP Lender's Charge*") on the Property in the maximum amount of all Obligations (as that term is defined in the DIP Credit Agreement) outstanding under the DIP Facility at any given time (including, without limitation, on account of principal, interest, fees and expenses) (the "*DIP Obligations*"), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. For greater certainty, advances made to the Petitioners under the DIP Credit Agreement shall not be used to pay amounts outstanding under the Wells Fargo Credit Agreement. The DIP Lender's Charge shall have the priority set out in paragraphs 54 and 56 hereof.

47A THIS COURT ORDERS that the Petitioners are hereby directed to deposit receipts received after the date of this Order in an amount sufficient to cash collateralize all of the letters of credit issued by Wells Fargo Capital Finance, LLC under the Wells Fargo Credit Agreement in a cash collateral account (the "*Cash Collateral Account*") on terms agreed to between Wells Fargo Capital Finance, LLC and the Petitioners. The Cash Collateral Account shall not form part of the Property and shall be excluded from the Charges (as defined herein).

48. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) the DIP Lender may cease making advances to the Petitioners in accordance with and as provided in the DIP Credit Agreement;

(c) upon the occurrence of an Event of Default under and as defined in the DIP Credit Agreement, or the DIP Lender's Charge or, before the execution of the DIP Credit Agreement the happening of an event that is defined as an Event of Default under the Draft Credit Agreement, the DIP Lender and/or agent and the lenders under the Wells Fargo Credit Agreement, may, upon five (5) days notice to the Petitioners and the Monitor; (i) exercise any and all of its, or their, rights and remedies against the Petitioners or the Property under or pursuant to the Wells Fargo Credit Agreement, the DIP Credit Agreement, the Definitive Documents and the DIP Lender's Charge including without limitation to set-off and/or consolidate any amounts owing to the DIP Lenders and/or the agents and lenders under the Wells Fargo Credit Agreement by the Petitioners against the DIP Obligations, the Definitive Documents, the DIP Lender's Charge or the Obligations under the Wells Fargo Credit Agreement, to make demand, accelerate payment and give notices or to apply to Court for the appointment of a receiver, receiver manager or interim receiver or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners and; (ii) the DIP Lender, the agent and lenders under the Wells Fargo Credit Agreement shall be entitled to seize and retain proceeds from the sale of Property and the cash flow of the Petitioners to repay amounts owing to the Lenders under the Wells Fargo Credit Agreement and the DIP Lender under the DIP Facility in each case, in accordance with the Definitive Documents and the DIP Lender's Charge, but subject to the priorities as set out in paragraphs 55 and 57 of the Order; and

(d) the foregoing rights and remedies of the DIP Lender and the agent and lenders under the Wells Fargo Credit Agreement shall be enforceable against any trustee in bankruptcy, interim receiver, receiver, or receiver and manager of the Petitioners or the Property.

49. THIS COURT ORDERS AND DECLARES that the DIP Lender, in such capacity, and Wells Fargo Capital Finance, LLC, in its capacity as agent and lender under the Wells Fargo Credit Agreement, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners, or any one of them, under the CCAA, or any proposal filed by the Petitioners under the *Bankruptcy and Insolvency Act* of Canada (the "*BIA*"), with respect to any advances

made under and obligations outstanding in respect of the Wells Fargo Credit Agreement and the DIP Obligations outstanding under the Definitive Documents.

49A THIS COURT ORDERS that the Petitioners shall not file a Plan in these proceedings that does not provide for the indefeasible payment in full in cash of the obligations outstanding in respect of the Wells Fargo Credit Agreement and the DIP Obligations outstanding under the Definitive Documents as a pre-condition to the implementation of any such Plan, without the prior written consent of Wells Fargo Capital Finance, LLC and the DIP Lender, as applicable. Subject to paragraph 47(b) herein, the stays of proceedings provided for in this Order shall not apply to Wells Fargo Capital Finance, LLC, the DIP Lender or their respective rights under or in respect of the Wells Fargo Credit Agreement, the DIP Facility or the Definitive Documents, as applicable.

Inter-Company Charges

50. THIS COURT ORDERS that, subject to the terms of the DIP Facility and the Cash Flow Budgets, (a) Angiotech U.S. are hereby authorized to make advances of funds to Angiotech Canada from time to time in accordance with inter-company transaction practices existing as of the Order Date and (b) Angiotech Canada are hereby authorized to repay funds previously advanced to Angiotech Canada by Angiotech U.S. from time to time in accordance with intercompany transaction practices existing as of the Order Date.

51. THIS COURT ORDERS that, subject to the terms of the DIP Facility and the Cash Flow Budgets, (a) Angiotech Canada are hereby authorized to make advances of funds to Angiotech U.S. from time to time in accordance with inter-company transaction practices existing as of the Order Date and (b) Angiotech U.S. are hereby authorized to repay funds previously advanced to Angiotech U.S. by Angiotech Canada from time to time in accordance with inter-company transaction practices existing as of the Order Date.

52. THIS COURT ORDERS that Angiotech U.S. shall be entitled to the benefits of, and are hereby granted, a charge (the "*U.S. Inter-Company Charge*") on the Property in an amount equal to but not exceeding the aggregate amounts actually outstanding at any given time based on advances made by Angiotech U.S. to Angiotech Canada pursuant to the authorization granted under paragraph 49 herein from and after the Order Date. The U.S. Inter-Company Charge shall have the priority set out in paragraphs 54 and 56 hereof.

53. THIS COURT ORDERS that Angiotech Canada shall be entitled to the benefits of, and are hereby granted, a charge (the "*Canada Inter-Company Charge*") on the Property in an amount equal to but not exceeding the aggregate amounts actually outstanding at any given time based on advances made by Angiotech Canada to Angiotech U.S. pursuant to the authorization granted under paragraph 50 herein from and after the Order Date. The Canada Inter-Company Charge shall have the priority set out in paragraphs 54 and 56 hereof. The U.S. Inter-Company Charge and the Canada Inter-Company Charge are collectively referred to herein as the Inter-Company Charges.

54. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefits of the Intercompany Charges to the maximum amount of the DIP Obligations outstanding at any given time and such assignment shall remain in effect only until such time as the DIP Obligations are repaid and satisfied in full and the DIP Lender's Charge has been discharged.

Validity and Priority of Charges Created by this Order

55. THIS COURT ORDERS that the priorities of the Administration Charge, the Directors' Charge, the Inter-Company Charges and the DIP Lender's Charge, as among them, shall be as follows:

First — Administration Charge (to the maximum amount of \$1,500,000);

Second — Directors' Charge (to the maximum amount of \$1,000,000);

Third — Any existing liens, charges, security interests or other encumbrances securing the obligations under the Wells Fargo Credit Agreement;

Fourth — DIP Lender's Charge;

Fifth — Inter-Company Charges, which shall rank *pari passu* with each other;

Sixth — Administration Charge (to the maximum amount of \$1,000,000); and

Seventh — Director's Charge (to the maximum amount of \$1,000,000).

56. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge, the DIP Lender's Charge, the Inter-Company Charges and the Directors' Charge (collectively, the "*Charges*") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

57. THIS COURT ORDERS that each of the Administration Charge, the DIP Lender's Charge, the Inter-Company Charges and the Directors' Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "*Encumbrances*"), in favour of any Person, notwithstanding the order of perfection or attachment, except for any validly perfected purchase money security interest in favour of a secured creditor or any valid statutory Encumbrance existing on the date of this Order in favour of any Person that is a Secured Creditor (as defined in the CCAA) in respect of any of source deductions from wages, employer health tax, workers compensation, vacation pay and banked overtime for employees, amounts under the Wage Earners Protection Program that are subject to a super priority claim under the BIA.

58. THIS COURT ORDERS that except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioners shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Petitioners obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Administration Charge, the Inter-Company Charges and the Director's Charge.

59. THIS COURT ORDERS that the Administration Charge, the Director's Charge, the Inter-Company Charges, the DIP Credit Agreement, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "*Chargees*") and/or the DIP Lender shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "*Agreement*") which binds the Petitioners; and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Credit Agreement, the Definitive Documents, the Recapitalization Support Agreement or the FRN Support Agreement shall create or be deemed to constitute a breach by the Petitioners of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Petitioners entering into the DIP Credit Agreement, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made and the incurrance and performance of obligations by the Petitioners pursuant to this Order, the DIP Credit Agreement, the Definitive Documents, the Recapitalization Support Agreement or the FRN Support Agreement, and the granting of the Charges, including the payments referred to in paragraph 13(a) herein, do not

and will not constitute preferences, fraudulent conveyances or transfers, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

60. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Petitioners' interest in such real property leases.

Service and Notice

61. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in *The Globe and Mail* and *The Wall Street Journal* a notice containing the information prescribed under the CCAA, (ii) within five days after Order Date, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Petitioners of more than \$1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that, for the purposes of this list, (i) with respect to the Subordinated Notes and the Floating Rate Notes, only the name and address of the indenture trustee of such notes and the aggregate amount owing in respect of such notes shall be listed and made publicly available and (ii) the Monitor shall not make the names and addresses of individuals who are creditors publicly available.

62. THIS COURT ORDERS that the Petitioners and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Petitioners' creditors or other interested parties at their respective addresses as last shown on the records of the Petitioners and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

63. THIS COURT ORDERS that the Monitor shall maintain a list (the "*Service List*") of all parties, including emails and other contact information of such parties, that have appeared in these proceedings or have in writing requested that the Monitor add them to the Service List. The Monitor shall post the Service List on its website at: www.alvarezandmarsal.com/angiotech.

64. THIS COURT ORDERS that any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at: www.alvarezandmarsal.com/angiotech.

65. THIS COURT ORDERS that notwithstanding paragraphs 62 and 64 of this Order, service of the Petition, the Notice of Hearing of Petition, the Affidavit #1 of K. Thomas Bailey, this Order and any other pleadings in this proceeding (collectively, the "*Materials*"), shall be made on the federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and regulations thereto, in respect of the federal Crown, and the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, in respect of the British Columbia Crown.

General

66. THIS COURT ORDERS that the Petitioners or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

67. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Petitioners, the Business or the Property.

68. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any Federal or State Court or administrative

body in the United States of America, including the United States Bankruptcy Court for the District of Delaware, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

69. THIS COURT ORDERS that each of the Petitioners and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

70. THIS COURT ORDERS that the Monitor is hereby directed, as a foreign representative of the Petitioners to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended.

71. THIS COURT ORDERS that the Petitioners may (subject to the provisions of the CCAA and the BIA) at any time file a voluntary assignment in bankruptcy or a proposal pursuant to the commercial reorganization provisions of the BIA if and when the Petitioners determine that such a filing is appropriate.

72. THIS COURT ORDERS that the time limited for filing and serving a Response to the Petition along with any affidavit material upon which the Person filing such Response intends to rely shall, for Persons in Canada, be 14 days from the date of service of the Materials upon such Person, and, for persons outside Canada, be 21 days from the date of service of the Materials upon such Person.

73. THIS COURT ORDERS that the Petitioners are hereby at liberty to apply for such further interim or interlocutory relief as it deems advisable within the time limited for Persons to file and serve Responses to the Petition.

74. THIS COURT ORDERS that short leave is hereby granted to allow the hearing of any Notice of Application filed in these proceedings on two (2) clear days' notice after delivery of such Notice of Application and all affidavits in support, subject to the Court in its discretion further abridging or extending the time for service.

75. THIS COURT ORDERS that any interested party (including the Petitioners and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

76. THIS COURT ORDERS that endorsement of this Order by counsel appearing on this application, other than counsel for the Petitioners, is hereby dispensed with.

77. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the Order Date.

BY THE COURT

DISTRICT REGISTRAR

APPROVED AS TO FORM:

Counsel for the Petitioners

Schedule "A"

1. 0741693 B.C. Ltd.
2. Angiotech International Holdings, Corp.
3. Angiotech Pharmaceuticals (US), Inc.
4. American Medical Instruments Holdings, Inc.
5. NeuColl, Inc.
6. Angiotech BioCoatings Corp.
7. Afmedica, Inc.
8. Quill Medical, Inc.
9. Angiotech America, Inc.
10. Angiotech Florida Holdings, Inc.
11. B.G. Sulzle, Inc.
12. Surgical Specialties Corporation
13. Angiotech Delaware, Inc.
14. Medical Device Technologies, Inc.
15. Manan Medical Products, Inc.
16. Surgical Specialties Puerto Rico, Inc.

Schedule "B"

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—
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Logan Willis

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End of Document

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Tab 6

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.

3 No one appearing opposed the relief requested.

Background 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

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

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) Threshold 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

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

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.

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.

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'

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

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

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.).

- 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 7

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.

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

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

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

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

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

Background Facts

(i) Financial Difficulties

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

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

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

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

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

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

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

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

(iii) LP Entities' Response to Financial Difficulties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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, if 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

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:

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'

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

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

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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

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

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

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

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

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

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of \$35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank *pari passu* with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *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.

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.

- 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.

Tab 8

2012 ONSC 3767
Ontario Superior Court of Justice [Commercial List]

Cinram International Inc., Re

2012 CarswellOnt 8413, 2012 ONSC 3767, 217 A.C.W.S. (3d) 11, 91 C.B.R. (5th) 46

**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 Cinram International Inc., Cinram International Income Fund, CII Trust and The Companies Listed in Schedule "A" (Applicants)

Morawetz J.

Heard: June 25, 2012

Judgment: June 26, 2012

Docket: CV-12-9767-00CL

Counsel: Robert J. Chadwick, Melaney Wagner, Caroline Descours for Applicants
Steven Golick for Warner Electra-Atlantic Corp.

Steven Weisz for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler for Twentieth Century Fox Film Corporation

David Byers for Proposed Monitor, FTI Consulting Inc.

Subject: Insolvency

APPLICATION by group of debtor companies for initial order and other relief under *Companies' Creditors Arrangement Act*.

Morawetz J.:

1 Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

2 Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

3 The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.

4 Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

5 Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

- (i) to ensure the ongoing operations of the Cinram Group;
- (ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and
- (iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

6 Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

7 The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

8 Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

- (i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;
- (ii) provides various digital media services through One K Studios, LLC; and
- (iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

9 Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

10 The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

11 Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

12 Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under

the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

13 Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

14 Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

15 Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

16 The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

17 All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

18 As at March 31, 2012, there was approximately \$233 million outstanding under the First-Lien Term Loan Facility; \$19 million outstanding under the First-Lien Revolving Credit Facilities; approximately \$12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately \$12 million outstanding under the Second-Lien Credit Agreement.

19 Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

20 Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

21 The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

- (a) the lenders demanding payment in full for money owing under the Credit Agreements;

- (b) potential termination of contracts by key suppliers; and
- (c) potential termination of contracts by customers.

22 As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of \$15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of \$15 million.

23 The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

- (a) the active employment of employees in the ordinary course;
- (b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;
- (c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and
- (d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

24 Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

25 The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

26 In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

27 Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

28 Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

29 Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent

consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

30 Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

31 The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

32 Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

33 The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

34 Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

35 The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

36 In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

37 As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

38 The Applicants have also requested that the confidential supplement — which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules — be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of*

Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 (S.C.C.), I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

39 Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

40 In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

- (a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;
- (b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;
- (c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;
- (d) meetings of the board of trustees and board of directors typically take place in Canada;
- (e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;
- (f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;
- (g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;
- (h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;
- (i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;
- (j) new business development initiatives are centralized and managed from Toronto, Ontario; and
- (k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

41 Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

42 The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — 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.

43 In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

Schedule "A"

Additional Applicants

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

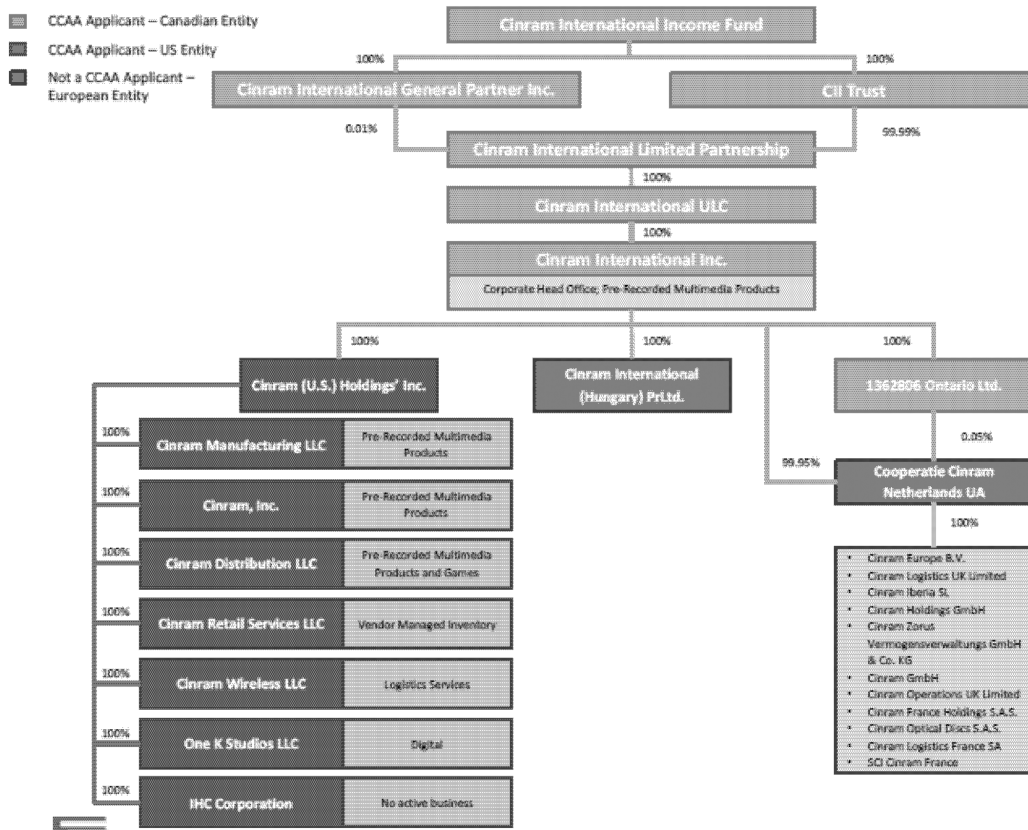
Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

Schedule "B"



Graphic 1

Schedule "C"

A. The Applicants Are "Debtor Companies" to Which the CCAA Applies

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds \$5 million.

CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds \$5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.

"debtor company" means any company that:

(a) is bankrupt or insolvent;

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

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

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

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Canwest Global Communications Corp., Re (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("*Book of Authorities*"), Tab 1.

Global Light Telecommunications Inc., Re (2004), 2 C.B.R. (5th) 210 (B.C. S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

Global Light Telecommunications Inc., Re, supra at para. 17; Book of Authorities, Tab 2.

Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

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

BIA, Section 2 ("insolvent person").

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), at para.4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco Inc., Re, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco Inc., Re, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

- a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.
- b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.
- d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of \$5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

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

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

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately \$252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately \$12 million in letter of credit exposure) and approximately \$12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed \$5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. The Relief is Available under The CCAA and Consistent with the Purpose and Policy of the CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Nova Metal Products Inc. v. Comiskey (Trustee of), *supra* at paras. 22 and 56-60; Book of Authorities, Tab 4. *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 5; Book of Authorities, Tab 6.

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

Sulphur Corp. of Canada Ltd., Re (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) *The Stay of Proceedings Against Non-Applicants is Appropriate*

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

- a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;
- b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and
- c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

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.

Lehndorff General Partner Ltd., Re, *supra* at para. 5; Book of Authorities, Tab 6. *Canwest Global Communications Corp., Re*, *supra* at para. 27; Book of Authorities, Tab 1.

CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

Lehndorff General Partner Ltd., Re, supra at paras. 5 and 16; Book of Authorities, Tab 6.

T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

- a. where it is important to the reorganization process;
- b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;
- c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and
- d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10. *Lehndorff General Partner Ltd., Re, supra* at para. 21; Book of Authorities, Tab 6.

Canwest Global Communications Corp., Re, supra at paras. 28 and 29; Book of Authorities, Tab 1.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 5, 18, and 31; Book of Authorities, Tab 11.

Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Canwest Global Communications Corp., Re*, the recent amendments,

including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Canwest Global Communications Corp., Re supra, at paras. 41 and 43; Book of Authorities, Tab 1.

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

- a. whether the goods and services were integral to the business of the applicants;
- b. the applicants' dependency on the uninterrupted supply of the goods or services;
- c. the fact that no payments would be made without the consent of the Monitor;
- d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
- e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and
- f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global Communications Corp., Re supra, at para. 43; Book of Authorities, Tab 1.

Brainhunter Inc., Re, [2009] O.J. No. 5207 (Ont. S.C.J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.

Prizm Income Fund, Re (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those

services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of \$15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2) *Priority* — secured creditors — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Timminco Ltd., Re, 211 A.C.W.S. (3d) 881 (Ont. S.C.J. [Commercial List]) [2012 CarswellOnt 1466] at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

11.2(4) Factors to be considered — 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.

CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrow funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

Re Catalyst Paper Corporation, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.

Angiotech, supra, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18

Fraser Papers Inc., Re [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

- a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;
- b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;
- c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedings and implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;
- d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;
- e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;
- f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

- g. the DIP Lenders' Charge will not secure any pre-filing obligations;
- h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings; and
- i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD\$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent, the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration 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*

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

CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco Ltd., Re, Canwest Global Communications Corp., Re* and *Canwest Publishing Inc./Publications Canwest Inc., Re*.

Canwest Global Communications Corp., Re, supra; Book of Authorities, Tab 1.

Canwest Publishing, supra; Book of Authorities, Tab 16.

Timminco Ltd., Re, 2012 ONSC 106 (Ont. S.C.J. [Commercial List]) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an

assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

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

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, supra, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

- a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;
- b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;
- c. there is no unwarranted duplication of roles;
- d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and
- e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD\$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

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 — 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.

11.51(2) *Priority*

The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

11.51(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.

11.51(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.

CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global Communications Corp., Re*, the Court outlined the test for granting such a charge:

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.

Canwest Global Communications Corp., Re, supra at paras 46-48; Book of Authorities, Tab 1.

Canwest Publishing, supra at paras. 56-57; Book of Authorities, Tab 16.

Timminco, supra at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD \$13 million, given:

- a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
- b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;
- c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;
- d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;
- e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257; Application Record, Tab 2.

(D) *KERP Charge*

90. The Applicants seek a KERP Charge in an amount of CAD\$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])] considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
- h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Grant Forest Products Inc., Re, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.

Canwest Publishing Inc./Publications Canwest Inc., Re supra, at paras 59; Book of Authorities, Tab 16.

Canwest Global Communications Corp., Re supra, at para. 49; Book of Authorities, Tab 1.

Timminco Ltd., Re (2012), 95 C.C.P.B. 48 (Ont. S.C.J. [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest Products Inc., Re, supra at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD \$3 million, given:

- a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora Employees to remain with the Cinram Group while the company pursued its restructuring efforts;
- b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;
- c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;
- d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;
- e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;
- f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
- g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest Corp., Re*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

Sino-Forest Corp., Re, supra, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

- a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;
- b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

Bell Affidavit, para. 176; Application Record, Tab 2.

Application granted.

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Tab 9

2014 ONSC 6998
Ontario Superior Court of Justice

Cline Mining Corp., Re

2014 CarswellOnt 18943, 2014 ONSC 6998, 22 C.B.R. (6th) 278, 251 A.C.W.S. (3d) 381

**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 and Arrangement of Cline Mining
Corporation, New Elk Coal Company LLC and North Central Energy Company

G.B. Morawetz R.S.J.

Heard: December 3, 2014
Judgment: December 3, 2014
Docket: CV-14-10781-00CL

Counsel: Robert J. Chadwick, Logan Willis for Applicants
J. Swartz for Secured Noteholders
Marc Wasserman, Michael De Lellis for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency

APPLICATION by debtor companies for initial order and other relief under *Companies' Creditors Arrangement Act*.

G.B. Morawetz R.S.J.:

1 Cline Mining Corporation ("Cline"), New Elk Coal Company LLC ("New Elk"), North Central Energy Company ("North Central") and, together with Cline and New Elk (the "Applicants") are in the business of locating, exploring and developing mineral resource properties, with a focus on gold and metallurgical coal (the "Cline Business"). The Applicants, along with their wholly-owned subsidiary, Raton Basin Analytical LLC ("Raton Basin") and, together with the Applicants (the "Cline Group") have interests in resource properties in Canada, the United States and Madagascar.

2 The Applicants apply for an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("CCAA") and, if granted, the Applicants also seek an order (the "Claims Procedure Order") approving a claims process (the "Claims Procedure") for the identification and determination of claims against the Applicants and their present and former directors and officers. The Applicants also seek an order (the "Meetings Order") *inter alia*: (i) accepting the filing of a plan of compromise and arrangement in respect of the Applicants (the "Plan"); (ii) authorizing the Applicants to call, hold and conduct meetings (the "Meetings") of creditors whose claims are to be affected by the Plan for the purpose of enabling such creditors to consider and vote on a resolution to approve the Plan; and (iii) approving the procedures to be followed with respect to the calling and conduct of the Meetings.

3 The Cline Group has experienced financial challenges that necessitate a recapitalization of the Applicants under the CCAA. As set out in the affidavit of Mr. Matthew Goldfarb, Chief Restructuring Officer and Acting Chief Executive Officer of Cline, the performance of the Cline Business has been adversely affected by the broader industry wide challenges, particularly the protracted downturn in prevailing prices for metallurgical coal. Operations at the New Elk metallurgical coal mine in Colorado (the "New Elk Mine") were suspended in July 2012 because the mine could not operate profitably as a result of a decline in the market price of metallurgical coal. The suspension of mining activities

was intended to be temporary. However, Mr. Goldfarb contends that market conditions in the coal industry have not sufficiently recovered and the suspension of full scale mining activities is still in effect.

4 Mr. Goldfarb contends that the Cline Group's other resource investments remain at the feasibility, exploration and/or development stages and the Cline Group's current inability to derive profit from the New Elk Mine has rendered the Applicants unable to meet their financial obligations as they become due.

5 Cline is in default of its 2011 series 10% Senior Secured Notes (the "2011 Notes") as well as its 2013 series 10% Senior Secured Notes (the "2013 Notes", and collectively with the 2011 Notes, the "Secured Notes"). As at December 1, 2014, total obligations in excess of \$110 million are owed in respect of the Secured Notes, which matured on June 15, 2014. The Secured Notes were subject to Forbearance Agreements that expired on November 28, 2014 and Mr. Goldfarb contends that the Applicants do not have the ability to repay the Secured Notes.

6 The Secured Notes are issued by Cline and guaranteed by New Elk and North Central. The indenture trustee in respect of the Secured Notes (the "Trustee") holds a first ranking security interest over substantially all the assets of Cline, New Elk and North Central. Mr. Goldfarb states that the amounts owing under the Secured Notes exceed the value of the Cline Business and that there would be no recovery for unsecured creditors if the Trustee were to enforce its security against the Applicants in respect of the Secured Notes.

7 The Secured Notes are held by beneficial owners whose investments are managed by Marret Asset Management Inc. ("Marret"). Marret exercises all discretion and authority in respect of the holders of the Secured Notes (the "Secured Noteholders"). Cline has engaged in discussions with representatives of Marret regarding a consensual recapitalization of the Applicants and these discussions have resulted in a proposed recapitalization transaction that is supported by Marret, on behalf of the Secured Noteholders (the "Recapitalization").

8 Mr. Goldfarb states that if implemented, the Recapitalization would:

- a. maintain the Cline Group as a unified corporate enterprise;
- b. reduce the Applicants' secured indebtedness by more than \$55 million;
- c. reduce the Applicants' annual interest expense in the near term;
- d. preserve certain tax attributes within the restructured company; and
- e. effectuate a reduced debt structure to enable the Cline Group to better withstand prolonged weakness in the price of metallurgical coal.

9 Mr. Goldfarb also states that the Recapitalization would also provide a limited recovery for the Applicants' unsecured creditors, who would otherwise receive no recovery in a security enforcement or asset sale scenario. It is contemplated that the Recapitalization would be implemented pursuant to a plan of compromise and arrangement under the CCAA (the "CCAA Plan") that is recognized in the United States under Chapter 15, Title 11 of the United States Bankruptcy Code ("Chapter 15").

10 Cline and Marret have entered into a Support Agreement dated December 2, 2014 that sets forth the principal terms of the proposed Recapitalization. Based on Marret's agreement to the Recapitalization (on behalf of the Secured Noteholders), the Applicants have achieved support from their senior ranking creditors, which represent in excess of 95% of the Applicants' total indebtedness.

11 The Applicants seek the Initial Order to stabilize their financial situation and to proceed with the Recapitalization as efficiently as possible, and to this end, the Applicants request that the Court also grant the Claims Procedure Order and the Meetings Order.

12 Cline is a public company incorporated under the laws of British Columbia, with its registered head office located in Vancouver. Cline commenced business under the laws of Ontario in 2003 and Mr. Goldfarb states that its principal office, which serves as the head office and nerve centre of the Cline Group is located in Toronto.

13 Cline is the direct or indirect parent company of New Elk, North Central and Raton Basin. Cline also holds minority interests in Iron Ore Corporation in Madagascar SARL, Strike Minerals Inc. and UMC Energy plc, all of which are exploration companies.

14 Cline is the sole shareholder of New Elk, a limited liability company incorporated pursuant to the laws of Colorado. New Elk holds mining rights in the New Elk Mine and maintains a Canadian bank account with the Bank of Montreal in Toronto.

15 New Elk is the sole shareholder of North Central and Raton Basin, both of which are incorporated pursuant to the laws of Colorado. North Central holds a fee-simple interest in certain coal parcels on which the New Elk Mine is situated and maintains a Canadian bank account with the Bank of Montreal in Toronto. Raton Basin is inactive and is not an applicant in the proceedings.

16 Cline Group prepares its financial statements on a consolidated basis. The required financial statements are in the record. As at August 31, 2014, the Cline Group's liabilities were approximately \$99 million. The primary secured liabilities were the 2011 Notes in the principal amount in excess of \$71 million, plus accrued and unpaid interest, and the 2013 Notes in the principal amount of approximately \$12 million, plus accrued and unpaid interest. Both the 2011 Notes and the 2013 Notes matured on June 15, 2014.

17 Pursuant to an Inter-Creditor Agreement, the 2011 Notes and the 2013 Notes have a first ranking security interest on the property and undertakings of the Applicants and rank *pari passu* as between each other.

18 Cline and New Elk are defendants in an uncertified class action lawsuit alleging that they violated the *WARN Act* by failing to provide personnel who provided services to New Elk with at least 60 days advance written notice of the suspension of both scale production at the New Elk Mine. These allegations are disputed.

19 The Applicants are aware of approximately \$3.5 million in other unsecured claims.

20 On December 16, 2013, Cline was unable to make semi-annual interest payments in respect of both the 2011 and 2013 Notes. A Forbearance Agreement was entered into. During the forbearance period, the Applicants engaged Moelis & Company to conduct a comprehensive sale process in an effort to maximize value for the Applicant and its stakeholders (the "Sales Process"). No offers or expressions of interest were received in the Sale Process.

21 The forbearance period expired on November 28, 2014 and Mr. Goldfarb has stated that Marret has confirmed that the Secured Noteholders have given instructions to the Trustee to accelerate the Secured Notes.

22 Accordingly, Cline is immediately required to pay in excess of \$110 million in respect of the Secured Notes. Mr. Goldfarb states that the Cline Group does not have the ability to pay these amounts and consequently the Trustee is in a position to enforce its security over the assets and property of the Applicants.

23 In light of these financial conditions, Mr. Goldfarb states that the Applicants are insolvent.

24 Mr. Goldfarb also contends that without the benefit of CCAA protection, there could be an erosion of the value of the Cline Group and that the stay of proceedings under the CCAA is required to preserve the value of the Cline Group.

25 The Applicants are seeking the appointment of FTI Consulting Canada Inc. ("FTI") as the proposed monitor in these proceedings (the "Monitor").

26 The proposed Initial Order also provides for a court ordered charge (the "Administration Charge") to be granted in favour of the Monitor, its counsel, counsel to the Applicants, the Chief Restructuring Officer (the "CRO") and counsel to Marret in respect of their fees and disbursements incurred at the standard rates and charges. The proposed Administration Charge is an aggregate amount of \$350,000.

27 The directors and officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities. Mr. Goldfarb states that in order to continue to carry on business during the CCAA proceedings and in order to conduct the Recapitalization most effectively, the Applicants require the active and committed involvement of the board and, accordingly, the proposed Initial Order provides for a court ordered charge (the "Directors' Charge") in the amount of \$500,000 to secure the Applicants' indemnification of its directors and officers in respect of liabilities they may incur during the CCAA proceedings. The amount of the Directors' Charge has been calculated based on the estimated exposure of the directors and officers and has been reviewed with the prospective Monitor. The proposed Directors Charge would only apply to the extent that the directors and officers do not have coverage under the D&O insurance policy with AIG Insurance Company of Canada.

28 The Applicants seek to complete the Recapitalization as quickly as reasonably possible and they anticipate that their existing cash resources will provide the Cline Group with sufficient liquidity during the CCAA proceedings.

29 It is also contemplated that foreign recognition proceedings will be sought in Colorado pursuant to Chapter 15. The Applicants seek the authorization for the Monitor to act as the foreign representative of the Applicants in the CCAA proceedings and to seek recognition of these proceedings in the United States pursuant to Chapter 15.

30 Having reviewed the record, including the affidavit of Mr. Goldfarb and the pre-filing report submitted by FTI, I am satisfied that each of the Applicants is "a debtor company" within the meaning of the defined term in s. 2 of the CCAA.

31 Cline is a "company" within the meaning of the CCAA. It is incorporated under the laws of British Columbia with gold development assets in Ontario and does business from its head office in Toronto.

32 New Elk and North Central are incorporated in Colorado, have assets in Canada, namely bank accounts in Toronto and are directed from Cline's head office in Toronto. In my view, each of New Elk and North Central is a "company" within the meaning of the CCAA because it is an incorporated company having assets in Canada.

33 I am also satisfied that the Applicants meet both the traditional test for insolvency under the *Bankruptcy and Insolvency Act* and the expanded test for insolvency based on a looming liquidity condition given that Cline has been unable to make interest payments under the Secured Notes, the Secured Notes have matured, the Forbearance Agreement has expired and the Trustee is in a position to enforce its security over the property of the Applicants. Further, I am satisfied that the Applicants are unable to obtain traditional or alternative financing to support the day-to-day operations and there is no reasonable expectation that the Applicants will be able to generate sufficient cash flow from operations to support their existing debt obligations (see: *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to CA refused [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to SCC refused [2004] S.C.C.A. No. 336 (S.C.C.)).

34 It is also clear that the Applicants' liabilities far exceed the \$5 million threshold amount under the CCAA.

35 In my view, the CCAA applies to the Applicants' as "debtor companies" in accordance with s. 3(1) of the CCAA.

36 The Applicants have filed the required financial information, including audited financial statements and the cash-flow forecast.

37 The Applicants in the Initial Order seek authorization (but not a requirement) to make certain pre-filing payments, including, *inter alia*:

- a. payments to employees of effective wages, benefits and related amounts;
- b. the amounts owing to respective individuals working as independent contractors;
- c. the fees and disbursements of any consultants, agents, experts, accountants, counsel or other persons currently retained by the Applicants in respect of the CCAA; and
- d. certain expenses incurred by the Applicants in carrying on the business in the ordinary course, that pertains to the period prior to the date of the Initial Order, if, in the opinion of the Applicants and with the consent of the Monitor, the applicable supplier or service provider is critical to the Cline Business and the ongoing operations of the Cline Group.

38 The court has jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor's companies (see: *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]); *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) and *SkyLink Aviation Inc., Re*, 2013 ONSC 1500 (Ont. S.C.J. [Commercial List])). In granting such authorization, the courts consider a number of factors, including:

- a. whether the goods and services were integral to the business of the applicants;
- b. the applicants' need for the uninterrupted supply of the goods or services;
- c. the fact that no payments would be made without the consent of the monitor;
- d. the monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate;
- e. whether the applicants had sufficient inventory of goods on hand to meet their needs; and
- f. the effect on the debtor's ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

39 In this case, the Applicants are of the view that their employees and certain of their independent contractors, certain suppliers of goods and services and certain providers of permits and licences are critical to the operation of the Cline Business. Mr. Goldfarb believes that such persons should be paid in the ordinary course, including in respect of pre-filing amounts, in order to avoid disruption to the Applicants' operations during the CCAA proceedings.

40 I am satisfied that it is appropriate in the present circumstances to grant the Applicants the authority to pay certain pre and post-filing obligations, subject to the terms and conditions in the proposed Initial Order.

41 Turning now to the request for the Administration Charge, s. 11.52 of the CCAA expressly provides the court with the jurisdiction to grant the Administration Charge. In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), the court noted that s. 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provide a list of non-exhaustive factors to consider in making such an assessment. The list of factors to consider include:

- a. the size and complexity of the business being restructured;
- b. the proposed role of the beneficiaries of the charge;
- c. whether there is unwarranted duplication of roles;
- d. whether the quantum of the proposed charge appears to be fair and reasonable;

e. the position of the secured creditors likely to be affected by the charge; and

f. the position of the monitor.

42 The Applicants submit that the Administration Charge is warranted and necessary for the reasons set forth in Mr. Goldfarb's affidavit at paragraphs 133 - 140.

43 I am satisfied that in these circumstances, the granting of the Administration Charge is warranted and necessary and that it is appropriate for the court to exercise its jurisdiction to grant the Administration Charge in the amount of \$350,000.

44 The Applicants also seek a Directors' Charge in the amount of \$500,000.

45 Section 11.51 of the CCAA affords the court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis. The court has granted director and officer charges in a number of cases including *Canwest Global*, *supra*, *Canwest Publishing*, *supra*, *Cinram*, *supra* and *SkyLink*, *supra*.

46 The Applicants submit that the Directors' Charge is warranted and necessary and that it is appropriate in the present circumstances for the court to exercise its jurisdiction and grant the charge in the amount of \$500,000.

47 For the reasons set out in Mr. Goldfarb's affidavit at paragraphs 134 - 138, I accept these submissions.

48 The Applicants have also indicated that, with the assistance of the Monitor as foreign representative, they intend to commence Chapter 15 proceedings in the United States Bankruptcy Court for the District of Colorado. Pursuant to s. 56 of the CCAA, the court has the authority to appoint a foreign representative of the Applicants for the purpose of having these proceedings recognized in a jurisdiction outside of Canada.

49 The Applicants seek authorization for each of the Applicants and the Monitor to apply to any court for recognition of the Initial Order and authorization for the Monitor to act as representative in respect of these CCAA proceedings for the purpose of having the CCAA proceedings recognized outside of Canada.

50 I am satisfied that it is appropriate to appoint the Monitor as foreign representative of the Applicants with respect to these proceedings.

51 The Applicants, in their factum, also address the issue of the Applicants' "center of main interest" as being in Ontario. These submissions are set out at paragraphs 77 - 84 of the Applicants' Factum.

52 Although the submissions are of interest, the determination of the Applicants' "center of main interest" ("COMI") is an issue to be considered by the United States Bankruptcy Court for the District of Colorado, rather than this court.

53 The Applicants also seek a postponement of the Annual Shareholders Meeting. The previous Annual Meeting of Cline was held on August 15, 2013 and therefore Cline was required by statute to hold an annual general meeting by November 15, 2014.

54 Mr. Goldfarb states that it would serve no purpose for Cline to call and hold its annual meeting of Shareholders given that the Shareholders of Cline no longer have an economic interest in Cline as a result of the insolvency. The Applicants submit that it is appropriate for the court to exercise its jurisdiction to relieve Cline from its obligation to call and hold its annual meeting of Shareholders until after the termination of the CCAA proceedings or further order of the court. In support of this request, the Applicants reference *Canwest Global*, *supra* and *SkyLink*, *supra*.

55 In my view, the request to postpone the annual Shareholders meeting is appropriate in the circumstances and is granted.

56 In the result, I am satisfied that the Applicants meet all of the qualifications required to obtain the requested relief under the CCAA and the Initial Order is granted in the form presented.

57 The Applicants also request two additional orders that they believe are necessary to advance the Recapitalization:

- a. an order establishing a process for the identification and determination of claims against the Applicants and their present and former directors and officers (the Claims Procedure Order); and
- b. an order authorizing the Applicants to file the Plan and to convene meetings of their affected creditors to consider and vote on the Plan (the Meetings Order).

58 The Applicants seek the Claims Procedure Order and the Meetings Order at this stage because they wish to effectuate the recapitalization as efficiently as possible. Further, the Applicants submit that the "comeback clauses" included in the draft Claims Procedure Order and Meetings Order ensure that no party is prejudiced by the granting of such order at this time.

59 The Applicants have submitted a factum in support of the Claims Procedure Order and Meetings Order. In the factual background to the Recapitalization and proposed Plan, the Claims Procedure and the meeting of creditors is set out at paragraphs 8 - 29 of the factum. For informational purposes, these paragraphs are set out in Appendix "A" to this Endorsement.

60 The issues to be considered on this motion are whether:

- (a) it is appropriate to proceed with the Claims Procedure;
- (b) it is appropriate to permit the Applicants to file the Plan and call the meetings;
- (c) the proposed classification of creditors is appropriate; and
- (d) a consolidated plan is appropriate in the circumstances.

61 In *SkyLink*, *supra* at paragraph 35, I noted that while it is not the usual practice for applicants to request claims procedure and meetings order concurrently with an initial CCAA application, the court has granted such relief in appropriate circumstances. The support for a restructuring proposal from the only creditors with an economic interest, and the existence of a comeback hearing at which any issues in respect of the orders can be addressed, are two factors that militate in favour of granting the Claims Procedure and Meetings Order concurrently with the initial application.

62 In my view, the foregoing comment is applicable in these proceedings.

63 I also note that both the Claims Procedure Order and the Meetings Order provide that any interested party that wishes to amend the Claims Procedure Order or the Meetings Order, as applicable, can bring a motion on a comeback date to be set by the court.

64 I also accept that most of the Applicants' known creditors are familiar with the Applicants and the Cline Business and the determination of most of the claims against the Applicants would be carried out by the Applicants using the Notice of Claim Procedure. As such, the Applicants submit that a claims bar date of January 13, 2015 will provide sufficient time for creditors to assert their claims and will not result in any prejudice to said creditors.

65 Based on the submissions of the Applicants, I accept this submission.

66 Accordingly, I am satisfied that the court should exercise its discretion and grant the requested Claims Procedure Order at this time.

67 Turning now to the issue as to whether it is appropriate to permit the Applicants to file the Plan and call the meetings, the court is not required to address the fairness and reasonableness of the Plan at this stage.

68 In these circumstances, I am satisfied that it is appropriate to grant the Meetings Order at this time in order to allow the Meetings Procedure to proceed concurrently with the Claims Procedure, with a view to completing the Recapitalization as efficiently as possible.

69 Commencing at paragraph 42 of the factum, the Applicants make submissions with respect to the proposed classification of creditors for voting purposes.

70 The Applicants submit that the holders of the 2011 Notes and the 2013 Notes have a commonality of interest in respect of their *pro rata* share of the Secured Noteholders Allowed Secured Claim and should be placed in the same class for voting purposes.

71 For the purposes of the motion today, I am prepared to accept that it is appropriate for the Secured Noteholders to vote in the same class in respect of their Secured Noteholders Allowed Secured Claim.

72 The Affected Unsecured Creditors' Class includes creditors with unsecured claims against the Applicants, including the Secured Noteholders in respect of their Secured Noteholders Allowed Unsecured Claim and, if applicable, Marret in respect of the Marret Unsecured Claim. The Applicants submit that the affected Unsecured Creditors have a commonality of interest and should be placed in the same class for voting purposes.

73 It is noted that the determination of the Secured Noteholders Allowed Unsecured Claim has been determined by the Applicants and Marret and, for purposes of voting at the Secured Noteholders Meeting, is set at \$17.5 million.

74 For the purposes of the motion today, I am prepared to accept the submissions of the Applicants including their determination of the affected Unsecured Creditors class.

75 The *WARN Act* plaintiffs class consists of potential members of an uncertified class action proceeding. The Applicants submit that the *WARN Act* claims have been asserted by only two *WARN Act* plaintiffs on behalf of other potential members of the class and these claims have not been proven and are contested by the Applicants.

76 Due to the unique nature and status of these claims, the Applicants have offered the *WARN Act* plaintiffs consideration that is different than the consideration offered to the Affected Unsecured Creditors.

77 I accept, for the purposes of this motion, that the *WARN Act* plaintiffs should be placed in a separate class for voting purposes.

78 With respect to holders of "Equity Claims", the Meetings Order provides that any person with a claim that meets the definition of "equity claim" under s. 2(1) of the CCAA will have no right to, and will not, vote at meetings; and the Plan provides that equity claimants will not receive a distribution under the Plan or otherwise recover anything in respect of their equity claims or equity interest.

79 For the purposes of this motion, I accept the submission of the Applicants that it is appropriate for equity claimants to be prohibited from voting on the Plan.

80 The Plan as proposed by the Applicants is a consolidated plan of arrangement that is intended to address the combined claims against all the Applicants. Courts will authorize a consolidated plan of arrangement to be filed for two or more related companies in appropriate circumstances (see, for example: *Northland Properties Ltd., Re* (1988), 69 C.B.R. (N.S.) 266 (B.C. S.C.); *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])).

81 In this case, the Applicants submit that a consolidated plan is appropriate because:

- a. New Elk is a wholly-owned subsidiary of Cline and North Central is a wholly-owned subsidiary of New Elk;
- b. the Applicants are integrated members of the Cline Group, and there is significant sharing of business functions within the Cline Group;
- c. the Applicants have prepared consolidated financial statements;
- d. all three of the Applicants are obligors in respect of the Secured Notes;
- e. the Secured Noteholders are the only creditors with an economic interest in any of the three Applicants and have a first ranking security interest over all or substantially all of the assets, property and undertakings of each of the Applicants;
- f. the *WARN Act* claims are asserted against both Cline and New Elk under a "single employer" theory of liability;
- g. North Central has no known liabilities other than its obligations in respect of the Secured Notes;
- h. Unsecured Creditors of the Applicants would receive no recovery outside of the Plan; and
- i. the filing of a consolidated plan does not prejudice any affected Unsecured Creditor or *WARN Act* plaintiff, since a consolidated plan will not eliminate any veto position with respect to approval of the plan that such creditors would have if separate plans of arrangement were filed in respect of each of the Applicants.

82 For the purposes of the motion today, I accept these submissions and consider it appropriate to authorize the filing of a consolidated plan.

83 In the result, I am satisfied that it is appropriate to grant both the Claims Procedure Order and the Meetings Order at this time.

84 It is specifically noted that the "comeback clause" that is included in both the Claims Procedure and the Meetings Orders will allow parties to come back before this court to amend or vary the Claims Procedure Order or the Meetings Order. The comeback hearing has been scheduled for Monday, December 22, 2014.

Application granted.

Appendix "A"

A. Recapitalization and Proposed Plan

(1) Overview of the Recapitalization

8. The Applicants have been actively engaged in discussions with Marret, on behalf of the Secured Noteholders, regarding a possible recapitalization of the Applicants. The Applicants believe that that the Recapitalization, in the circumstances, is in the best interests of the Applicants and their stakeholders. The Recapitalization provides for, *inter alia*, the following:

- (a) the Secured Noteholders Allowed Secured Claim will be compromised, released and discharged as against the Applicants upon implementation of the Plan (the "*Plan Implementation Date*") for new Cline common shares representing 100% of the equity in Cline (the "*New Cline Common Shares*"), and new indebtedness in favour of the Secured Noteholders in the principal amount of \$55 million (the "*New Secured Debt*");

(b) Cline will be the borrower and New Elk and North Central will be the guarantors of the New Secured Debt, which will be evidenced by a credit agreement with a term of seven (7) years, bearing interest at a rate of 0.01% per annum plus an additional variable interest payable only once the Applicants have achieved certain operating revenue targets;

(c) the claims of Affected Unsecured Creditors, which exclude the WARN Act Plaintiffs but include the Secured Noteholders in respect of the Secured Noteholders Allowed Unsecured Claim, will be compromised, released and discharged as against the Applicants on the Plan Implementation Date in exchange for an unsecured, subordinated, non-interest bearing entitlement to receive \$225,000 from Cline on the date that is eight (8) years from the Plan Implementation Date (the "*Unsecured Plan Entitlement*");

(d) notwithstanding the Secured Noteholders Allowed Unsecured Claim, the Secured Noteholders will waive their entitlement to the proceeds of the Unsecured Plan Entitlement, and all such proceeds will be available for distribution to the other Affected Unsecured Creditors with valid claims who are entitled to the Unsecured Plan Entitlement, allocated on a *pro rata* basis;

(e) all Affected Unsecured Creditors with Affected Unsecured Claims of up to \$10,000 will, instead of receiving their *pro rata* share of the Unsecured Plan Entitlement, be paid in cash for the full value of their claim and will be deemed to vote in favour of the Plan unless they indicate otherwise, provided that this cash payment will not apply to any Secured Noteholder with respect to its Secured Noteholders Allowed Unsecured Claim;

(f) all WARN Act Claims will be compromised, released and discharged as against the Applicants on the Plan Implementation Date in exchange for an unsecured, subordinated, non-interest bearing entitlement to receive \$100,000 from Cline on the date this is eight (8) years from the Plan Implementation Date (the "*WARN Act Plan Entitlement*");

(g) certain claims against the Applicants, including claims covered by insurance, certain prior-ranking secured claims of equipment providers and the secured claim of Bank of Montreal in respect of corporate credit card payables, will remain unaffected by the Plan;

(h) existing equity interests in Cline will be cancelled for no consideration; and

(i) the shares of New Elk and North Central will not be affected by the Recapitalization and will remain owned by Cline and New Elk, respectively.

Goldfarb Affidavit at para. 124; Application Record, Tab 4.

9. Any Affected Creditor with a Disputed Distribution Claim will not be entitled to receive any distribution under the Plan with respect to such Disputed Distribution Claim unless and until such Claim becomes an Allowed Affected Claim. A Disputed Distribution Claim will be resolved in the manner set out in the Claims Procedure Order.

Plan, Section 3.6.

10. Unaffected Creditors will not be affected by the Plan and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

Plan, Sections 1.1, 2.3 and 3.5.

11. If implemented, the Recapitalization would result in a reduction of over \$55 million in interest-bearing debt.

Goldfarb Affidavit at para. 126; Application Record, Tab 4.

12. The proposed Recapitalization is supported by Marret, which has the ability to exercise all discretion and authority of the Secured Noteholders. Consequently, the proposed Recapitalization is supported by 100% of the Secured Noteholders, both as secured creditors of the Applicants and as unsecured creditors of the Applicants in respect of the portion of their claims that is unsecured.

Goldfarb Affidavit at paras. 63, 67 and 145; Application Record, Tab 4.

(2) Classification for Purposes of Voting on the Plan

13. The only classes of creditors for the purposes of considering and voting on the Plan will be (i) the Secured Noteholders Class, (ii) the Affected Unsecured Creditors Class, and (iii) the WARN Act Plaintiffs Class.

Plan, Section 3.2.

Goldfarb Affidavit at para. 153; Application Record, Tab 4.

14. The Secured Noteholders Class consists of the Secured Noteholders in respect of the Secured Noteholders Allowed Secured Claim, being the portion of the Secured Noteholders Allowed Claim against the Applicants that is designated as secured. Each Secured Noteholder will be entitled to vote its *pro rata* portion of that amount in the Secured Noteholders Class.

Goldfarb Affidavit at para. 154; Application Record, Tab 4.

15. The Affected Unsecured Creditors Class consists of the unsecured creditors of the Applicants who are to be affected by the Plan, excluding the WARN Act Plaintiffs (who are addressed in a separate class). The Affected Unsecured Creditors Class includes the Secured Noteholders in respect of the Secured Noteholders Allowed Unsecured Claim, being the portion of the Secured Noteholders Allowed Claim that is designated as unsecured. Each Secured Noteholder will be entitled to vote its *pro rata* portion of the Secured Noteholders Allowed Unsecured Claim in the Affected Unsecured Creditors Class.

Goldfarb Affidavit at para. 155; Application Record, Tab 4.

16. Within the Affected Unsecured Creditors Class, unsecured creditors with Affected Unsecured Claims of up to \$10,000 will be paid in full and will be deemed to vote in favour of the Plan, unless they indicate otherwise.

Goldfarb Affidavit at para. 156; Application Record, Tab 4.

17. The WARN Act Plaintiffs Class consists of all WARN Act Plaintiffs in the WARN Act Class Action who may assert WARN Act Claims against the Applicants. Each WARN Act Plaintiff will be entitled to vote its *pro rata* portion of all WARN Act Claims.

Goldfarb Affidavit at para. 157; Application Record, Tab 4.

18. Unaffected Creditors and Equity Claimants are not entitled to vote on the Plan at the Meetings in respect of their Unaffected Claims and Equity Claims, respectively.

Plan, Sections 3.4(3) and 3.5.

19. The Plan provides that, if the Plan is not approved by the required majorities of both the Unsecured Creditors Class and the WARN Act Plaintiffs Class, or the Applicants determine that such approvals are not forthcoming, the Applicants are permitted to withdraw the Plan and file an amended and restated plan with the features described on Schedule "B" to the Plan (the "Alternate Plan"). The Alternate Plan would provide, *inter alia*, that all unsecured claims and all WARN Act Claims against the Applicants would be treated as unaffected claims, the only voting class under the Alternate Plan

would be the Secured Noteholders Class, and all assets of the Applicants would be transferred to an entity designated by the Secured Noteholders in exchange for a release of the Secured Noteholders Allowed Secured Claim.

Goldfarb Affidavit at para. 125; Application Record, Tab 4.

B. Claims Procedure

20. The Applicants wish to commence the Claims Procedure as soon as possible to ascertain all of the Claims against the Applicants for the purpose of voting and receiving distributions under the Plan.

21. Liabilities and claims against the Applicants that the Applicants are aware of, include, *inter alia*, secured obligations in respect of the Secured Notes, secured obligations in respect of leased equipment used at the New Elk Mine, contingent claims for damages and other amounts in connection with certain pending litigation claims against the Applicants, and unsecured liabilities in respect of accounts payable relating to ordinary course trade and employee obligations.

Goldfarb Affidavit at paras. 52-57; Application Record, Tab 4.

22. The draft Claims Procedure Order provides a process for identifying and determining claims against the Applicants and their directors and officers, including, *inter alia*, the following:

(a) Cline, with the consent of Marret, will determine the aggregate of all amounts owing by the Applicants under the 2011 Indenture and the 2013 Indenture up to the Filing Date, such aggregate amounts being the "*Secured Noteholders Allowed Claim*";

(b) the Secured Noteholders Allowed Claim will be apportioned between the Secured Noteholders Allowed Secured Claim and the Secured Noteholders Allowed Unsecured Claim (being the amount of the Secured Noteholders Allowed Claim that is designated as unsecured in the Plan);

(c) the Monitor will send a Claims Package to all Known Creditors, which Claims Package will include a Notice of Claim specifying the Known Creditor's Claim against the Applicants for voting and distribution purposes, as valued by the Applicants based on their books and records, and specifying whether the Known Creditor's Claim is secured or unsecured;

(d) the Claims Procedure Order contains provisions allowing a Known Creditor to dispute its Claim as set out in the applicable Notice of Claim for either voting or distribution purposes or with respect to whether such Claim is secured or unsecured, and sets out a procedure for resolving such disputes;

(e) the Monitor will publish a notice to creditors in The Globe and Mail (National Edition), the Denver Post and the Pueblo Chieftain to solicit Claims against the Applicants by Unknown Creditors who are as yet unknown to the Applicants;

(f) the Monitor will deliver a Claims Package to any Unknown Creditor who makes a request therefor prior to the Claims Bar Date, containing a Proof of Claim to be completed by such Unknown Creditor and filed with the Monitor prior to the Claims Bar Date;

(g) the proposed Claims Bar Date for Proofs of Claim for Unknown Creditors and for Notices of Dispute in the case of Known Creditors is January 13, 2015;

(h) the Claims Procedure Order contains provisions allowing the Applicants to dispute a Proof of Claim as against an Unknown Creditor and provides a procedure for resolving such disputes for either voting or distribution purposes and with respect to whether such claim is secured or unsecured;

(i) the Claims Procedure Order allows the Applicants to allow a Claim for purposes of voting on the Plan without prejudice to whether that Claim has been accepted for purposes of receiving distributions under the Plan;

(j) where the Applicants or the Monitor send a notice of disclaimer or resiliation to any Creditor after the Filing Date, such notice will be accompanied by a Claims Package allowing such Creditor to make a claim against the Applicants in respect of a Restructuring Period Claim;

(k) the Restructuring Period Claims Bar Date, in respect of claims arising on or after the date of the Applicants' CCAA filing, will be seven (7) days after the day such Restructuring Period Claim arises;

(l) for purposes of the matters set out in the Claims Procedure Order in respect of any WARN Act Claims: (i) the WARN Act Plaintiffs will be treated as Unknown Creditors since the Applicants are not aware of (and have not quantified) any bona fide claims of the WARN Act Plaintiffs; and (ii) Class Action Counsel shall be entitled to file Proofs of Claim, Notices of Dispute of Revision and Disallowance, receive service and notice of materials and to otherwise deal with the Applicants and the Monitor on behalf of the WARN Act Plaintiffs, provided that Class Action Counsel shall require an executed proxy in order to cast votes on behalf of any WARN Act Plaintiffs at the WARN Act Plaintiffs' Meeting; and

(m) Creditors may file a Proof of Claim with respect to a Director/Officer Claim.

Goldfarb Affidavit at para. 151; Application Record, Tab 4.

23. As further discussed below, the Applicants may elect to proceed with the Meetings notwithstanding that the resolution of Claims in accordance with the Claims Procedure may not be complete. The Meetings Order provides for the separate tabulation of votes cast in respect of Disputed Voting Claims and provides that the Monitor will report to the Court on whether the outcome of any vote would be affected by votes cast in respect of Disputed Voting Claims.

Goldfarb Affidavit at paras. 161(f)-(h) and 162; Application Record, Tab 4.

24. The Claims Procedure Order includes a comeback provision providing interested parties who wish to amend or vary the Claims Procedure Order with the ability to appear before the Court or bring a motion on a date to be set by this Court.

Goldfarb Affidavit at para 149; Application Record, Tab 4.

C. Meetings of Creditors

25. It is proposed that the Meetings to vote on the Plan will be held at Goodmans LLP, 333 Bay Street, Suite 3400, Toronto, Ontario on January 21, 2015 at 10:00 a.m. for the WARN Act Plaintiffs Class, 11:00 a.m. for the Affected Unsecured Creditors Class, and 12:00 p.m. for the Secured Noteholders Class.

Goldfarb Affidavit at para. 160; Application Record, Tab 4. Meetings Order, Section 20.

26. The draft Meetings Order provides for, *inter alia*, the following in respect of the governance of the Meetings:

(a) an officer of the Monitor will preside as the chair of the Meetings;

(b) the only parties entitled to attend the Meetings are the Eligible Voting Creditors (or their proxyholders), representatives of the Monitor, the Applicants, Marret, all such parties' financial and legal advisors, the Chair, the Secretary, the Scrutineers, and such other parties as may be admitted to a Meeting by invitation of the Applicants or the Chair;

(c) only Creditors with Voting Claims (or their proxyholders) are entitled to vote at the Meetings; provided that, in the event a Creditor holds a Disputed Voting Claim as at the date of a Meeting, such Disputed Voting Claim may

be voted at the Meeting but will be tabulated separately and will not be counted for any purpose unless such Claim is ultimately determined to be a Voting Claim;

(d) each WARN Act Plaintiff (or its proxyholder) shall be entitled to cast an individual vote on the Plan as part of the WARN Act Plaintiffs Class, and Class Action Counsel shall be permitted to cast votes on behalf of those WARN Act Plaintiffs who have appointed Class Action Counsel as their proxy;

(e) the quorum for each Meeting is one Creditor with a Voting Claim, provided that if there are no WARN Act Plaintiffs voting in the WARN Act Plaintiffs Class, the Applicants will have the right to combine the WARN Act Plaintiffs Class with the Affected Unsecured Creditors Class and proceed without a vote of the WARN Act Plaintiffs Class, in which case there shall be no WARN Act Plan Entitlement under the Plan;

(f) the Monitor will keep separate tabulations of votes in respect of:

- i. Voting Claims; and
- ii. Disputed Voting Claims, if any;

(g) the Scrutineers will tabulate the vote(s) taken at each Meeting and will determine whether the Plan has been accepted by the required majorities of each class; and

(h) the results of the vote conducted at the Meetings will be binding on each creditor of the Applicants whether or not such creditor is present in person or by proxy or voting at a Meeting.

Goldfarb Affidavit at para. 161; Application Record, Tab 4.

27. The Applicants may elect to proceed with the Meetings notwithstanding that the resolution of Claims in accordance with the Claims Procedure may not be complete. The Meetings Order, if approved, authorizes and directs the Scrutineers to tabulate votes in respect of Voting Claims separately from votes in respect of Disputed Voting Claims, if any. If the approval or non-approval of the Plan may be affected by the votes cast in respect of Disputed Voting Claims, then the Monitor will report such matters to the Court and the Applicants and the Monitor may seek advice and directions at that time. This way, the Meetings can proceed concurrently with the Claims Procedure without prejudice to the Applicants' Creditors.

Goldfarb Affidavit at paras. 161(f)-(h) and 162; Application Record, Tab 4.

28. Like the Claims Procedure Order, the Meetings Order includes a comeback provision providing interested parties who wish to amend or vary the Meetings Order with the ability to appear before the Court or bring a motion on a date to be set by the Court.

Meetings Order, Section 68.

29. By seeking the Claims Procedure Order and the Meetings Order concurrently, the Applicants hope to move efficiently and expeditiously towards the implementation of the Recapitalization.

Goldfarb Affidavit at para. 148; Application Record, Tab 4.

Tab 10

2015 ONSC 2010
Ontario Superior Court of Justice

Comark Inc., Re

2015 CarswellOnt 20810, 2015 ONSC 2010, 266 A.C.W.S. (3d) 541

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

In the Matter of a Proposed Plan of Compromise or Arrangement of Comark Inc.

G.B. Morawetz R.S.J.

Heard: March 26, 2015
Judgment: March 26, 2015
Docket: CV-15-10920-00CL

Counsel: Marc Wasserman, Caitlin Fell, for Applicant
Brian Empey, Ryan Baulke, for Proposed Monitor, Alvarez & Marsal Canada Inc.
Sam Babe, for Salus Capital Partners, LLC (DIP Lender)

Subject: Insolvency

APPLICATION by company for initial order under Companies' Creditors Arrangements Act.

G.B. Morawetz R.S.J.:

1 The Applicant, Comark Inc. ("Comark"), brings this application for relief under the *Companies' Creditors Arrangement Act* ("CCAA").

2 Comark operates 343 retail stores across Canada under three distinct divisions: Ricki's, Bootlegger and Cleo (together, the "Banners"). Comark sells predominantly exclusive private label merchandise. Comark employs approximately 3,400 people.

3 Comark is a privately held corporation that is a portfolio company of an investment fund managed by KarpReilly LLC ("KarpReilly"). Comark's corporate headquarters are in Mississauga, Ontario (the "Corporate Headquarters") and employ 83 full time employees. Comark operates an essential distribution centre in Laval, Quebec, which employs approximately 200 people and processes approximately 9.3 million and 2 million units of merchandise each year for stores and online sales, respectively.

4 Comark has over 300 product suppliers, primarily located in Asia and North America. Approximately 80% of Comark's unit purchases were sourced from foreign manufacturers and the remaining 20% were sourced in North America. Purchases are typically made in US dollars.

5 Comark transports all products to its stores through third party transportation companies. Purolator is Comark's primary third party transportation provider. The Applicant is of the view that Purolator's continued services are critical to the company's ongoing operations. Approximately 90% of Comark's products are transported using Purolator.

6 Comark has over 60 third party landlords from which it leases all of its retail and distribution locations. As part of its restructuring under these proceedings, Comark anticipates that it will disclaim certain leases in respect of Comark stores.

7 Comark participates in co-brand community events and cause marketing with charitable organizations. Comark customers have donated amounts intended for various charities, and these donated funds are currently comingled with Comark's other funds. As of March 17, 2015, Ricki's has (Cdn.) \$40,057, Bootlegger has (Cdn.) \$108 and Cleo has (Cdn.) \$107,917 in funds received from customers in respect of donations to various charitable organizations.

8 Comark has experienced declining financial results over the past two years.

9 As of February 28, 2015, Comark had total assets of (Cdn.) \$112.4 million and its total indebtedness was approximately (Cdn.) \$126.1 million.

10 Comark is financed primarily through a term loan and revolving credit facilities under a credit agreement dated as of October 31, 2014 between Comark, as the lead borrower, and Salus, as administrative collateral agent and lender thereto (the "Salus Credit Agreement").

11 As of March 17, 2015, the Applicant reports that there was approximately U.S.\$43.1 million outstanding under the term loan facility and (Cdn.) \$24.8 million outstanding under the revolving credit facility (the "Revolving Credit Facility"). The Salus Credit Agreement has a maturity date of October 31, 2018. All of the obligations of Comark under the Salus Credit Agreement are secured by all of Comark's assets.

12 Comark has been noted in default of the Agreement and Salus has made a demand for repayment. Comark advises that it is not able to repay its debt obligations to Salus.

13 Comark reports that its adjusted EBITDA fell to approximately (Cdn.) \$16.5 million for the year end February 28, 2015. Comark acknowledges that this constitutes an event of default under the Salus Credit Agreement. On the occurrence of an event of default, Salus has the right to terminate the Salus Credit Agreement and declare that all obligations under it are due and payable with presentment, demand, protest or other notice of any kind.

14 Salus delivered a Reservation of Rights Letter on March 5, 2015. On March 25, 2015, Salus made a demand for repayment for all amounts owing under the Salus Credit Agreement. Comark acknowledges that it is not able to pay the full amount owing under the Salus Credit Agreement, which has become immediately due and payable as a result of the event of default and the demand made by Salus. Comark acknowledges that it is insolvent.

15 The Applicant seeks the granting of an initial order. With the benefit of the protection of the stay of proceedings, Comark is of the view that it will be provided with the necessary "breathing space" in order to allow it to develop a plan to restructure and reorganize the business and preserve enterprise of value.

16 Comark is of the view that it requires interim financing for working capital and general corporate purposes and for post-filing expenses and costs during the CCAA proceedings.

17 Salus has agreed to act as DIP lender (the "DIP Lender") and provide an interim financing facility (the "DIP Facility") under an amended and restated credit agreement with Salus (the "DIP Agreement"). It is a condition of the DIP Agreement that advances made to Comark be secured by a court ordered security interest, lien and charge over all of the assets and undertakings of Comark (the "DIP Lender's Charge").

18 The Applicant advises that under the draft initial order, the charges, including the DIP Lender's Charge, do not prime TD Bank and creditors with a purchase money security interest, which are Comark's only secured creditors. Further, the company advises that it is also an express term of the DIP Agreement that advances made thereunder may not be used to satisfy pre-filing obligations under the Salus Credit Agreement. Further, the company states that the DIP Lender's Charge will not secure any obligation that exists before the date of the initial order.

19 It is anticipated that the proceeds from Comark's operations will be used to reduce pre-filing obligations outstanding under the Salus Revolver Facility in order to free-up availability under the DIP Facility. In accordance with the DIP

Facility and the current cash management system in effect, Comark's cash from business operations will be deposited into the blocked account and swept by Salus in order to reduce amounts outstanding under the Salus Revolver Facility prior to the commencement of these proceedings.

20 In his supplementary affidavit, Mr. Bachynski states that Comark requires \$15 million during the week ending April 11, 2015 and as such, Comark is proposing a maximum DIP Charge of (Cdn.) \$28 in the draft initial order with a restriction on borrowing of (Cdn.) \$15 million prior to the proposed comeback hearing scheduled for April 7, 2015.

21 Mr. Bachynski goes on to state that Comark will not be able to satisfy its ordinary course obligations in the CCAA proceedings without the DIP Facility.

22 In its pre-filing report, the Monitor reports at length on the debtor-in-possession financing. In its report, the Monitor states that Salus has exercised cash dominion pursuant to the Blocked Account Agreement and the Salus Credit Agreement and has made demand under the Salus Credit Agreement. As a consequence, the Monitor states that Comark does not have access to liquidity to discharge its financial obligations. Further, given the deterioration in the Applicant's financial position and its current liquidity crisis, the Monitor states that the Applicant cannot continue to operate without the DIP Facility.

23 The Monitor also advises that senior management and the Applicant's advisors believe that the DIP Facility is the only realistic source of funding available, given the urgency of the proposed filing, the position of the lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand.

24 At section 9.5 of this report, the Monitor summarizes the DIP Facility Terms. This chart is reproduced below.

Comark

Summary of DIP Facility Terms

Total Availability	<ul style="list-style-type: none"> • The lesser of: (a) the Maximum Amount of \$32 million, (b) the Borrowing Base, or (c) extensions of credit required under and set out in the Budget, plus outstanding principal amount of pre-filing Revolving Credit Facility.
<i>Effective Date</i>	<ul style="list-style-type: none"> • Date of the Initial Order
<i>Purpose/Permitted Payments</i>	<ul style="list-style-type: none"> • Limited to amounts set out in the Restructuring Plan and the Budget approved by Salus.
<i>Significant Terms</i>	<ul style="list-style-type: none"> • Initial Order must be granted and issued and provide for a DIP Lender's Charge; • The establishment of a cash flow budget and a restructuring plan that is satisfactory to the DIP Lender; • The DIP Lender shall have received control agreements with respect to the deposit accounts of the Borrower which effectively provides for a sweeping of the Borrower's gross receipts, such collections are to be applied to reduce pre-filing Revolving Credit Facility; and • Other covenants which appear customary under the circumstances.
<i>Fees and Interest</i>	<ul style="list-style-type: none"> • Interest Rate per annum: LIBOR + 5.75 (as at March 24, 2015 LIBOR was approximately 0.25%; however, the DP Facility contains a LIBOR floor of 1.00%) • Exit fee of 4% of total outstanding borrowing at exit under the DIP, the pre-filing Revolving Credit Facility and the pre-filing Term Loan Facility • Collateral monitoring fee of US\$7,000 per month
<i>Security</i>	<ul style="list-style-type: none"> • All assets and property of the Borrower and DIP Lender's Charge.
<i>Maturity</i>	<ul style="list-style-type: none"> • The earliest of: (i) completion of a transaction in compliance with the SISF; and (ii) a default.
<i>DIP Lender's Charge</i>	<ul style="list-style-type: none"> • DIP Lender's Charge to rank subordinate only to the Administration Charge and the Directors' Charge (all further defined herein). DIP Lender's Charge in amount of \$32 million to ensure fees, costs and expenses are covered.

25 The DIP Facility contains various affirmative covenants, negative covenants, events of default and conditions that, in the proposed Monitor's view, are reasonable and customary for this type of financing.

26 The Monitor further comments that the DIP Facility is not a new facility layered on top of the pre-filing credit facilities, rather it is an amended version of the pre-filing Salus Credit Agreement pursuant to which Salus would be prepared to commence to provide liquidity, despite the prior default. Importantly, the Monitor comments that ultimately, the DIP Facility will not result in a greater level of secured debt than was contemplated under the pre-filing facilities (absent the default that occurred). Furthermore, the Monitor reports that as there is no indication of any deficiencies with Salus' security package, and the Applicant has advised that it does not intend that the DIP Lender's Charge prime any other secured party's purchase money security interests or statutory deemed trusts, the fact that the DIP Lender's Charge will increase while the pre-filing Revolving Credit Facility would be paid down, should have no negative impact on the other stakeholders.

27 The proposed Monitor recommends that the Court approve the DIP Facility. In arriving at this recommendation, the proposed Monitor considered:

(i) the facts and circumstances of the Applicant;

(ii) section 11.2(4) of the CCAA;

(iii) the financial terms of the DIP Facility relative to comparable facilities and the fact that it is the only realistic source of funding available given the urgency of the proposed filing, the prominent position of the Lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand;

(iv) the stability and flexibility of the DIP Facility will provide to ensure there is sufficient liquidity to facilitate the CCAA proceedings and a Sale and Investment Facilitation Process ("SISP"), to maximize realization; and

(v) the interests of the Applicant's stakeholders.

28 In providing its recommendation, the proposed Monitor specifically stated that it has considered the provisions of section 11.2(1) of the CCAA which prohibit the DIP Lender's Charge from securing an obligation that exists before the requested order is made. The Monitor reports that having consulted with its counsel, it is of the view that since the pre-filing Revolving Credit Facility is being reduced by the use of the Applicant's cash generated from its business, the DIP Lender's Charge is only securing advances made post-filing under the DIP Facility.

29 For the purposes of this application, I accept the foregoing submissions and recommendation of the Monitor and, specifically, its view that the form of DIP Facility being proposed, does not contravene the provisions of section 11.2(1) of the CCAA.

30 Comark proposes a key employee retention plan (the "KERP") for certain employees (the "Key Employees") which Comark considers critical to a successful proceeding under the CCAA. Key Employees include certain key senior management employees, both at the Corporate Headquarters and Banner level that possess unique professional skills and experience with Comark's business and operations.

31 The proposed Monitor agrees that the KERP is reasonable in the circumstances.

32 The Applicant has retained Houlihan Lokey Capital, Inc. as financial advisor (the "Financial Advisor") to advise on a possible restructuring, refinancing or sale for Comark.

33 The Applicant also reports that it has worked with the Financial Advisor, in consultation with the proposed Monitor and Salus, to develop the Sale and Investor Solicitation Process ("SISP"). The purpose of the SISP is to solicit and assess available opportunities for the acquisition of or investment in Comark's business and property.

34 In its factum, the Applicant submits that the application addresses the following issues:

- (a) the Applicant's entitlement to seek protection under the CCAA;
- (b) the Applicant's entitlement to a stay of proceedings;
- (c) the granting of the DIP Lender's Charge on a priority basis over the property and approval of the DIP Facility;
- (d) the approval of the KERP and KERP Charge;
- (e) the sealing of the KERP Schedule;
- (f) the granting of the Director's Charge on a priority basis over the property;
- (g) the approval of pre-filing payments to "critical" suppliers and to certain charitable organizations to which Comark's customers donated funds; and
- (h) the approval of the SISP.

35 I am satisfied that Comark meets the definition of "debtor company" under the CCAA. It is a corporation incorporated under the *Canada Business Corporations Act*.

36 I am also satisfied that the total claims against Comark far exceed \$5 million and that Comark is insolvent.

37 In arriving at the conclusion that Comark is insolvent, I have taken into account that, as a result of the event of default and the acceleration of all amounts due under the Salus Credit Agreement, it is apparent that Comark does not have sufficient liquidity to satisfy its liabilities as they become due.

38 The required financial statements and cash-flow statements are included in the record.

39 I am also satisfied that the Applicant is entitled to a stay of proceedings pursuant to section 11.02 of the CCAA.

40 With respect to the request to approve the DIP Facility and to grant a DIP Financing Charge on a priority basis, the authority to approve same is found in section 11.2 of the CCAA. In its factum, the Applicant specifically references section 11.2(1) and submits that it is clear on the facts that the DIP Lender's Charge meets this requirement. Counsel submits that the DIP Facility expressly provides that Comark may not use any advances under the DIP Facility to repay pre-filing obligations. Counsel goes on to state that to the extent that Salus is repaid pre-filing amounts owing to it, this repayment will be made from operational receipts as a result of lending, security and enforcement arrangements in place prior to the CCAA filing. Further, the repayment is not made out of proceeds of the DIP Facility. Rather, the payments to Salus simply maintain the status quo as of the CCAA filing date under the existing Salus asset-based lending credit facility.

41 For the purposes of this application, I accept the submissions of the Applicant and recommendations of the Monitor and have concluded that the DIP Facility should be approved and the Court should grant the DIP Lender's Charge to a maximum DIP Charge of (Cdn.) \$28 million with a restriction on borrowing of (Cdn.) \$15 million up to April 7, 2015.

42 Counsel to the Applicant requests approval of the KERP and the KERP Charge. Submissions in support of this request are made at paragraphs 26 - 32 of the Amended Factum. I accept these submissions and approve the KERP and the granting of the KERP Charge.

43 Insofar as the KERP Schedule contains confidential personal information, the Applicant seeks a sealing of the KERP Schedule. The Applicant references *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), in support of its request to seal the Schedule.

44 I am satisfied, having considered the *Sierra Club* principles, that it is appropriate to seal the confidential KERP Schedule.

45 The Applicant also seeks a Directors Charge in the amount of up to (Cdn.) \$3 million, to act as security for indemnification obligations for Comark's directors' potential liabilities. It is contemplated that the Directors Charge would stand in priority to the proposed DIP Charge, but subordinate to the proposed Administration Charge.

46 Pursuant to section 11.51 of the CCAA, the Court has authority to grant a "super priority" charge to the Directors and Officers as security for the indemnity. The factors to be considered on such a request were set out by Pepall J. (as she then was) in *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]).

47 Comark has estimated the potential exposure of the Directors and Officers for unpaid statutory amounts, including wages, unremitted source deductions, vacation pay, sales and service taxes, termination pay, employee health tax and unpaid workers' compensation to be approximately (Cdn.) \$7.15 million.

48 I accept the submissions of the Applicant and have concluded that the Directors Charge is necessary and appropriate and is granted in the requested amount.

49 The Applicant also requests authorization to make certain pre-filing payments, specifically to critical suppliers.

50 The argument in support of the granting of this request is set out in the Amended Factum at paragraphs 44 - 52. I accept these submissions and concluded that it is appropriate to authorize Comark to make the pre-filing payments. I note that the Monitor will be involved in this process and that the consent of the Monitor to make such payments is required.

51 I have also been persuaded that it is appropriate for the Court to exercise its jurisdiction to authorize Comark to pay certain amounts that were donated by Comark's customers to the charitable organizations for which the amounts were intended. This authorization is made notwithstanding that the donated amounts are currently comingled with Comark's other funds.

52 The Applicant also requests approval of the SISP for the reasons set out at paragraphs 54 - 59 of the Amended Factum. I accept these submissions and authorize and approve the SISP.

53 This application was brought without notice to the creditors of Comark, with the exception of Salus. As such, I treat it as an *ex parte* application.

54 The requested relief is granted and the order has been signed to reflect the foregoing.

55 A come-back hearing has been scheduled for April 7, 2015. A further hearing has been scheduled for April 21, 2015.

56 The come-back hearing is to be neutral in all respects.

57 The stay of proceedings is in effect up to and including April 24, 2015, or such later date as the Court may order.

Application granted.

Tab 11

Action No.: 1003 05560
E-File No.: EVQ10COWHARB
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT,
R.S.C. 1985, c. C-36, AS AMENDED
AND 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 COW HARBOUR CONSTRUCTION LTD.

P R O C E E D I N G

Edmonton, Alberta
April 28, 2010

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

2

3 April 28, 2010 Afternoon Session

4

5 The Honourable Mr. Justice The Court of Queen's Bench
6 K. D. Yamauchi (by video) of Alberta

7

8 M. J. McCabe, Q. C. For the Applicant Cow Harbour Construction
9 Limited

10 A. M. Turcza-Karhut For the Applicant Cow Harbour Construction
11 Limited

12 R. T. G. Reeson, Q. C. For Finning Canada

13 K. A. Rowan For Wajax

14 K. J. Bourassa (by video) For Caterpillar Financial Services Ltd.

15 R. C. Rutman (by telephone) For Royal Bank of Canada

16 B. W. Summers For Royal Bank of Canada

17 F. M. Ouelette For Royal Bank of Canada

18 C. P. Russel, Q. C. For Deloitte and Touche Inc.

19 I. D. Logan For Syndercrude

20 B. E. Mintz For Experienced Equipment Sales and Rentals
21 Inc.

22 S. J. Weatherill/K. R. Kawanami For John Deere Credit Inc. and De Lage.
23 Landen Financial Services Canada Inc.

24 J. H. H. Hockin/B. Maruyama For Equirex Leasing Corporation, Servus Credit
25 Union and Western Star Trucking

26 S. F. Collins (by video) For GE Canada Equipment Financing G.P.

27 J. R. Pawlyk For SMS Equipment Inc.

28 H. L. Williams (be telephone) For Marubeni Corporation

29 S. C. Fitzpatrick (by telephone) For Marubeni Corporation

30 L. J. Latham (by telephone) For PNC Equipment

31 M. D. McGown, Q. C. For Operating Engineers

32 K. E. Siddall (by telephone) For ESCO Supply

33 J. R. MacLean For Canadian Western Bank

34 J. M. Shafir (by telephone) For Heavy Metal Equipment

35 S. Hinz/K. Chambers Court Clerks

36

1
2 THE COURT: That would be fine with me.

3
4 MR. RUTMAN: Thank you, My Lord.

5
6 THE COURT: All right. Any other problems with that? 20
7 after 2. That will give me a chance to type like a mad person. All right?

8
9 UNIDENTIFIED SPEAKER: Is it still 20 after 3, My Lord?

10
11 THE COURT: I am sorry 20 after 3; otherwise I would be
12 really typing fast.

13
14 UNIDENTIFIED SPEAKER: That's (INDISCERNIBLE) time.

15
16 THE COURT: Yeah.

17
18 (ADJOURNMENT)

19
20 **Decision (Application for Stay Dismissed)**

21
22 THE COURT: What I did in the last hour or hour and a little
23 bit was, I think this is for the benefit of the equipment financiers and their appeal, I
24 thought it would be worthwhile for them to have a good sense of what I was thinking
25 when I granted the initial order so I have -- I will be giving you some comments with
26 respect to the reasoning for, or my thinking at least, with respect to how I granted that
27 original order. And it also gives me a chance to put on the record my uptightness with
28 respect to the term "DIP Financing". So if you will just bear with me just for a minute.
29 Okay.

30
31 On April 8th, 2010, I granted an initial order involving Cow Harbour Construction Ltd.
32 under the *Companies' Creditors Arrangement Act*. The most contentious aspect of the
33 initial order was that involving the interim financing that the Royal Bank of Canada
34 would be providing during the course of the restructuring. Some have referred to interim
35 financing as DIP financing, which I consider to be inappropriate. The *CCAA* itself refers
36 to this as interim financing. As well, the concept of debtor in possession financing was
37 originally taken from the use of that term in the United States. It has a different meaning
38 in the United States and therefore our use of that term in this country is wrong from an
39 American perspective and inaccurate from a Canadian perspective. I am surprised that we
40 have not run into more problems for our use of that term in complex cross-boarder
41 restructuring matters. Thus I will use the term interim financing, forever actually.

1
2 Parliament amended the *CCAA* and those amendments came into force on September 18th,
3 2009. For our purposes the amendment that is causing the difficulty in this case is *CCAA*
4 section 11.2(1), which provides, quote:

5
6 On application by a debtor company and on notice to the secured
7 creditors who are likely to be affected by the security or charge, a
8 court may make an order declaring that all or part of the
9 company's property is subject to a security or charge - in an
10 amount that the court considers appropriate - in favour of a person
11 specified in the order who agrees to lend to the company an
12 amount approved by the court as being required by the company,
13 having regard to its cash-flow statement. The security or charge
14 may not secure an obligation that exists before the order is made.
15

16
17 It is the last sentence that is causing the most difficulty here. RBC's interim financing is
18 just that, it is intended to fund the debtor's ongoing operations on the interim while the
19 debtor puts together a plan of arrangement. Paragraph 6 of RBC's term sheet, dated April
20 6th, 2010, says, quote:

21
22 For greater certainty, advances under the [Interim Financing] shall
23 not be used to repay or satisfy any indebtedness outstanding prior
24 to the date of the *CCAA* order.
25

26 In other words, RBC would be in breach of its term sheet and as well the initial order
27 were it to use the interim financing to pay any of the indebtedness of the debtor that the
28 debtor owed to it before I granted the initial order. A number of the debtor's creditors
29 argue that the cash flow statement the debtor filed in support of the granting of the initial
30 application permits the debtor to repay some of the pre-initial order debt to RBC. Their
31 argument is that the debtor is using the interim financing to:

32
33 Secure or charge an obligation that exists before the order is made.
34
35

36 In other words, they complain that RBC is bootstrapping itself. From a strict statutory
37 interpretation perspective, that interpretation is incorrect because the interim financing
38 security does not secure the previous indebtedness. The term sheet says that. And I
39 approved the initial order on that basis. The super-priority security secures only the
40 interim financing and no more. From a practical perspective, however, the creditors
41 complain that RBC's non-primed security is becoming primed security because as RBC

1 gets its initial order money paid it turns around and lends that money to the debtor under
2 the interim financing. That would be a strong argument, except that the debtor is using the
3 interim financing money to pay for its ongoing operations such as payroll. The payments
4 to RBC are coming out of cash-flow, not interim financing. If there were little or no
5 ongoing costs then the creditor's argument would be much stronger. Granted at this time
6 there is no interim financing money outstanding, but we are all aware that the debtor had
7 to meet payroll on April 9th, 2010, using interim financing money, and I suspect it will
8 have to meet it again on April 30th, 2010.

9
10 In *Canwest Global Communications Corp.*, I will give you the site for that. It is at, it is
11 59 CBR 5th 72. Justice Pepall approved of an application for interim financing. She
12 found -- by the way, this case is post-amendments, just so you know. She found that the
13 interim financing did not secure an obligation that existed before the initial order.
14 Interestingly, however, this was her description of pre-initial order indebtedness and how
15 the initial order would affect it.

16
17 The only amount outstanding on the [interim financier's] facility --

18
19
20 And interim financiers is in square brackets, so I will start that again.

21
22 The only amount outstanding on the [interim financier's] facility is
23 \$10.7 in outstanding letters of credit. These letters of credit are
24 secured by existing security and it is proposed that the security
25 rank ahead of the interim financing.

26
27 I leave it to counsel in this room to determine whether the existing security in that case
28 was being primed in that case. Nonetheless, Her Ladyship approved of the proposed
29 interim financing. In that case the interim financier would not provide the interim
30 financing without such a provision. Justice Pepall made the following observation in that
31 case at paragraph 24.

32
33 In no way do the amendments change or detract from the
34 underlying purpose of the CCAA, namely to provide debtor
35 companies with the opportunity to extract themselves from
36 financial difficulties notwithstanding insolvency and to reorganize
37 their affairs for the benefit of stakeholders. In my view, the
38 amendments should be interpreted and applied with that objective
39 in mind.

40
41 I completely agree with that observation. Interim financiers must not breach CCAA section

1 11.2(1). However, they must be careful in structuring their financing arrangements. In this
2 case, if RBC were not financing the proceeding, I would have no hesitation in not
3 granting the initial order. However, that is not the case here. As all counsel in this room
4 know proceedings under the *CCAA* require a delicate balancing of disparate interests.
5 Parliament has added another feature to this balancing with the addition of the last
6 sentence of *CCAA* 11.2(1), but we must remember always that the primary purposes for
7 which we are using the *CCAA*, which is the restructuring and hopeful rehabilitation of
8 insolvent corporations.

9
10 Those same creditors also seek a stay preventing RBC from paying a portion of its
11 pre-initial order indebtedness pending an appeal of my initial order under rule 508. They
12 base their arguments in part on the tripartite test outlined in *RJR Macdonald v. Canada*.
13 According to that case they must show, 1) that there is a serious issue to be tried, 2) they
14 will suffer irreparable harm if I do not grant the relief, and 3) that I must grant the order
15 after balancing the inconvenience that flows to the parties.

16
17 Under the serious issue to be tried, *CCAA* section 11.2(1) has not been considered by
18 other courts in any detail and certainly no appeal court has addressed the issues contained
19 in the last sentence of that section. RBC argued that the interim financing was the result
20 of careful negotiations and that RBC and others have relied on the initial application.
21 RBC has already advanced funds. With respect, RBC's argument goes to the balance of
22 inconvenience more than this first test. A threshold under this first aspect is low and the
23 creditors have met it.

24
25 With respect to irreparable harm, the creditors have provided numerous cases which show
26 irreparable harm in the context of cases where the appeal would be rendered nugatory
27 without the stay. In this case, however, the appeal would not be rendered nugatory. If the
28 Alberta Court of Appeal were to overturn my decision by deleting paragraph 63(b) of the
29 initial order the parties might be required to conduct a detailed financial analysis of the
30 damage that each party allegedly suffered, but it is not impossible to unscramble the egg
31 in this case. As Justice Cote said in *Toronto Dominion Bank v. Switlo*, at paragraph 13:

32
33 Besides, this suit is over money. If money turns out to have been
34 paid wrongly, I think that the Toronto Dominion Bank has enough
35 assets that it could be forced to repay it. The appellant Switlo
36 argued before me that the bank is very wealthy. If one uses the
37 common three-part test for a stay, there is no evidence that paying
38 money would work irreparable harm, and courts presume that it
39 would not. The procedural prejudices argued are but ancillary to,
40 or part of, the money suit. Therefore, it does not matter whether
41 one uses the test for a stay analogous to an injunction motion, or a

1 special test for money matters. Neither test is met here.

2
3 In fact, although there are numerous interests that play in this case, not the least of whom
4 are the debtor's employees, an unscrambling in this case might simply be for the Court to
5 order that RBC repay the money. Undoubtedly, as the source of those funds was a single
6 debtor, namely Syncrude, RBC could appoint a receiver pursuant to its security and seize
7 the funds there under in any event. The creditors have not satisfied me that they would
8 suffer irreparable harm.

9
10 Under the balance of convenience test, the creditors claim that they are more
11 inconvenienced than RBC, or the debtor, for that matter, in that they are financing the
12 proceeding through the debtors continued use of their assets without any payment for past
13 indebtedness.

14
15 As for current and future indebtedness they may receive those payments of the debtor and
16 I consider them to be critical suppliers as that term is now used in the *CCAA*, or they
17 might not. But is that not one of blessings and curses of the *CCAA*? The blessing is that
18 they may end up with a viable entity. The curse is that the restructuring is undertaken on
19 the backs of certain creditors, be they employees, pension funds, subordinate secured
20 creditors, or unsecured creditors. RBC retains the first priority over the debtor's
21 receivables in any event, so even if I were to grant the stay, which may result in RBC
22 withdrawing its financing, RBC would have that priority. In that case the debtor and its
23 employees and other creditors would undoubtedly be inconvenienced. The balance in this
24 case does not favour the granting of the stay.

25
26 Therefore, the creditor's application to stay the effect of paragraph 63(c) of the initial
27 order is dismissed.

28
29 **Discussion**

30
31 THE COURT: Now, what are we going to do with this order,
32 the extension order, in terms of the date? Mr. McCabe, I suspect that you are going to
33 want to contact Mr. Rosin to find out when I am around.

34
35 MR. MCCABE: I have been trying to, Sir, and I haven't had
36 any luck at all.

37
38 THE COURT: Oh.

39
40 MR. MCCABE: They don't seem to want to find out what your
41 availability is on that one.

Tab 12

2015 ONSC 7656
Ontario Superior Court of Justice [Commercial List]

Essar Steel Algoma Inc., Re

2015 CarswellOnt 18694, 2015 ONSC 7656, 261 A.C.W.S. (3d) 265, 31 C.B.R. (6th) 116

**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 Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA, Applicants

Newbould J.

Heard: December 3, 2015
Judgment: December 7, 2015
Docket: CV-15-11169-00CL

Counsel: Ashley Taylor, for Applicants
Derrick Tay, Clifton P. Prophet, for Monitor Ernst & Young, Inc.
Marc Wasserman, Andrea Lockhart, for Deutsche Bank
Massimo Starnino, Debra McKenna, for USW and Local 2724
Lou Brzezinski, for USW Local 2251
Karen Ensslen, for Applicants' retirees
L. Joseph Latham, for Ad Hoc Committee of Essar Algoma Noteholders
Shayne Kukulowicz, Ryan C. Jacobs, for Ad Hoc Committee of Junior Secured Noteholders
Sara-Ann Van Allen, John J. Salmas, for Wilmington Trust, National Association

Subject: Corporate and Commercial; Insolvency

MOTION for approval of key employee retention plan and charge on current and future assets, undertakings and properties of applicants to secure obligations under plan.

Newbould J.:

1 The applicants were granted protection under the CCAA in an Initial Order on November 9, 2015. On November 16, 2015 a DIP loan was approved, with the order settled on November 19, 2015, which provided tight timelines for the entire process, including strict timelines for a SISF process.

2 The applicants have now moved for the approval of a key employee retention plan ("KERP") offered to certain management employees of Essar Steel Algoma Inc. ("Algoma") said to be deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the applicants to secure the obligations under the KERP. The KERP is supported by all those who appeared at the hearing save for the unions who opposed it.

The KERP

3 The KERP covers 23 management personnel. The maximum aggregate amount which may become payable under the KERP is \$3,468,027. This includes a \$250,000 reserve for additional cash retention payments in the discretion of the board of directors, subject to approval of the Monitor.

4 Under the KERP, a cash retention payment will be paid to the KERP participants upon the earliest of the following events: (a) implementation of a plan of compromise or arrangement sanctioned by the Court; (b) completion of a sale (or liquidation) of all or substantially all of the assets and operations of Algoma approved by the Court; (c) termination of a KERP participant's employment by Algoma without cause; and (d) December 31, 2016.

5 In order to receive payments under the KERP, a KERP participant cannot have resigned, been terminated with cause or failed to perform his or her duties and responsibilities diligently, faithfully and honestly in the opinion of his or her direct supervisor and the special committee of the board of directors.

6 The cash retention payment will be an amount equal to a percentage of the KERP participant's annual salary. The KERP participants are categorized in four tiers, with the retention payment corresponding to 100%, 75%, 50% or 25% of annual salary respectively for each of the four tiers.

7 The list of KERP participants and the amounts of the cash retention payments offered to them were formulated by Algoma's management with the assistance of the applicants' legal counsel and other professional advisors, and with the assistance of a report prepared by a third party human resources firm, and in consultation with the Monitor. The KERP has been recommended by the special committee of the board of directors and approved by the board of directors of Algoma.

Analysis

8 At the outset, the unions appearing requested an adjournment of the motion to further consider the requested relief. I declined the adjournment. The motion was served on November 26, 2015 and the confidential information regarding the persons and the amounts to be promised to them under the KERP was provided to counsel for the unions on November 30 after a confidentiality agreement was signed. That information is straightforward and easily understood.

9 I understand the anxiety in Sault Ste. Marie caused by the difficulties being experienced by Algoma and the importance to the employees of the survival of Algoma. It would be preferable to have the luxury of considering all of the many issues in this CCAA proceeding in a relaxed atmosphere without time pressures. However that is not possible. The difficulty in this case is that the timelines are tight and the risk of senior management leaving the applicants, which I will discuss further, requires a quick decision on the KERP. Notice that the KERP would be sought was disclosed at the outset but deferred, and to delay this matter any further increases the risks that the KERP is intended to address. Moreover, taking into account the process that was followed by the applicants, it is questionable whether more that is relevant could be said on behalf of the unions than has been said on their behalf in their affidavit and factum filed at the hearing of the motion.

10 There is no express statutory jurisdiction in the CCAA for a court to approve a KERP. However, the courts have routinely held that the general power under section 11 of the CCAA gives jurisdiction to authorize a KERP and grant a charge to secure the applicants' obligations under the KERP. In *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]), I considered the factors to be considered in determining whether a KERP should be approved. These were summarized by Morawetz J. (as he then was) in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) at para. 91 as follows:

91....The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- a. whether the Monitor supports the KERP agreement and charge;
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
- h. whether the payments under the KERP are payable upon the completion of the restructuring process.

11 In my view, the KERP should be approved for the following reasons:

(i) The evidence is that the KERP participants are critical to a successful restructuring of the applicants. Their institutional knowledge and experience would be very difficult, if not impossible, to be replaced during the relative short time in which the restructuring is contemplated. Without the KERP and the security provided by the KERP charge, there is concern that the KERP participants are likely to consider other employment options prior to the completion of the applicants' restructuring proceedings.

(ii) The unions contend that there is no evidence that any of the KERP participants have been approached by any other potential employers. Regardless of whether that is the case, it is no reason not to approve a KERP. The issue is whether there is a sufficient risk that persons may leave their employ, not whether there has been an approach by some other employer. See *Grant, supra*, at para. 14.

(iii) In this case, many of the management covered by the KERP are not from Sault Ste. Marie. They are obviously mobile and understandably would be concerned about their future in that city with a steel company that is under CCAA protection and not for the first time. The risk of their leaving for some other more certain future cannot be ignored, and it would be in no one's interest for them to leave Algoma at this critical time in which efforts are being made to restructure the business.

(iv) Management of Algoma took into account the difficulty of replacing the KERP participants during the stay period, taking into account the remoteness of Sault Ste. Marie. Algoma has been trying to recruit for some of these positions for the past year without success.

(v) The process to establish the KERP and those who should be covered by it was a thorough process. Outside HR personnel were consulted, legal counsel provided advice and the special committee of the board of directors as well as the board itself considered and approved the KERP. The Monitor provided input to Algoma in formulating the KERP and was invited to the meetings of the special committee and the board when the KERP was considered in detail, including whether the entitlements of certain participants should be changed from what management had proposed.

(vi) The business acumen of the board of directors, including the special committee of the board, should not be ignored unless there is good reason in the record to disregard it. See *Grant, supra*, at para. 18.

(vii) The KERP is not opposed by the various classes of noteholders, who will become junior to the KERP charge. They have worked with the applicants and have agreed to certain terms that will give them protection from their

main concerns. While their concerns have not been completely answered, they are satisfied that it is in the best interests of Algoma that the KERP be approved.

(viii) The KERP is not opposed by the DIP lenders who are satisfied with the settled terms.

(ix) The Monitor supports the KERP.

12 Counsel for the USW contends that the terms of the individual contracts of employment of each of the KERP participants should be disclosed to them as there may be non-competition provisions that would prevent the executives from leaving Algoma. Disclosure of all of the terms of employment is not required to deal with this issue. Of the 23 employees covered by the KERP, only eight have an employment agreement. The template for this agreement has been provided in confidence. There is a non-competition clause but it is questionable whether it would be enforceable and it clearly does not prevent all possible jobs that might be available elsewhere. Six of the eight employees in question are not from Sault Ste. Marie. To run the risk that the eight management employees in question would not leave Algoma because of this clause and to ignore the business judgment of the board and the special committee to the board because of this clause would be foolhardy.

13 It is also said that the terms of the employment agreements should be reviewed to determine whether these employees would be entitled in any event to the amounts provided for in the KERP. This is completely answered by the terms to be agreed by the KERP participants that any amounts paid under the KERP will result in a corresponding reduction in any non-KERP claim that the participants may be entitled to.

14 It is contended by the USW that the KERP was planned and approved without any input from the unions. I would not on that basis refuse to approve the KERP. Whether a particular person in a management role is important enough to be covered by a KERP agreement in an insolvency, or what the size of the KERP payment should be, is something that is the purview of management and the board of directors of a company. What useful input could be provided by the unionized employees is not apparent on the record, and no case provided to me suggested that the unionized employees should be consulted on such a decision.

15 It was contended on behalf of local 2251 that the collective agreement provides for a steering committee on which the union has an important role and that the steering committee will work with the President and CEO and senior management towards achievement of the company's business goals and in particular how they relate to the facilities, manning objectives including attrition and other matters which impact the company's employees. It is contended that this is broad enough to require the steering committee to have been involved in the implementation of the KERP for the senior executives of the company.

16 I doubt that this provision of the collective agreement goes so far as contended to require union input into the terms of employment of the company's executives, which is what the contention of the union amounts to. However, if it is thought that the collective agreement was breached by the process leading to the KERP, a grievance could presumably be taken under the collective agreement. That is independent of the considerations to be given by a CCAA court in deciding whether to approve a KERP. A CCAA proceeding is not the place for grievances under collective agreements.

17 It was also contended by the USW that the total amount of the KERP, being \$3.4 million was excessive, taking into account the amount of the special pension shortfall payments that were deferred for the month of November. Counsel declined to say what a reasonable amount would be, saying it was a matter of discretion for the Court. In my view, the tying together these two separate issues is not appropriate. Whether the special pension payments should be deferred is a different issue and one that will be dealt with at a future date. The judgment of the board of directors and the special committee of the board should not be disregarded because of this issue.

18 It was contended on behalf of the retirees that the terms of the KERP provide for payment when there has been a completion of a sale or liquidation of the assets of Algoma and that the KERP should not pay out in the event of a liquidation as it is in the interests of all stakeholders that the company or its business be reorganized rather than

liquidated. I would not change this provision. The management to be protected by the KERP are being incentivized to stay in Sault Ste. Marie to assist in the SISF and it would only be after that process that a liquidation might take place if a SISF were not successful. It is in the interests of the KERP participants, along with all stakeholders, that Algoma survive and not be liquidated, and to deny them their KERP payment after they stayed to attempt to save Algoma from liquidation would not be appropriate.

19 In accordance with terms worked out by the applicant with the secured lenders, the applicants will not make or distribute any payments in respect of any claim of a KERP participant against the applicants (including any claims for termination, severance and change of control entitlements, but not including claims for payment pursuant to the KERP, claims for wages and vacation pay, or claims in respect of pension plans administered by the applicants) without first obtaining court approval of such payments on notice to the Service List. The KERP letters will have complimentary provisions worked out by the parties.

Sealing order requested.

20 The applicants requested that the list of KERP participants and the information regarding their income and amounts of their proposed KERP payments be sealed. This information was contained in a confidential supplement to the third report of the Monitor. This request is supported by the Monitor. The unions oppose the request.

21 In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), Justice Iacobucci adopted the following test to determine when a sealing order should be made

A confidentiality order ... 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.

22 Sealing orders are routinely granted in KERP cases, and found to meet the *Sierra Club* tests. In *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) stated the following, which is entirely apt to this case of Algoma:

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.

23 See also *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]).

24 In this case, it is contended by the union that under Ontario law, disclosure is made of salary information for public servants who make in excess of \$100,000 per annum. Thus as this is a very public restructuring process and there is significant public interest in the outcome of these proceedings, the salary information for individual KERP participants should be disclosed. I do not agree. Persons who choose to work as public servants understand the rules of disclosure relating to their employment. Persons who work in the private sector take employment with the expectation that their income is private information. There are exceptions under securities legislation requiring disclosure of the income of the

top earning executives of companies whose shares are publicly traded. I would not extend these statutory requirements to the KERP participants.

25 The union also contends that they may wish to test the necessity of including individuals in the list of KERP participants and need the particular financial information of each for that purpose. I agree with the Monitor that it would not be appropriate to consider each individual person. The process of selecting the participants and the amounts to be paid to them as incentives to stay and assist the restructuring was a robust process as discussed, and it is not in these circumstances helpful for public discussion about whether any particular person should be included. The impact of such disclosure in the workplace would not be helpful. I agree with Justice Pepall in *Canwest* that individual personal information adds nothing when the aggregate is disclosed.

26 The sealing order requested by the applicants is granted.

Motion granted.

Tab 13

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ESSAR STEEL ALGOMA
(ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND
ESSAR STEEL ALGOMA INC. USA**

Applicants

**AFFIDAVIT OF RAJAT MARWAH
(Sworn November 9, 2015)**

I, Rajat Marwah, of the City of Sault Ste. Marie, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Chief Financial Officer of the Applicant Essar Steel Algoma Inc. ("**Algoma**"). I have been the Chief Financial Officer since October 3, 2014. Before becoming Chief Financial officer, I was Algoma's Vice President, Finance since July 23, 2012. I am also the president and a director of Essar Tech Algoma Inc., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA. All of the entities described in this paragraph will collectively be referred to in this affidavit as the "**Applicants**".
2. Because of my involvement with each of the Applicants, I have knowledge of the matters to which I hereinafter depose, except where otherwise stated. I have also reviewed the records, press releases, and public filings of the Applicants and have spoken with certain of the directors, officers and/or employees of the Applicants, as necessary, and where I have relied upon such information do verily believe such information to be true.
3. All references to currency in this affidavit are references to Canadian dollars, unless otherwise indicated.

PART 1 - INTRODUCTION

4. This affidavit is sworn in support of an application by the Applicants for protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

5. On October 5, 2015, The Cleveland Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company (collectively, "Cliffs") purported to terminate Algoma's long-term iron ore pellet supply agreement (as amended, the "Cliffs Contract") and immediately ceased delivering iron ore to Algoma. Iron ore is the principal input for the manufacture of steel. Cliffs' actions have had a number of immediate significant detrimental effects on Algoma and Algoma's stakeholders, including:

- (a) Algoma has been forced to reduce production, resulting in approximately 100 full time employees being laid off;
- (b) The reduced production has resulted in a material decrease in Algoma's revenues at a time that Algoma could least afford it;
- (c) Algoma has been forced to seek supply of iron ore from alternative suppliers at a materially higher price than Algoma was entitled to purchase ore under the Cliffs Contract in order to continue producing at even a reduced level;
- (d) Algoma's ability to build inventory in advance of winter and the freezing of the Great Lakes (Algoma's principal method of receiving inventory) has been seriously compromised; and
- (e) Algoma has been forced to seek creditor protection on an emergency basis.

6. In addition to the issues caused by Cliffs' purported termination of the Cliffs Contract and Cliffs' refusal to supply iron ore, the Applicants face other significant financial issues, including:

- (a) Steel prices have continued to decrease to their lowest levels in six years resulting in reduced profit margins;
- (b) On October 8, 2015 and October 13, 2015, Standard & Poor's and Moody's (respectively) downgraded Algoma's credit rating;

- (c) On October 15, 2015, Algoma breached a borrowing base covenant contained in the Term Loan (as defined below). This resulted in an immediate Event of Default under the Term Loan and a cross-default under the ABL (as defined below);
- (d) On November 16, 2015, mandatory interest payments on the Term Loan and the Senior Secured Notes (as defined below) in the aggregate amount of approximately US\$25 million come due. Algoma is unable to make these payments;
- (e) The public dispute with Cliffs and concerns about Algoma's credit-worthiness have negatively impacted Algoma's relationships with customers, suppliers and creditors; and
- (f) Algoma faces significant pension and other retiree and employment benefit obligations.

7. As a result of Cliffs' actions and the other financial issues that the Applicants are facing the Applicants are unable to meet their ongoing payment obligations. Despite significant efforts to do so (which are described below), Algoma has been unable to successfully restructure its operations and capital structure outside of formal insolvency proceedings and is now insolvent. Without the protection of the CCAA and the other relief available thereunder, Algoma will be forced to shut-down operations, which would be extremely detrimental to Algoma's employees, suppliers, lenders and customers. CCAA protection will allow Algoma to obtain the necessary supply of inventory, stabilize operations, and give the Applicants the time required to consult with their stakeholders regarding a restructuring.

8. The Applicants are also commencing ancillary insolvency proceedings (the "**Chapter 15 Proceedings**") under Chapter 15 of Title 11 of the *United States Code* (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**").

9. The board of directors of each of the Applicants has authorized this Application.

PART 2 - THE APPLICANTS

10. All of the Applicants are indirectly-held subsidiaries of Essar Global Fund Limited (the "**Fund**"). A partial corporate chart showing the Applicants is attached hereto as **Exhibit "A"**.

A. Essar Steel Algoma Inc.

11. Algoma is a corporation incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA"). Algoma is a subsidiary of Algoma Holdings B.V. ("Holdings"), which owns 75.41% of the issued and outstanding shares of Algoma, and of Essar Tech Algoma Inc. ("Tech"), which owns 24.59% of the issued and outstanding shares of Algoma. Algoma's registered office is located at 105 West Street in Sault Ste. Marie, Ontario.

12. Algoma has a significant history in the city of Sault Ste. Marie. It was founded in 1901 to produce steel for railroad expansion across Canada. Today, Algoma is an integrated steel producer whose business includes: (a) the production of certain raw steel inputs; (b) steelmaking; and (c) the sale and distribution of steel products to customers in North America. The steel sheet and steel plate produced by Algoma is used in automotive, fabrication and manufacturing applications, among other things.

13. Algoma is Sault Ste. Marie's single largest employer. Algoma directly employs nearly 3,000 people. Adding household members and retirees, approximately 54,000 people in Sault Ste. Marie (or 69% of the city's total population of approximately 78,000) directly or indirectly depend on Algoma.

B. Algoma Holdings B.V.

14. Holdings is a Dutch private limited liability company. Holdings is not an operating company. Its sole asset is the shares of Algoma, which are located in certificated form at Algoma's offices in Sault Ste. Marie, Ontario. Holdings is a guarantor of all of the Credit Facilities (as defined below). Holdings is not one of the Applicants.

C. Essar Tech Algoma Inc.

15. Tech is a corporation established under the laws of British Columbia. Tech is not an operating company. Its sole asset is the shares of Algoma. Tech's shares of Algoma are located in certificated form at Algoma's offices in Sault Ste. Marie, Ontario. Tech is a guarantor of all of the Credit Facilities.

D. Essar Steel Algoma (Alberta) ULC

16. Essar Steel Algoma (Alberta) ULC (“**Alberta ULC**”), formerly 1839688 Alberta ULC, is an unlimited liability corporation established under the laws of Alberta. Alberta ULC is the issuer of approximately \$252 million in junior secured notes (the “**Junior Secured Notes**”), which the other Applicants have guaranteed. In addition, Alberta ULC is a guarantor of the Credit Facilities other than the Junior Secured Notes. Alberta ULC is not an operating company.

E. Essar Steel Algoma Inc. USA

17. Essar Steel Algoma Inc. USA (“**Algoma USA**”) is a corporation established under the laws of Delaware and is a wholly-owned subsidiary of Algoma.

18. Algoma USA principally serves as the American sales arm of the Applicants’ operations. Algoma USA employs 6 persons. As described below, Algoma USA relies on the Cash Management System (defined below) to pay its obligations as they come due.

F. Cannelton Iron Ore Company

19. Cannelton Iron Ore Company (“**Cannelton**”) is a corporation established under the laws of Delaware. Cannelton is a wholly-owned subsidiary of Algoma. Cannelton is non-operational and has no material assets other than a receivable owing from Algoma in the approximate amount of US\$16 million. Cannelton has an interest in the Cash Management System.

PART 3 - ALGOMA’S BUSINESS AND OPERATIONS

20. Algoma produces steel and steel products for customers throughout North America. Algoma is one of the largest integrated steel producers in Canada. Prior to the decrease in production caused by Cliffs’ termination of supply, Algoma produced an average of 220,000 tons¹ of steel per month, which amounts to approximately 2.5 million tons of steel per year.

21. Algoma has two general product categories:

¹ All references in this affidavit to tons of iron ore pellets are to short tons. One short ton is approximately 907.2 kilograms.

- (a) Sheet steel products (coils) include a wide variety of widths and gauges of both unprocessed and value-added steel. Algoma supplies steel sheet products to the automotive, hollow structural product, light manufacturing and transportation industries. In the past five years, sheet steel products have represented approximately 85% of Algoma's total steel shipment volumes; and
- (b) Plate steel products consist of various high-strength, low-alloy grades of steel. The majority of Algoma's plate steel products are purchased by members of the fabrication industry, which use these products in the construction and manufacture of railcars, buildings, bridges, off-highway equipment, storage tanks, ships, armored products for military applications, large diameter pipelines and wind energy generation equipment. For the last five years, plate steel products have represented approximately 15% of Algoma's total steel shipment volumes.

22. In contrast to many other steel manufacturers that convert steel scrap into liquid steel with electricity, Algoma is an integrated steel producer that melts iron ore pellets (with a small proportion of scrap metal) into hot metal using a blast furnace. Using a blast furnace means that a shutdown of operations, however brief, has a significant negative effect on production (described in more detail below).

23. Algoma experienced a capacity utilization rate of approximately 85% during its 2015 fiscal year, as compared to the North American industry average of about 75%. Algoma's superior capacity utilization is attributable to Algoma's integrated operations and wide range of production machinery and equipment. These give Algoma the ability to adjust its product mix between sheet and plate products depending on market conditions, allowing Algoma to optimize its product mix in different markets and based on different customer demands.

A. Manufacturing Steel

24. Algoma's costs of steel production can be approximately segmented as follows:

Input	Percent of Cost of Production
Raw materials	62%
Employment costs	17%
Energy costs	9%
Other costs	12%

25. Steel production requires a number of different raw material inputs, which are described below. The acquisition of these raw material inputs is complicated by Algoma's location in Sault Ste. Marie, Ontario and by the cold winters experienced there. Stockpiling sufficient raw materials to maintain operations throughout the winter is one of the most significant operational challenges that Algoma faces.

26. As described in greater detail below, Algoma takes delivery of the majority of its raw materials from ships sailing on the Great Lakes. Almost all of these ships are owned and operated by Lower Lakes Towing Limited, which has entered into a long-term contract of affreightment with Algoma. These ships arrive and dock at a port (the "Port") located at the Facility (as that term is defined below). In the winter, the shipping lanes on the Great Lakes freeze and become unnavigable. During the winter months, Algoma depends on receiving product by rail (which can be significantly more costly than delivery by ship) and on stockpiles of raw materials that it has accumulated at the Facility and the Port in the period leading up to winter.

27. If Algoma is unable to stockpile sufficient raw materials at the Facility, it will be forced to idle and eventually shut down its steel-making and other equipment at the Facility. In particular, the coke ovens that Algoma uses to transform coal into coke must be continuously fed with coal in order to maintain their internal temperature. If the interior of a coke oven falls below its optimal temperature range, the coke oven may suffer damage that could take several million dollars and several months' time to repair. If a sufficient number of Algoma's coke oven is shut down due to lack of coal, Algoma will have insufficient coke to operate its blast furnace, which must also be shut down.

28. If the blast furnace is shut down, it will take weeks to reactivate the blast furnace, and Algoma will not be able to restart the blast furnace in the winter. If the blast furnace undergoes an uncontrolled shut down, molten metal residue inside the furnace will solidify. This metal residue must be removed before the furnace can be restarted. The process of cleaning out and restarting the blast furnace could cost several million dollars and two to six months' time. Depending on how long it takes to restart the blast furnace, the majority of employees could be laid off.

Iron Ore and the Cliffs Contract

29. Algoma manufactures steel out of iron ore pellets. Since 2002, all of Algoma's iron ore has been supplied by Cliffs pursuant to the Cliffs Contract. Algoma melts these pellets into hot metal in a furnace that is heated by burning coke, natural gas and pure oxygen.

30. The Cliffs Contract was initially entered into in January 2002 between Cliffs and Algoma Steel Inc. ("Old Algoma"), which is a predecessor company of Algoma. I understand that Old Algoma entered into the Cliffs Contract at the time of its exit from CCAA creditor protection in 2002. At the time, Old Algoma had limited negotiating power, was financially vulnerable, and owed amounts to Cliffs in respect of previous supply of iron ore pellets. As a result of this imbalance of power, Cliffs was able to negotiate an exclusive supply contract at a price that was significantly higher than the then-prevailing market price for pellets.

31. The Cliffs Contract has been amended on eight occasions since 2002. The most recent amendment was made pursuant to a term sheet dated on or about June 7, 2013 (the "Term Sheet"). Pursuant to the Cliffs Contract, Algoma agreed to purchase iron ore exclusively from Cliffs until December 31, 2016, and on a non-exclusive basis until 2024.

32. A key component of the amendments to the Cliffs contract were amendments to the pricing formulas that resulted in a reduction in pricing such that it is based on market prices as compared to the previous formula which was substantially above market prices.

33. As amended by the Term Sheet, the Cliffs Contract specifies a price for the purchase and sale of iron ore pellets for the 2013 and 2014 calendar years and a formula for fixing the price of iron ore pellets in 2015 and 2016, and a separate formula for calendar years 2017 to 2024. In

essence, all of these formulas provide for a number of adjustments from the market price for iron ore pellets, which is established in certain global price benchmarks from time to time.

34. As a result of recent global trends, the price of all commodities, including iron ore pellets has been decreasing over the last few years. In addition, the top-up relating to the amortization of amounts owing from Old Algoma to Cliffs has been gradually eliminated. Consequently, the price of iron ore pellets to be supplied under the Cliffs Contract has been decreasing in steps and has now become materially more favourable to Algoma than pricing from other suppliers of iron ore pellets.

35. The most recent of these stepped decreases in the purchase price under the Cliffs Contract was scheduled to take place within days of Cliffs' purported termination of the Cliffs Contract. Algoma believes that Cliffs' purported termination of the Cliffs Contract was wrongful and ineffective, and considers the Cliffs Contract to still be valid and binding on the parties thereto. As described below, Algoma intends to seek relief from the Court with respect to Cliffs.

36. As a result of Cliffs' purported termination of the Cliffs Contract and Cliffs' failure to supply, Algoma was left with no source of iron ore pellets at a critical juncture. Algoma is already behind its usual schedule for receiving iron ore. Algoma must immediately begin stockpiling pellets in order (together with supply by rail during the winter) to have sufficient inventory to maintain steel production throughout the winter. Without sufficient inventory, Algoma will have to seriously curtail its operations or (in a worst case scenario) shut down its blast furnace. Cutting production will have a material adverse effect on Algoma's employees and could impact Algoma's ability to regain customers lost during any slowdown or shutdown. It is estimated a shutdown or material slowdown would cause Algoma to lose all contracted sales, being approximately 50% of its total sale volume.

37. Cliffs has informed Algoma that it is prepared to resume supplying iron ore pellets to Algoma if Algoma pays a price that is significantly more than the existing contract price (which is soon to decrease further). Algoma is not economically viable if it is required to purchase pellets at the price proposed by Cliffs.

38. In order to mitigate the potentially devastating effect of Cliffs' purported termination of the Cliffs contract, Algoma approached a number of other pellet suppliers (the "Alternate Suppliers"), including United States Steel International, Inc. ("US Steel") and The Iron Ore Company of Canada ("IOC") in order to secure an alternative supply of pellets. Algoma has entered into agreements with US Steel and IOC to purchase approximately two-thirds of the iron ore pellets that Algoma requires in order to maintain operations through the winter. Supply pursuant to these contracts has already started arriving at the Facility and will continue to be stockpiled. Notwithstanding this supply, Algoma will require Cliffs to continue supplying.

Coal

39. Algoma's blast furnace (which melts iron ore pellets into hot metal) is primarily fueled by coke, which Algoma produces by processing coal. Each year, Algoma purchases approximately 1.5 million tons of coal, which it converts into approximately 1 million tons of coke. Algoma purchases the majority of its coal pursuant to year-long contracts with three American coal suppliers and one Canadian coal supplier, and purchases the remainder on the spot market.

40. An ongoing supply of coal is critical to Algoma's ongoing operations. The Applicants have recently signed a coal supply agreement (the "Southern Coal Agreement") with Southern Coal Sales Corporation ("Southern Coal"). The Southern Coal Agreement terminates on March 31, 2017 and provides for the supply of coal to Algoma on a consignment basis. Pursuant to the Southern Coal Agreement, Southern Coal will deliver approximately 540,000 tons of coal (\pm 10%) to Algoma by rail and vessel in November and December 2015. This coal will be stockpiled and held in consignment at a segregated area of the Port. Algoma will pay Southern Coal a deposit of 10% of the purchase price of each shipment of coal before the coal is loaded for shipping. The arrangement contemplated in the Southern Coal Agreement allows Algoma to stockpile a substantial inventory of coal at the Facility before the shipping lanes become unnavigable without incurring the full cost of such coal in advance.

Natural Gas

41. Algoma purchases approximately 50,000 million British Thermal Units (“**mmbtu**”)² of natural gas each day from three suppliers. Algoma’s principal supplier of natural gas is Shell Energy North America (Canada) Inc. (“**Shell**”), which supplies Algoma with natural gas pursuant to a five-month contract negotiated each year in the fall. Pursuant to Algoma’s supply agreement with Shell (the “**Shell Agreement**”), Algoma purchases approximately 22,500 mmbtu of natural gas each day.

42. Algoma also purchases approximately 12,500 mmbtu of natural gas per day from Noble Americas Gas & Power Corp. (“**Noble**”) pursuant to a master agreement dated December 3, 2010 between Noble and Algoma (the “**Noble Agreement**”).

43. The balance of Algoma’s natural gas purchases are made at spot pricing from Noble or DTE Energy Co. (“**DTE**”).

44. Algoma has contracts with Active Energy Inc. (“**Active**”) for capacity on natural gas pipeline networks. Pursuant to that contract, Active transports natural gas from Shell, Noble and DTE to Sault Ste. Marie Union Gas’s facility in Sault Ste. Marie, from which the natural gas is transported to the Facility.

45. As described in greater detail below, the supply of natural gas is critical to Algoma’s ongoing operations, and the Applicants are seeking a critical supplier order with respect to Shell and Noble.

Oxygen

46. Algoma uses oxygen in producing steel. Algoma purchases oxygen from Praxair, Inc. (“**Praxair**”), which owns and operates a plant that generates oxygen located at the Facility (the “**Oxygen Plant**”). The Oxygen Plant was constructed specifically to supply Algoma with oxygen and certain other gases.

² A British Thermal Unit is a measure of the energy content of a fuel.

47. Algoma cannot economically purchase oxygen from any other vendor, and enjoys significant cost savings because of the location of the Oxygen Plant. Moreover, Algoma must pay Praxair certain fixed amounts each month regardless of the volume of gases that Algoma purchases from Praxair (if any).

Power

48. Algoma purchases approximately 50% of its power supply from Essar Power Canada Ltd. ("EPC") which operates a power co-generation plant (the "Cogen Plant") located at the Facility and which is essential to Algoma's operations. As shown on the organizational chart previously attached hereto as Exhibit "A", EPC is an indirectly-held, wholly-owned subsidiary of the Fund. Aside from sharing an ultimate parent with Algoma, EPC is not related to Algoma.

49. On December 21, 2009 Algoma and EPC entered into a land lease, an energy supply agreement and a shared services agreement which are described below:

- (a) Pursuant to the terms of the land lease, EPC leased the premises that the Cogen Plant is located on from Algoma for a nominal rent of \$1.00 per year, plus approximately \$400,000 per year on account of real property taxes in respect of the leased premises and EPC's proportionate share of unmetered utilities, shared common area repairs and infrastructure and capital repairs;
- (b) Pursuant to the terms of the energy supply agreement, Algoma provides EPC with surplus coke oven gas and blast furnace gas which is generated as a by-product from the steel making process that EPC uses at the Plant to generate electricity and processed steam. EPC sells the electricity which is generated to Algoma at the Hourly Ontario Energy Price, a rate which is materially less than the cost of purchasing electricity directly from the Independent Electricity System Operator (IESO). In lieu of payment in respect of the deliveries of the by-product fuel and processed steam, payment is satisfied by the parties' performance of the obligations under the energy supply agreement;
- (c) Pursuant to the terms of the shared services agreement, Algoma provides EPC with operating, maintenance and administrative personnel as required by EPC at market prices. The cost of all salary and benefits to personnel provided by

Algoma to EPC are paid by Algoma and fully reimbursed by EPC. EPC also pays Algoma an annual flat fee of up to 2% of the total amount of the reimbursement for non-exclusive use of and access to shared premises and equipment.

Scrap

50. Algoma uses scrap metal to produce steel. Algoma's principal scrap metal supplier is Triple M Metal LP ("Triple M"). Algoma buys scrap metal from Triple M pursuant to a letter agreement dated September 14, 2015 (the "Triple M Letter") that sets out the types, quantities and pricing for scrap that Triple M will sell to Algoma. The Triple M Letter expires on August 15, 2016.

B. Customers

51. Algoma has a diverse customer base. In FY 2015, approximately 62% of Algoma's sales were made to steel service centres, which act as middle-men in the steel markets. Service centres typically purchase steel products from a variety of manufacturers and re-sell them to end users, including customers in the automotive, construction and heavy equipment manufacturing industries. Sales by service centres are typically done on a "just-in-time" basis, which requires a service centre to have a close functional integration with its end users. Because of this integration, service centres are critical to Algoma's ability to reach a majority of its ultimate customers, and Algoma's relationships with service centres are essential to Algoma's viability as a going concern. From my knowledge and experience in the steel industry, if Algoma were to become temporarily unable to fill orders from service centres, the service centres could readily find alternative sources of product, and it would be very difficult for Algoma to replace these suppliers in the future.

52. The remainder of Algoma's production is sold directly to end users, as follows:

- (a) Direct sales to automotive customers, including car manufacturers and their tier-one suppliers: 11% of FY 2015 sales;
- (b) Pipe and tube sector sales: 4% of FY 2015 sales;
- (c) Fabrication sector: 8% of FY 2015 sales; and
- (d) Manufacturing sector: 7% of FY 2015 sales.

53. In FY 2015, 47% of Algoma's sales by volume were to Canadian customers and 48% were to customers in the United States, with the balance being sold on the international market.

54. About half of Algoma's customers purchase steel products pursuant to one year contracts, while the remainder purchase steel products on the spot market at market prices. I understand that customers who purchase steel products from Algoma pursuant to one-year contracts are concerned that Algoma should have the liquidity and financial stability necessary to continue supplying products throughout the term of the contract. In particular, although purchasers in the automotive industry (which made up 11% of Algoma's sales in FY2015) acquire product pursuant to annual contracts, they are reluctant to switch suppliers for a given model of car and commonly enter into consecutive one-year contracts during the lifespan of a project. Public perception of Algoma's viability as a going concern is, therefore, critical to Algoma's ability to continue in business. As described below, without the benefit of the relief sought on this application, Algoma will not be able to adequately manage its customer relationships and may lose many of its customers. Moreover, most of these contracts are negotiated in November of each year, making this a particularly important time of year for the Applicants.

C. Employees

55. Algoma is the largest single employer in Sault Ste. Marie, Ontario. As of October 15, 2015, Algoma employed approximately 2,900 people, all of which are full time employees. Of these employees, approximately 80% are paid on an hourly basis and approximately 20% are salaried. Effective October 4, 2015, Algoma laid off approximately 100 employees.

56. About 95% of Algoma's employees (both hourly and salaried) are subject to collective bargaining agreements and are represented by the United Steel Workers (the "USW").

57. Hourly employees subject to a collective bargaining agreement are represented by USW Local 2251 (the "Hourly Union"). The collective bargaining agreement with the Hourly Union came into effect August 1, 2013 and expires on July 31, 2016.

58. Salaried employees subject to a collective bargaining agreement are represented by USW Local 2724 (the "Salaried Union"). The collective bargaining agreement was ratified by its members in June 2014 and is scheduled to expire on April 1, 2016.

Pension Plans

59. Algoma sponsors four registered pension plans (the “**Pension Plans**”), all of which are subject to the *Pension Benefits Act* (Ontario) (the “**PBA**”):

- (a) The Essar Steel Algoma Inc. Pension Plan for Hourly Employees (the “**Hourly Plan**”);
- (b) The Essar Steel Algoma Inc. Pension Plan for Salaried Employees (the “**Salaried Plan**”);
- (c) Essar Steel Algoma Inc. Wrap Pension Plan (the “**Wrap Plan**”); and
- (d) Essar Steel Algoma Inc. Money Purchase Pension Plan for Exempt Employees (the “**DC Plan**”).

60. The Hourly Plan and Salaried Plan are non-contributory defined benefit pension plans, the membership of which comprises members of the Hourly Union and Salaried Union, respectively, hired before 2011, as well as certain exempt employees hired prior to 2003. The Wrap Plan provides small defined benefits to a closed group of members of Old Algoma’s two defined benefit pension plans who retired on or before January 1, 2002, as well as deferred vested members, survivors and beneficiaries under these plans as at September 17, 2001, and whose unindexed pension was not covered by the Pension Benefit Guarantee Fund. The Wrap Plan, together with the Salaried Plan and the Hourly Plan are referred to as the “**Defined Benefit Pension Plans**”.

61. The obligation to provide the Pension Plans is incorporated in the collective bargaining agreements with the Hourly Union and the Salaried Union.

62. The most recently filed funding valuation reports prepared in respect of the Hourly Plan and Salaried Plan are as of August 1, 2014. At that time, the Hourly Plan and the Salaried Plan had a combined wind-up deficit of \$461,427,000. The most recently filed funding valuation report prepared in respect of the Wrap Plan is as of December 31, 2014. At that time, the Wrap Plan had a combined wind-up deficit of \$65,348,000. As of November 1, 2015, Algoma is current on all of its payment obligations under the Pension Regulation (defined and described below).

63. As at October 31, 2015, Algoma's post-retirement benefit liabilities totaled approximately \$389.6 million. As at November 1, 2015, Algoma is current on these benefit obligations.

64. Algoma also sponsors four supplemental unregistered retirement plans, for certain former executives of Algoma (the "Supplemental Plans"), each of which is funded through a retirement compensation arrangement. The terms of each Supplemental Plan require that each such plan be secured or funded to the same funded ratio as the Salaried Plan. Algoma has elected to fund the Supplemental Plans in cash. The assets of the Supplemental Plans are held partly through trust agreements, and partly through the balance held in the refundable tax account with Canada Revenue Agency. Each month, Algoma makes payments to beneficiaries under the Supplemental Plan in the aggregate amount of \$22,620.

D. Properties and Facilities

65. Algoma's production facility (the "Facility") is situated on 1700 acres of land in Sault Ste. Marie, Ontario. The facility is adjacent to the St. Mary's River and is accessible by rail, road and water (other than during the winter). Current raw steel production capacity at Algoma facility totals 4.3 million tons per year. Algoma's executive and administrative offices are located on the same site as the production facility.

66. The Facility is comprised of, among other things, the Port, which is located on the St. Marys River and is essential to Algoma's operations. As described below, Algoma owns the Port through which it ships out steel product and receives the majority of its raw materials but leases it to Port of Algoma Inc. ("PortCo"). As of the date of this affidavit, all of Algoma's inventory of raw materials (constituting approximately half of Algoma's inventory) is located on the Port lands leased by Algoma to PortCo.

67. As shown on the organizational chart previously attached hereto as Exhibit "A", PortCo is an indirectly-held, wholly-owned subsidiary of the Fund. Aside from sharing an ultimate parent with Algoma, PortCo is not related to Algoma.

68. Algoma and PortCo entered into a lease, a cargo handling agreement and a shared services agreement as part of the Restructuring (defined below) in late 2014, which are described below:

- (a) Pursuant to the lease, PortCo leased the premises on which the Port is located from Algoma for a term of 50 years. Rent under the lease was paid in a US\$154.8 million lump sum on or before November 14, 2014, the majority of which was paid in cash and the remainder was paid by way of a promissory note in the approximate amount of US\$20 million (the "Port Note"). The Port Note bears interest at the rate of 10% per annum. The Port Note has been assigned one or more times, such that (as of the date of this affidavit) the Fund is the obligor under the Port Note. The Port Note matures and is payable in full on November 13, 2015. Algoma is responsible for the property taxes payable in respect of lands relating to the Port, and PortCo is generally responsible for utilities;
- (b) Pursuant to the terms of the cargo handling agreement, PortCo provides certain services to Algoma relating to the receipt, handling and storage of materials at the Port, for which Algoma pays PortCo a "tariff" of \$6 per net ton for incoming raw materials and outgoing by-product and finished steel product, subject to a reduction if other parties use the Port and a minimum monthly payment of \$3 million. The next payment from Algoma to PortCo is due on November 16, 2015. If Algoma fails to make this or any other scheduled payment, it must pay PortCo 11% interest per year on the outstanding bill amount. Algoma will also lose priority access to the Port, the Port services and the cargo handling services provided by PortCo; and
- (c) Pursuant to the terms of the shared services agreement, PortCo pays Algoma an annual shared services fee of \$11 million per year in equal monthly installments. Amounts owing from PortCo to Algoma can be set off against amounts owing from Algoma on account of the tariff described above.

Environmental Issues

69. As described below, Algoma is subject to three environmental remediation orders issued by the Ontario Ministry of the Environment and Climate Change (the “MOE”):

- (a) A “Site-specific Air Standard Approval” order dated March 27, 2015, which requires Algoma to adhere to progressively more stringent coke-making emission limits until the order expires on December 31, 2020. All coke producers in Ontario are subject to the same or similar emission limits. Algoma must make significant capital expenditures in order to comply with current and future emission limits;
- (b) An order regarding Algoma’s lime plant³ dated August 26, 2015, which requires that Algoma repair defects found in the lime plant, install a recording camera in the lime plant and update the MOE on preventative maintenance activities. As of the date of this affidavit, this order has been fully complied with; and
- (c) An “Environmental Penalty Order” dated September 16, 2015, pertaining to (i) an accidental effluent discharge from the Facility into a near-by lagoon and (ii) higher-than-acceptable cyanide levels at the Facility. The order imposes a penalty in the total amount of \$17,511. In accordance with its rights under the order, Algoma has made submissions to the MOE seeking a 25% reduction in the penalty imposed under this order. Algoma has taken steps to remedy the issues described in the order and to prevent future violations.

70. In addition to the foregoing, Algoma is working to comply with Ontario environmental regulations requiring it to remove all equipment containing polychlorinated biphenyls (PCBs) from service by December 31, 2014. Algoma must remove all such equipment from the Facility and send it to an approved destruction facility by no later than December 31, 2015.

71. Algoma has posted letters of credit in the aggregate amount of \$10 million with the MOE to secure performance of any environmental remediation that may become required in respect of Algoma’s properties, as follows:

³ The lime plant is used to process lime, which is used at various stages in the manufacture of steel.

- (a) A Letter of Credit in the approximate amount of \$7.4 million to secure performance of environmental remediation obligations in respect of closure obligations at a mining property located in Wawa, Ontario; and
- (b) A Letter of Credit in the approximate amount of \$3.0 million to secure performance of environmental remediation obligations in respect of an active landfill at the Facility.

72. Algoma is conducting water treatment and remediation work at certain legacy mining properties in a region of Northern Ontario known as the Goudreau Region where certain abandoned open pit mines became flooded in recent years and must be remediated. It is estimated that the remediation work will be completed by approximately 2031, and Algoma maintains an accounting provision for the cost of such work. An interruption in remediation work could result in an overflow of acidic mine water into Wawa Lake, which is the source of drinking water for the community of Wawa.

E. Cash Management System

73. In the ordinary course of its business, Algoma uses a cash management system (the "Cash Management System") to, among other things, collect funds and pay expenses associated with its operations. As described below, one of the other Applicants also has a bank account. Continued access to the Cash Management System and the bank accounts described below is critical to the Applicants' ongoing business.

Bank Accounts

74. Algoma has three types of bank accounts:

- (a) Eleven bank accounts (the "Disbursement Accounts") with RBC Royal Bank ("RBC") from which Algoma makes various disbursements, eight of which are denominated in Canadian dollars and three of which are denominated in US dollars; and
- (b) Two bank accounts with Bank of America Canada NA (the "Receipt Accounts") into which all of Algoma's receipts are deposited, one of which is denominated in Canadian dollars and the other in US dollars.; and

75. Funds deposited into the Receipt Accounts are swept daily and their contents are transferred into two controlled accounts held at RBC, one denominated in Canadian and one in US dollars. From those accounts, funds are deposited into the Disbursement Accounts as necessary to pay Algoma's obligations as they come due.

76. In addition to the foregoing accounts, Algoma USA has two bank accounts that are denominated in US dollars with Bank of America in Atlanta, Georgia. However, Algoma USA has little cash of its own and relies on Algoma to pay all of Algoma USA's expenses through the Cash Management System. Amounts that Algoma disburses on behalf of Algoma USA are reconciled periodically and set off against payments that Algoma makes to Algoma USA for various services.

77. Cannelton relies on the Cash Management System and has an interest therein.

Payroll System

78. Algoma pays its hourly employees in arrears every two weeks and its salaried employees in arrears on the first business day of each month. Algoma does not use a payroll services provider. On the day prior to the scheduled pay day, Algoma deposits the aggregate amount owing to all hourly employees, net of amounts withheld, into a bank account at RBC for distribution. It withholds all amounts required by law and remits those amounts to the relevant governmental agencies and other parties. There are currently no amounts outstanding on account of employee withholdings.

79. Algoma makes its monthly contribution to the Pension Plans (described above) on the last business day of each month by disbursing funds to RBC Investor & Treasury Services, which processes and makes pension benefit payments to beneficiaries.

F. Litigation

80. Algoma has various litigation matters outstanding before courts and tribunals in Canada and the United States.

81. On January 13, 2015, Cliffs filed a complaint against Algoma in the United States District Court for the Northern District of Ohio in which Cliffs sought damages in the amount of US\$90 million caused by Algoma's alleged breaches of the Cliffs Contract. Algoma denied Cliffs'

allegations, defended the litigation commenced by Cliffs and has filed counterclaims against Cliffs seeking US\$164 million. Cliffs' complaint was filed under seal and the particulars of the litigation cannot be publicly disclosed. Trial of this matter is scheduled to start on December 7, 2015, but Essar has filed a motion to continue the trial date.

Trade Cases

82. As noted above, Algoma's profitability has been impacted by an excess of global supply of steel around the world and in Canada in particular. In addition to the steps that Algoma has taken to improve its cost structure and operational efficiency, it is also taking steps to address these over-supply issues in the Canadian and US steel markets.

83. Algoma, together with a number of other Canadian and American steel companies, has filed complaints with the Canadian Border Services Agency (the "CBSA") and the Canadian International Trade Tribunal (the "CITT") and their respective American counterparts pursuant to Canadian and American trade laws that provide for the application of duties against unfairly traded products. In September 2015, CBSA introduced levies on certain steel products from affected countries. These investigations and related proceedings before the CITT are ongoing.

PART 4 - FINANCIAL STATUS

A. Assets

84. Algoma's assets, as reflected in the pro forma consolidated balance sheet prepared by Algoma for the period ended September 30, 2015 (which are the most recent such statements available), the unaudited consolidated financial statements of Algoma for the 3 months ended June 30, 2015, and the audited consolidated financial statements of Algoma for the 12 months ended March 31, 2015, attached as Exhibits "B", "C" and "D", respectively, had a net book value of approximately \$2.1 billion and consisted of the following:

	September 2015 (Pro Forma)	For the 3 months ended June 30, 2015 (unaudited)	For the 12 months ended March 31, 2015 (audited)
<u>Current Assets</u>			
Cash	\$847,000	\$12,500,000	\$34,700,000
Restricted cash	\$16,976,000	\$17,000,000	\$17,000,000
Accounts receivable	\$264,741,000	\$265,000,000	\$273,600,000

Inventory	\$391,949,000	\$393,000,000	\$403,500,000
Prepaid expenses	\$34,566,000	\$31,700,000	\$22,200,000
Loan receivable from related party	\$35,477,000	\$26,300,000	\$26,100,000
Total Current Assets	<u>\$744,555,000</u>	<u>\$745,500,000</u>	<u>\$777,100,000</u>
<u>Non-Current Assets</u>			
Property, plant and equipment (net)	\$1,384,902,000	\$1,299,000,000	\$1,322,100,000
Intangible assets (net)	\$70,524,000	\$68,700,000	\$73,500,000
Other assets	\$2,692,000	\$1,800,000	\$1,900,000
Total Non-Current Assets	<u>\$1,458,118,000</u>	<u>\$1,369,500,000</u>	<u>\$1,407,500,000</u>
Total Assets	\$2,202,673,000	\$2,115,000,000	\$2,184,600,000

B. Liabilities

85. As at September 30, 2015, Algomia had liabilities totalling approximately \$2.6 billion. The majority of these obligations, being Algomia's loan agreements and bond indentures, are described briefly below and in more detail starting at paragraph 87.

	September 2015 (Pro Forma)	For the 3 months ended June 30, 2015 (unaudited)	For the 12 months ended March 31, 2014 (audited)
<u>Current Liabilities</u>			
Bank indebtedness	\$56,765,000	\$53,100,000	\$53,800,000
Accounts payable and accrued liabilities	\$301,201,000	\$253,300,000	\$228,900,000
Taxes payable	\$5,322,000	\$3,700,000	\$6,800,000
Current portion of provisions	\$1,944,000	\$2,400,000	\$3,900,000
Current portion of long term debt	\$5,004,000	\$4,700,000	\$4,700,000
Current portion of other long term liabilities	\$5,130,000	\$5,000,000	\$5,000,000
Total Current Liabilities	<u>\$375,366,000</u>	<u>\$322,200,000</u>	<u>\$303,100,000</u>
<u>Non-Current Liabilities</u>			
Long term debt	\$1,348,091,000	\$1,247,900,000	\$1,254,800,000
Government loan	\$584,000	\$0	\$0
Accrued pension liability	\$359,291,000	\$349,200,000	\$389,300,000
Accrued post-employment benefit obligation	\$369,933,000	\$370,800,000	\$389,600,000
Provisions	\$7,540,000	\$7,300,000	\$7,300,000
Other long term liabilities	\$210,785,000	\$198,400,000	\$202,200,000
Total Non-Current Liabilities	<u>\$2,296,225,000</u>	<u>\$2,173,600,000</u>	<u>\$2,243,200,000</u>
Total Liabilities	\$2,671,591,000	\$2,495,800,000	\$2,546,300,000

86. Over the past few years, Algoma has faced certain operational, pension and financing challenges, as well as an over-leveraged balance sheet. As part of Algoma's response to these challenges, in the autumn of 2014, Algoma and certain of the other Applicants completed a restructuring (the "**Restructuring**") pursuant to a plan of arrangement under the CBCA as part of a recapitalization of Algoma's entire capital structure. This recapitalization included a refinancing of Algoma's secured indebtedness and certain of its unsecured indebtedness. The recapitalization resulted in a reduction of Algoma's overall debt load by approximately US\$145 million in principal and significantly reduced Algoma's cash interest expense. Algoma's post-Restructuring debt facilities are described below.

ABL Facility

87. Algoma (as borrower), Holdings and Essar Tech (as unsecured guarantors), Algoma USA, Cannelton and Alberta ULC (as secured guarantors), and Deutsche Bank AG (acting through its Canada Branch) (the "**ABL Agent**"), as administrative agent and collateral agent for a syndicate of lenders, are parties to a revolving credit agreement dated as of November 14, 2014 (the "**ABL Agreement**") in the principal amount of US\$50 million (the "**ABL Facility**"), which matures in May 2019. As at October 31, 2015, approximately US\$42.5 million was outstanding under the ABL Facility. Due to its size, a copy of the ABL Agreement is not attached to this affidavit but is available upon request.

88. The ABL Facility is an asset-backed loan governed by a borrowing base calculation that is comprised of eligible accounts receivable and eligible inventory. The ABL Facility requires that a certain cash balance be maintained to meet a minimum calculated borrowing base equal to the outstanding principal amount. The ABL Facility contains various restrictive covenants which, among other things, limit Algoma's ability to, among other things, incur additional indebtedness or encumber its assets.

89. The rate of interest payable on amounts outstanding under the ABL Facility is determined according to formulas set out in the ABL Agreement. The current rate of interest under the ABL Facility is between 2.9455% and 5.5%, depending on the type of loan drawn under the ABL Facility.

90. Algoma's obligations in respect of the ABL Facility are secured by, among other things: (a) a security agreement (the "ABL Security Agreement"), (b) a pledge agreement (the "ABL Pledge Agreement"), and (c) a debenture (the "ABL Debenture"), each dated as of November 14, 2014. Pursuant to the ABL Security Agreement, Algoma granted the ABL Agent (as agent) security interests in substantially all of Algoma's present and after-acquired personal property. Pursuant to the ABL Pledge Agreement, Algoma pledged a security interest in, among other things, all of the issued and outstanding shares of Algoma USA, Cannelton and Alberta ULC, and in all shares, interests, participations or other equivalents acquired from time to time by Algoma. Pursuant to the ABL Debenture, Algoma granted a security interest in all of its owned real estate holdings. Algoma also granted Section 427 *Bank Act* (Canada) security to Deutsche Bank AG (acting through its Canada Branch), in its capacity as a lender under the ABL Agreement.

91. Algoma's obligations in respect of the ABL Facility are jointly and severally guaranteed by Holdings, Essar Tech, Algoma USA, Cannelton and Alberta ULC. While Holdings and Essar Tech's guarantees are unsecured, Algoma USA, Cannelton and Alberta ULC's obligations are secured pursuant to, among other things, the ABL Security Agreement, which grants the ABL Agent security over substantially all of the present and after-acquired personal property of Algoma USA, Cannelton and Alberta ULC.

92. Repayment of the ABL Facility may be accelerated upon occurrence of an event of default, subject (in some cases) to a requirement that the ABL Agent give notice that an event of default has occurred and to certain cure rights. Events of default under the ABL Agreement include, among other things, defaults under any other indebtedness to which Holdings, Essar Tech or any of their subsidiaries are subject (subject to certain restrictions and to certain cure rights) and the commencement of insolvency proceedings by any of those entities.

93. As indicated above, on October 15, 2015, Algoma breached the borrowing base covenant under the Term Loan. This created a cross-default under the ABL Facility. Upon the occurrence of an event of default, the ABL Agent may, among other things, declare that all amounts owing under the ABL Facility be repaid and may enforce, as collateral agent, all of the liens and security interests created pursuant to the various security documents relating to the ABL Facility.

Term Loan Facility

94. Algoma, as borrower, Holdings and Essar Tech, as unsecured guarantors, Algoma USA, Cannelton and Alberta ULC, as secured guarantors, and Deutsche Bank AG New York Branch (the “**Term Loan Agent**”), as administrative agent and collateral agent for a syndicate of lenders, are parties to a term loan credit agreement dated as of November 14, 2014 (the “**Term Loan Agreement**”) in the principal amount of US\$375 million (the “**Term Loan Facility**”). As at October 31, 2015, approximately US\$371 million was outstanding under the Term Loan Facility. Due to its size, a copy of the Term Loan Agreement is not attached to this affidavit but is available upon request.

95. The rate of interest payable on amounts outstanding under the Term Loan Facility varies based on the type of advance and the appropriate applicable margin. The current rate of interest under the Term Loan Facility is 7.5% per annum.

96. Algoma’s obligations in respect of the Term Loan Facility are secured by, among other things, a security agreement (the “**Term Loan Security Agreement**”), a pledge agreement (the “**Term Loan Pledge Agreement**”) and a debenture (the “**Term Loan Debenture**”), each dated as of November 14, 2014. Pursuant to the Term Loan Security Agreement, Algoma granted the Term Loan Agent (as agent) security interests in substantially all of Algoma’s present and after-acquired personal property. Pursuant to the Term Loan Pledge Agreement, Algoma pledged a security interest in, among other things, all of the issued and outstanding shares of Algoma USA, Cannelton and Alberta ULC, and in all shares, interests, participations or other equivalents acquired from time to time by Algoma. Pursuant to the Term Loan Debenture, Algoma granted a security interest in all of its owned real estate holdings.

97. Principal amounts outstanding under the Term Loan Facility are repayable according to a repayment schedule set out in the Term Loan Agreement. The next scheduled interest payment of approximately US\$7 million is due on November 16, 2015 (which is the next business day after the contractual due date of November 15, 2015). Repayment of the Term Loan Facility may be accelerated upon the occurrence of an event of default, subject (in some cases) to a requirement that the Term Loan Agent give notice that an event of default has occurred.

98. Under the Term Loan Facility, there is a financial covenant which requires a minimum borrowing base calculation to be performed as of the last day of any fiscal quarter. At that time, if the borrowing base covenant is not maintained, an event of default occurs. This event of default is subject to a specific cure right. As described above, Algoma delivered a borrowing base certificate that showed that Algoma had breached the borrowing base covenant on October 15, 2015. Other events of default under the Term Loan Agreement include, among other things, the commencement of insolvency proceedings. Upon the occurrence of an event of default, and subject to the delivery of the Cure Notice (as defined below), the Term Loan Agent may, among other things, declare that all amounts owing under the Term Loan Facility be repaid and may enforce, as collateral agent, all of the liens and security interests created pursuant to the various security documents relating to the Term Loan Facility.

99. Algoma's obligations in respect of the Term Loan Facility are jointly and severally guaranteed by Holdings, Essar Tech, Algoma USA, Cannelton and Alberta ULC. While Holdings and Essar Tech's guarantees are unsecured, Algoma USA, Cannelton and Alberta ULC's obligations are secured pursuant to, among other things, the Term Loan Security Agreement, which grants the Term Loan Agent security over substantially all of the present and after-acquired personal property of Algoma USA, Cannelton and Alberta ULC.

100. As noted above and described in greater detail below, Algoma has delivered the Notice of Default and Cure Notice in accordance with the terms of the Term Loan Agreement.

Senior Secured Notes

101. Algoma issued senior secured notes bearing interest at a rate of 9.50% (the "Senior Secured Notes") pursuant to an indenture (the "Senior Secured Note Indenture") dated as of November 14, 2014, among Algoma, Holdings, Essar Tech, Algoma USA, Cannelton and Alberta ULC, and Wilmington Trust, National Association, as trustee and collateral agent for the Senior Secured Notes (in such latter capacity, the "Senior Secured Notes Trustee"), in the principal amount of US\$375 million. The Senior Secured Notes are due November 15, 2019. Due to its size, a copy of the Senior Secured Note Indenture is not attached to this affidavit but is available upon request.

102. Interest on the Senior Secured Notes is payable semi-annually in arrears on May 15 and November 15 of each year. The amount payable on November 15, 2015 on account of interest is approximately US\$18 million.

103. Algoma's obligations in respect of the Senior Secured Notes are secured by, among other things, a security agreement (the "**Senior Secured Notes Security Agreement**"), a pledge agreement (the "**Senior Secured Notes Pledge Agreement**") and a debenture (the "**Senior Secured Notes Debenture**"), each dated as of November 14, 2014. Pursuant to the Senior Secured Notes Security Agreement, Algoma granted the Senior Secured Notes Trustee security interests in substantially all of Algoma's present and after-acquired personal property. Pursuant to the Senior Secured Notes Pledge Agreement, Algoma pledged a security interest in, among other things, all of the issued and outstanding shares of Algoma USA, Cannelton and Alberta ULC, and in all shares, interests, participations or other equivalents acquired from time to time by Algoma. Pursuant to the Senior Secured Notes Debenture, Algoma granted a security interest in all of its owned real estate holdings.

104. Events of default under the Senior Secured Notes include, among other things, (a) the commencement of insolvency proceedings, and (b) the occurrence of a default in respect of any indebtedness for borrowed money which results in acceleration of such indebtedness prior to its final stated maturity. Upon the occurrence of an event of default, the holders of the Senior Secured Notes may, among other things, declare that all amounts owing under the Senior Secured Notes be repaid and may cause the Senior Secured Notes Trustee to take steps to enforce all of the liens and security interests created pursuant to the various security documents relating to the Senior Secured Notes.

105. Algoma's obligations in respect of the Senior Secured Notes are also jointly and severally guaranteed by Holdings, Essar Tech, Algoma USA, Cannelton and Alberta ULC. While Holdings and Essar Tech's guarantees are unsecured, Algoma USA, Cannelton and Alberta ULC's obligations are secured pursuant to the Senior Secured Notes Security Agreement, which grants the Senior Secured Notes Trustee security over substantially all of the present and after-acquired personal property of Algoma USA, Cannelton and Alberta ULC.

Junior Secured Notes

106. Alberta ULC issued the junior secured notes (the “**Junior Secured Notes**”), which bear interest at a rate of 14%, pursuant to an indenture (the “**Junior Secured Note Indenture**”) dated as of November 14, 2014 among Algoma, Holdings, Essar Tech, Algoma USA, Cannelton and Alberta ULC and Wilmington Trust, National Association, as trustee and collateral agent for holders of the Junior Secured Notes (in such latter capacity, the “**Junior Secured Notes Trustee**”), in the principal amount of US\$252,103,398. The Junior Secured Notes are due February, 2020. Due to its size, a copy of the Junior Secured Note Indenture is not attached to this affidavit but is available upon request.

107. Interest on the Junior Secured Notes is payable quarterly in arrears on February 15, May 15, August 15 and November 15 of each year. Approximately US\$9.8 million is due and payable in respect of interest on the Junior Secured Notes on November 15, 2015. As it is entitled to do under the Junior Secured Notes, Alberta ULC has elected to make all interest payments to date by issuing to the holders of the Junior Secured Notes additional notes in lieu of cash interest payments.

108. Events of default under the Junior Secured Notes include, among other things, the commencement of insolvency proceedings. Upon the occurrence of an event of default, the holders of the Junior Secured Notes may, among other things, declare that all amounts owing under the Junior Secured Notes be repaid and may cause the Junior Secured Notes Trustee to take steps to enforce all of the liens and security interests created pursuant to the various security documents relating to the Junior Secured Notes.

109. Algoma has guaranteed Alberta ULC’s obligations in respect of the Junior Secured Notes, and such guarantee is secured by, among other things, a security agreement (the “**Junior Secured Notes Security Agreement**”), a pledge agreement (the “**Junior Secured Notes Pledge Agreement**”) and a debenture (the “**Junior Secured Notes Debenture**”), each dated as of November 14, 2014. Pursuant to the Junior Secured Notes Security Agreement, Algoma granted the Junior Secured Notes Trustee security interests in substantially all of Algoma’s present and after-acquired personal property. Pursuant to the Junior Secured Notes Pledge Agreement, Algoma pledged a security interest in, among other things, all of the issued and outstanding

shares of Algoma USA, Cannelton and Alberta ULC, and in all shares, interests, participations or other equivalents acquired from time to time by Algoma. Pursuant to the Junior Secured Notes Debenture, Algoma granted a security interest in all of its owned real estate holdings.

110. Alberta ULC's obligations in respect of the Junior Secured Notes are also jointly and severally guaranteed by Holdings, Essar Tech, Algoma USA, and Cannelton. While Holdings and Essar Tech's guarantees are unsecured, Algoma USA and Cannelton's obligations are secured pursuant to the Junior Secured Notes Security Agreement, which grants the Junior Secured Notes Trustee security over substantially all of the present and after-acquired personal property of Algoma USA and Cannelton.

Intercreditor Agreements

111. In connection with the Credit Facilities (as defined below), two intercreditor agreements were entered into and dated as of November 14, 2014, one among all of the secured creditors of Algoma (the "**Intercreditor Agreement**") and one in respect of only the Senior Secured Notes and the Term Loan Facility (the "**Pari Passu Intercreditor Agreement**").

112. Pursuant to the Intercreditor Agreement among, among others, the ABL Agent, the Term Loan Agent, the Senior Secured Notes Trustee and the Junior Secured Notes Trustee,

- (a) the ABL Facility lenders have first-ranking security on cash, accounts receivable and inventory and third-ranking security on fixed assets;
- (b) the Term Loan Facility lenders have shared first-ranking security on fixed assets and second-ranking security on cash, accounts receivable and inventory;
- (c) the holders of the Senior Secured Notes have shared first-ranking security on fixed assets and third-ranking security on cash, accounts receivable and inventory; and
- (d) the holders of the Junior Secured Notes have fourth-ranking security on all assets.

113. The relative priorities of the Term Loan lender and the holders of the Senior Secured Notes are dealt with in accordance with the terms of the Pari Passu Intercreditor Agreement.

Overview of Credit Facilities

114. A summary of the obligors ABL Facility, the Term Loan Facility, the Senior Secured Notes and the Junior Secured Notes (collectively, the "Credit Facilities") is below:

Entity	ABL Facility	Term Loan Facility	Senior Secured Note	Junior Secured Note
Algoma	Borrower	Borrower	Borrower	Secured Guarantor
Holdings	Unsecured Guarantor	Unsecured Guarantor	Unsecured Guarantor	Unsecured Guarantor
Essar Tech	Unsecured Guarantor	Unsecured Guarantor	Unsecured Guarantor	Unsecured Guarantor
Alberta ULC	Secured Guarantor	Secured Guarantor	Secured Guarantor	Issuer
Cannelton	Secured Guarantor	Secured Guarantor	Secured Guarantor	Unsecured Guarantor
Algoma USA	Secured Guarantor	Secured Guarantor	Secured Guarantor	Unsecured Guarantor

PART 5 - FINANCIAL CHALLENGES AND RESPONSES

115. Algoma has experienced a number of challenges over the past few years, which together have negatively impacted its financial performance. These challenges can be classified as operational, pension-related and financing-related, each of which is discussed in greater detail below. After significant efforts, including the Restructuring, Algoma believed it had resolved these issues. However, continuing adverse economic conditions and the precipitous actions of Cliffs threaten the continued viability of Algoma as a going concern.

A. Operational Challenges and Responses to Those Challenges

116. Algoma has completed substantial improvements to its operations and cost structure over the past several years. Since 2007, Algoma has reduced its operating expenses by 30% and headcount expenses by 25%. Over the same period of time, employee productivity has increased by 21%. Furthermore, in Fiscal 2015, Algoma has achieved cost savings of \$12 per ton of steel produced.

117. Notwithstanding these significant efforts, Algoma's financial performance remains volatile due principally to the decrease in the price of steel and, to a lesser extent, fluctuations in the pricing of its raw materials. As noted above, the price of steel is at a six year low. Iron ore makes up a significant component of Algoma's cost of goods sold. Cliffs has historically been the exclusive supplier of iron ore pellets to Algoma, and until recently pricing under the Cliffs Contract has been significantly above the market price. As a result of the purported termination of the Cliffs Contract and Cliffs' refusal to supply at anything approaching market prices, Algoma has been forced to scale back production. The decrease in production has had a negative impact on Algoma's profitability and its ability to purchase additional supply and otherwise meet its obligations as they come due.

118. Algoma has secured some alternative supply but it is at prices in excess of the price at which Algoma is entitled to purchase iron ore pellets under the Cliffs Contract, and the alternative supply is inadequate to meet all of Algoma's needs until spring.

B. Pension-Related Challenges and Responses to Those Challenges

119. As described above, Algoma sponsors the Pension Plans which cover approximately 8,630 current and former employees and their spouses.

120. Due to, among other factors, the low interest rates prevailing since 2008, as at November 2012 Algoma was incurring pension obligations of approximately \$2 million per month for current service cost and \$6 million per month in special payments. As of August 1, 2012, the wind up deficit for the Defined Benefit Pension Plans was approximately \$641 million.

121. In response to the onerous financial obligations related to the Defined Benefit Pension Plans, in December 2012 Algoma sought and received emergency short-term pension relief from the Ontario Government to enable Algoma to negotiate a longer-term solution to its pension

funding issues. In 2013, Algoma supported by both the Salaried Union and Hourly Union, as well as three retiree groups, SOAR Chapters 7 and 17, and Group 1009 requested and received a longer-term funding relief regulation.

122. Pursuant to Ontario Regulation 202/02 to the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “**Pension Regulation**”) Algoma is permitted to fund the Defined Benefit Pension Plans based on a fixed schedule through to March 31, 2017. The fixed schedule provides that, for calendar years 2014 and 2015, Algoma will contribute a total of \$55 million to the Defined Benefit Pension Plans (including current service cost contributions and special payments), payable in 12 equal monthly installments. This obligation increases to \$60 million in calendar year 2016, again payable in 12 equal monthly installments, with an additional \$5 million payable in each of January, February and March 2017. In the event that Algoma has excess funds (as determined by the formula provided in the Pension Regulation), Algoma is required to make additional contributions to the Defined Benefit Pension Plans. The Pension Regulation contemplates that any remaining deficit existing in the Defined Benefit Pension Plans as of April 2017 will be fully funded by no later than March 2024.

123. In addition to the funding relief obtained through the Pension Regulation, Algoma has also bargained several pension concessions with its Unions, including closing the Defined Benefit Pension Plans to new hires in 2011, and has limited when the Defined Benefit Pension Plans pay indexation and benefit improvements. As described in more detail below, Algoma has sought debtor-in-possession financing in order to be able to continue operating during the CCAA, but was unsuccessful in obtaining adequate funding to continue to make the special payments.

124. The Applicants are insolvent. They have negotiated DIP financing to fund the CCAA proceedings but were unable to obtain adequate financing to fund the special payments due to be paid to the Defined Benefit Pension Plans each month. Algoma will continue to make normal cost contributions. Consequently, the Applicants intend to return to Court to seek an order suspending special payments required to be made to the Defined Benefit Pension Plans.

C. **Financing Related Challenges**

125. In addition to the significant monthly contributions Algoma is required to make to the Defined Benefit Pension Plans, the quantum of Algoma's aggregate Defined Benefit Pension Plan wind-up deficit has significantly contributed to Algoma being unable to secure financing at market rates.

D. **2014 Restructuring**

126. In late 2014, Algoma undertook the Restructuring, which included a series of interrelated steps that de-leveraged Algoma's balance sheet, extended the term to maturity of its indebtedness, reduced cash interest and enhanced liquidity. The Restructuring included a refinancing and repayment in full of Algoma's secured debt while leaving unaffected Algoma's obligations to its trade creditors, employees and pensioners.

E. **Engagement of Evercore**

127. Stikeman Elliott LLP ("**Stikeman**") and Weil, Gotshal & Manges LLP ("**Weil**") engaged Evercore Group L.L.C. ("**Evercore**") to assist with evaluating the Applicants' financial position and strategic alternatives pursuant to an engagement letter dated October 14, 2015 (the "**Evercore Engagement Letter**"). A copy of the Evercore Engagement Letter is attached hereto as **Exhibit "E"**.

128. Evercore was retained to provide Stikeman and Weil and the Applicants with general investment banking advice, and to specifically advise them regarding (a) a Restructuring (as that term is defined in the Evercore Engagement Letter); (b) a Financing (as that term is defined in the Evercore Engagement Letter, which includes DIP financing or "exit" financing); and/or (c) a Sale (as that term is defined in the Evercore Engagement Letter).

129. Pursuant to the Evercore Engagement Letter, Evercore is entitled to be paid:

- (a) A monthly fee of US\$150,000 payable beginning on October 15, 2015 and thereafter on the fifteenth day of each following month until a successful Restructuring or Sale (as those terms are defined in the Evercore Engagement Letter) has been completed, or Evercore's engagement is terminated;
- (b) A success fee (the "**Success Fee**") of between US\$7 and US\$8 million, depending on the scope of Evercore's responsibilities under the Evercore Engagement

Letter, which is payable upon the consummation of any Restructuring or Sale; and

- (c) A financing fee (the “**Financing Fee**”) in the maximum amount of 1% of the gross proceeds of any private issuance, sale or placement of newly issued or treasury security equity, equity-linked or debt securities, instruments or obligation of Algoma with one or more lenders or investors or security holders, including any debtor-in-possession financing, “exit” financing or any other loan. The first 6 months of monthly fees will be credited against any Success Fee or Financing Fee.

PART 6 - THE APPLICANTS ARE INSOLVENT

130. As indicated above, on October 15, 2015, Algoma defaulted on a borrowing base covenant under the Term Loan Facility. On October 20, 2015, Algoma delivered a Notice of Default and Cure Notice (the “**Cure Notice**”) to the Term Loan Agent. In accordance with the terms of the Term Loan Agreement, delivery of the Cure Notice entitles Algoma to 70 days in which to attempt to cure the breach of the borrowing base covenant by issuing shares in exchange for cash. During that 70-day period, the Term Loan Agent and the Term Loan Lenders are stayed from enforcing their rights or remedies under the Term Loan Agreement, the Term Loan Security Agreement, the Term Loan Pledge Agreement, the Term Loan Debenture, and any other security granted in connection with the Term Loan Facility.

131. It is an event of default under the ABL Facility for there to be a default in the observance of any condition in an agreement relating to indebtedness wherein the aggregate principal amount outstanding thereunder is an amount greater than US\$50 million, where such default causes, or permits the holder of such indebtedness to cause, any such indebtedness to become due prior to its stated maturity. As such, the borrowing base covenant default under the Term Loan Facility triggers an event of default under the ABL Facility. As of the date hereof, no notice of default has been delivered to the Applicants by the ABL Agent.

132. As indicated above, it is an event of default under the Senior Secured Notes and the Junior Secured Notes for there to be a default in respect of any indebtedness for borrowed money which results in acceleration of such indebtedness prior to its final stated maturity.

There has been no acceleration of any of the Applicants' indebtedness as a result of delivery of the Cure Notice. Therefore, the Applicants are not currently in default under the Senior Secured Notes or the Junior Secured Notes.

133. The commencement of these CCAA proceedings constitutes an event of default under the ABL Facility, the Term Loan Facility, the Senior Secured Notes and the Junior Secured Notes. Algoma lacks the liquidity necessary to meet its obligations as they come due, and does not have sufficient cash to fund its operations. Each of Holdings, Tech, Alberta ULC, Cannelton and Algoma USA are guarantors of the Credit Facilities. Their obligations pursuant to their respective guarantees exceed their respective assets. Accordingly, each of the Applicants is insolvent. Without the protection of the CCAA, a shut-down of operations is inevitable, which would be extremely detrimental to the Applicants' employees, pensioners, suppliers, and customers. CCAA protection will allow the Applicants to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and structure.

PART 7 - FUNDING THE CCAA PROCEEDINGS

134. As at November 7, 2015, the Applicants stopped paying their obligations and have inadequate funds to continue operations. The Applicants therefore require interim financing in order to begin and continue the CCAA Proceedings.

A. Process for Selection of DIP Financier

135. The DIP Facility was selected through a robust, intensive and extensive process whereby the Applicants, with the assistance of their legal advisors, the proposed Monitor, and Evercore, canvassed the market for interim financing and evaluated competing offers. On or about October 15, 2015, seventeen potential financiers were contacted by Evercore, of which fourteen were third-party lenders. Eleven potential financiers requested and reviewed due diligence materials. Of those eleven, five (including the two potential financiers described below) submitted DIP financing proposals.

136. The Applicants identified two proposals for DIP financing as being superior to all others received by the Applicants. The first proposal (the "DB Proposal") was submitted by Deutsche Bank AG New York Branch, as agent for a syndicate of proposed DIP lenders.

137. The Applicants (through their legal advisors and Evercore) engaged in lengthy negotiations with Deutsche Bank AG New York Branch and the other potential DIP lender about the terms of their respective proposals.

138. For the reasons described below, with the assistance of legal and financial advisors and on an informed basis and in good faith with a view to the best interests of the Applicants and their stakeholders, the Applicants selected the DIP facility proposed by Deutsche Bank AG New York Branch, as agent for a syndicate of proposed DIP lenders (the “DIP Facility”).

139. Algoma has negotiated and is seeking Court approval of the DIP Facility, described in more detail below, and a charge over the Property (defined below) securing the DIP Facility (the “DIP Lender’s Charge”), as further described in the US\$200 Million Senior Secured Superpriority Debtor-In-Possession Term and Revolving Credit Facilities Summary of Terms and Conditions (the “DIP Term Sheet”) attached as Exhibit “F” hereto. In addition to addressing Algoma’s liquidity issues, the DIP Facility will provide assurance to Algoma’s suppliers, employees, customers and other stakeholders that Algoma will continue operating as a going concern during these CCAA proceedings

B. Summary of the Proposed DIP Facility

140. In order to implement the DIP Term Sheet financings swiftly, due to the dire situation, a temporary loan agreement, as evidenced by the Senior Secured, Priming and Superpriority Debtor-In-Possession Revolving Credit Agreement (the “Bridge Loan Agreement”), has been negotiated to provide immediate “bridge” financing of US\$25 million on substantially the same terms as those described in the DIP Term Sheet. Deutsche Bank AG New York Branch shall act as the sole initial lender under this loan agreement.

141. In addition, within the next week, the Applicants must enter into an amended and restated Bridge Loan Agreement that will provide for an additional US\$25 million in funding by way of a drawdown of US\$50 million, US\$25 million of which will be used to repay the amount drawn on the Initial Availability Date (as defined in the DIP Term Sheet). The date on which the Applicants enter into the amended and restated Bridge Loan Agreement will be referred to herein as the “Interim Availability Date”.

142. The credit agreement that will govern the DIP Facility, together with all related documentation, shall, except for such modifications necessary to reflect the terms set forth in the DIP Term Sheet, be based on and give due regard to the definitive documentation for the ABL Agreement and the Term Loan Agreement. The Applicants must execute this definitive documentation within the next two weeks.

143. Deutsche Bank AG New York Branch or an affiliate shall act as administrative agent and collateral agent (the “DIP Agent”) on behalf of a syndicate of lenders (the “DIP Lenders”) under the DIP Facility, which is intended to consist of:

- (a) a senior secured, priming, superpriority non-amortizing revolving credit facility solely available in U.S. Dollars in an amount of up to US\$25.0 million (the “DIP Revolving Loan”) made available during the period from the Comeback Availability Date until the Maturity Date (both as defined in the DIP Term Sheet). Amounts borrowed under the DIP Revolving Loan that are repaid or prepaid may be reborrowed; and
- (b) a senior secured, priming, superpriority non-amortizing term loan facility solely available in U.S. Dollars in an amount of up to US\$175.0 million (the “DIP Term Loan”) made available pursuant to two (2) drawings as follows: the first draw on the date of the Comeback Hearing and the second draw on the Final Availability Date (defined in the DIP Term Sheet). Amounts borrowed under the DIP Term Loan that are repaid or prepaid may not be reborrowed.

144. The DIP Lenders will make such funds available to Algoma, as borrower, whose obligations under the DIP Facility will be jointly and severally guaranteed by each of Holdings and Tech (as unsecured guarantors, the “DIP Unsecured Guarantors”), Alberta ULC, Cannelton and Algoma USA (as secured guarantors, the “DIP Secured Guarantors”, and together with the DIP Unsecured Guarantors, the “DIP Guarantors”).

145. Each of Algoma’s and the DIP Secured Guarantors’ obligations in respect of the DIP Facility are contemplated to be secured by a priority CCAA Court ordered charge on, and a perfected security interest in, all assets and property of Algoma and the DIP Secured Guarantors (collectively, the “DIP Secured Debtors”), including, without limitation, any claims

and the proceeds of causes of action of the DIP Secured Debtors subject only to the Permitted Encumbrances (as defined in the DIP Term Sheet).

146. Algoma will have an obligation on the Interim Availability Date to pay cash for the ratable benefit of the lenders under the ABL Agreement (the “**Prepetition ABL Lenders**”) on account of interest and other fees accrued under the ABL Agreement as of the CCAA filing date, with cash payable thereafter on account of interest and fees payable monthly in arrears at 100% of the contractual non-default rate. Algoma is permitted to capitalize any remaining accruing interest and fees that are not paid in cash at the contractual default rate under the ABL Agreement. This term was negotiated to ameliorate the concerns of the Prepetition ABL Lenders associated with the prospect of a diminution in value of their respective underlying collateral during the course of the Algoma restructuring, which will be facilitated by their participation in the DIP Facility. In accepting this term, Algoma concluded that the issues raised by the Prepetition ABL Lenders had merit given the financial contingencies associated with the restructuring process and did not impose a materially onerous financial obligation on Algoma.

147. The DIP Term Sheet permits Algoma to capitalize accruing interest and fees at the contractual default rate under the ABL Agreement and the Term Loan Agreement.

148. Availability of funds under the DIP Facility will be as follows:

- (a) With the granting of the Initial Order, an initial single drawing on the DIP Revolving Loan in a maximum amount of US\$50 million to be used consistent with the Budget;
- (b) On the Interim Availability Date, an initial drawing on the DIP Term Loan in a maximum amount of US\$50 million to be used consistent with the Budget, which will include the repayment of the DIP Revolving Loan that was drawn initially;
- (c) At the Comeback Hearing, a drawing from the DIP Term Loan in a maximum amount of US\$125 million to be used consistent with the Budget, which will include the repayment of the DIP Revolving Loan that was drawn initially; and
- (d) On the Final Availability Date, the remaining amount of the DIP Facility shall be available to Algoma to be used consistent with the Budget.

149. The DIP Term Sheet requires that monthly consolidated financial statements be provided and that Algoma adhere to the Budget established, within the variances allowed. Algoma is prohibited from allowing the aggregate principal amount of the DIP Facility to exceed 100% of the Borrowing Base (as defined in the DIP Term Sheet). Algoma must also maintain a minimum liquidity level of (x) for the period from the Initial Order to but excluding the Comeback Hearing, US\$0; (y) for the period from the Comeback Hearing to but excluding the Final Availability Date, US\$10 million; and (z) thereafter, US\$20 million.

150. Fees payable by Algoma under the DIP Facility are as follows:

- (a) Interest on the DIP Facility, after the Comeback Hearing, will be calculated monthly by the DIP Agent and compounded daily at an annual rate of interest equal to adjusted LIBOR plus 9.00% or ABR plus 8.00%. The interest rate in connection with the Initial Order will be the DIP Agent's "prime rate" plus 8.00% per annum. Overdue principal and interest will accrue interest with a 2.00% increase. The DIP Revolving Loan and DIP Term Loan are subject to floors of 0.00% and 1.00%, respectively;
- (b) An exit fee of 1% of any reduction of commitments is payable, except if such reduction is a permitted reduction, as outlined in the DIP Term Sheet;
- (c) A fee of 0.50% and 2.00% per annum will be charged on the undrawn portion of the commitments in respect of the DIP Revolving Loan and DIP Term Loan, respectively;
- (d) Additional fees include an Administrative Agent Fee of \$75,000, a structuring fee of \$1.0 million, a closing fee and underwriting fee on the amount of the commitments of 2%, and 3%, respectively; and
- (e) All fees, disbursements and other out-of-pocket expenses of the lenders arising from or connected with the DIP Term Sheet, the loan documents or the CCAA proceedings, including professional fees.

151. The DIP Term Sheet includes a number of negative covenants prohibiting Algoma from taking certain actions without the prior written consent of the DIP Lenders, including:

- (a) Transfers, leases, the creation of liens or disposing of all or any part of its property out of the ordinary course of business;
- (b) Termination of any material contract expected to have a material adverse effect on financial conditions;
- (c) Creating new indebtedness or paying pre-filing debt or other obligations;
- (d) The sanctioning of any plan of compromise or arrangement, restructuring transaction or sale that does not provide the full payment, in cash, of the obligations outstanding in respect of the DIP Facilities, ABL Agreement and Term Loan Agreement;
- (e) Amending, restating, waiving or modifying the Port Agreements or the Cogen Agreements (as defined in the DIP Term Sheet) ; and
- (f) Exceeding the limitations governing dividends, stock repurchases, equity interests, transactions with affiliated entities, subsidiaries, modifications to organizational documents and debt documents, guarantees, burdensome agreements, ERISA pension plans, investments, activities of guarantors, lines of business and fundamental changes.

152. The DIP Facility is expected to provide sufficient liquidity to allow the Applicants to pursue a restructuring. I understand and believe that the proposed Monitor is supportive of the DIP Facility and DIP Lender's Charge.

153. Following completion of an open, robust and competitive selection process, the Applicants have determined that the DIP Facility, in its final form, represents the best interim financing available under the circumstances. Accordingly, the Applicants seek an order authorizing and empowering the Applicants to obtain and borrow under the DIP Facility in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures.

C. Cash Flows

154. The Applicants have prepared cash flow forecast for the period November 9, 2015 to January 31, 2016 that forecast the Applicants' receipts, disbursements and financing

requirements if the DIP Facility is approved by the Court. Copy of the cash flow forecast is attached hereto as **Exhibit "G"**.

155. The DIP Facility is expected to provide sufficient liquidity to allow the Applicants to pursue a restructuring. I understand and believe that the proposed Monitor is supportive of the DIP Facility and DIP Lender's Charge.

PART 8 - THE PROPOSED INITIAL ORDER

A. The Monitor

156. Ernst & Young Inc. ("EY") has consented to act as the Court-appointed Monitor (the "**Monitor**") of the Applicants, subject to Court approval.

157. EY is a trustee within the meaning of section 2 of the BIA, and is not subject to any of the restrictions on who may be appointed as monitor set out in section 11.7(2) of the CCAA.

158. I am advised by Brian Denega of EY that the proposed Monitor is supportive of the relief being sought in favour of the Applicants and the existence and amounts of the Court-ordered charges described below. Mr. Denega has also advised me that the proposed Monitor will be filing a pre-filing Monitor's report in respect of that relief.

B. Administration Charge

159. The Applicants seek a charge (the "**Administration Charge**") on their assets, property and undertakings (the "**Property**") in the maximum amount of \$5 million to secure the fees and disbursements incurred in connection with services rendered to the Applicants, both before and after the commencement of the CCAA proceedings by:

- (a) The Monitor and its counsel;
- (b) Stikeman, the Applicants' Canadian counsel;
- (c) Weil, the Applicants' US insolvency counsel;
- (d) Thompson Hine LLP, the Applicants' US litigation counsel;
- (e) Evercore, the Applicants' financial advisor, in respect of its monthly fees and expenses, but not in respect of the Success Fee or the Financing Fee (as those terms are defined below);

- (f) Norton Rose Fulbright Canada LLP, counsel to the board of directors of Algoma; and
- (g) Richards, Layton & Finger, P.A., Delaware counsel to the Applicants.

160. The Applicants worked with EY to estimate the proposed quantum of the Administration Charge and believe it to be reasonable and appropriate in view of the complexities of its CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge.

161. Subject to section 11.52 of the CCAA, the Administration Charge is proposed to rank ahead in priority to all other all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise in favour of any person other than a person with a properly perfected purchase money security interest and statutory super-priority deemed trusts and liens for unpaid employee source deductions (the “Encumbrances”), except (a) any person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable provincial legislation; and (b) statutory superpriority deemed trusts and liens for unpaid employee source deductions.

162. Algoma intends to return to Court to seek an Order granting a super-priority ranking to the Administration Charge ahead of all Encumbrances.

C. Critical Suppliers

163. Algoma has identified a number of suppliers that are critical to the ongoing operation of its business (the “Critical Suppliers”). Any interruption of supply or service by the Critical Suppliers could have an immediate material adverse impact on Algoma’s business, operations and cash flow, and could materially impact the value of the business and jeopardize the Applicants’ ability to restructure and continue as a going concern. Algoma has contracts in place with each of the Critical Suppliers whereby all such suppliers, other than Southern Coal, provide supply of goods or services on payment terms that are favourable to Algoma. To secure the benefit of those payment terms, and to reduce the burden on the Applicants’ cash flow and the consequential impact on the DIP Facility, it is very important for the Applicants to obtain critical supplier orders in respect of each of the Critical Suppliers.

164. Accordingly, the Applicants are seeking an Order pursuant to section 11.4 of the CCAA designating the Critical Suppliers as critical suppliers and requiring the Critical Suppliers to continue supplying on the terms set out in the agreements or in accordance with the existing supply relationship between each of them and Algoma. In addition, as required by the CCAA, in order to protect the Critical Suppliers, the Applicants are requesting that the Court grant a charge over the Property (the “Critical Supplier Charge”) in the amount of the value of the goods and/or services received by Algoma after the date of the Initial Order as security for payment, less all amounts paid to the Critical Suppliers in respect of such goods and/or services.

165. The Critical Supplier Charge is proposed to rank immediately behind the Administration Charge, ahead of all other Court-ordered charges and (subject to section 11.4 of the CCAA), ahead of all Encumbrances except (a) any person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable provincial legislation; and (b) statutory superpriority deemed trusts and liens for unpaid employee source deductions

166. The Applicants intend to return to Court and seek an Order granting a super-priority ranking to the Critical Supplier Charge ahead of the Encumbrances on the Comeback Motion.

167. The DIP Lenders require that the Critical Supplier Charge be capped at a maximum amount. Algoma, with the assistance of its financial advisors and the proposed Monitor, has calculated its maximum aggregate exposure to the Critical Suppliers at \$13.2 million. It is therefore proposed that the Critical Supplier Charge be capped in the proposed Initial Order at \$15 million.

168. The Critical Suppliers are listed below. Because the contents of the agreements with each of the Critical Suppliers are commercially sensitive, the Applicants are seeking an order sealing the contents of those agreements described in this section of the affidavit.

Shell

169. Algoma purchases natural gas from Shell pursuant to a master natural gas purchase and/or sale contract dated June 1, 2011, between Shell and Algoma (as amended, the “**Shell Agreement**”).

170. Algoma places orders with Shell from time to time. These orders are confirmed in Transaction Confirmations that set out the quantity and pricing for the order. There are three such Transaction Confirmations in effect at this time (collectively, the “**Transaction Confirmations**”), with the last Transaction Confirmation expiring on April 30, 2016. The Shell Agreement and the Transaction Confirmations are attached collectively hereto as **Confidential Exhibit “H”**.

171. Pursuant to the Shell Agreement, at the end of each calendar month, Shell invoices Algoma for gas delivered and received in the preceding month, and for any other applicable charges. Algoma is required to pay invoices issued by Shell on or before the later of (a) the 25th day of the month following the month of delivery, or (b) 10 days after Algoma receives Shell’s invoice.

Noble

172. Algoma purchases natural gas from Noble pursuant to the Noble Agreement. Algoma places orders with Noble from time to time. These orders are confirmed in physical deal confirmations that set out the quantity and pricing for the order. There are currently three such physical deal confirmations in effect at this time (collectively, the “**Physical Deal Confirmations**”), with the last Physical Deal Confirmation expiring on April 30, 2016. The Noble Agreement and the Physical Deal Confirmations are attached collectively hereto as **Confidential Exhibit “I”**.

173. Pursuant to the Noble Agreement, at the end of each month, Noble invoices Algoma for gas delivered and received in the preceding calendar month, and for any other applicable charges. Algoma pays invoices issued by Noble approximately five days after the end of the month in which the gas was delivered.

Praxair

174. Algoma purchases oxygen and certain other gases from Praxair pursuant to an agreement dated March 1, 1996 (as amended and extended by an amending agreement dated October 28, 2009) and an agreement dated March 3, 1999. Due to their size, copies of the agreements between Praxair and Algoma are not attached to this affidavit but are available upon request.

175. Pursuant to these agreements, Praxair invoices Algoma on the first day of each month for, among other things, gases supplied by Praxair in the previous month, power consumed by the Oxygen Plant in the previous month, and certain related charges. Algoma is required to pay each invoice within 15 days of the date of the invoice.

Southern Coal

176. Algoma purchases coal from Southern Coal pursuant to the Southern Coal Agreement. A copy of the Southern Coal Agreement is attached hereto as **Confidential Exhibit "J"**.

177. Pursuant to the Southern Coal Agreement, each week, Algoma will estimate its coal needs for the following week and will pay the balance of the purchase price for that coal, in advance, before removing the coal from the stockpile on the Port lands. Upon payment, title to the relevant coal will transfer to Algoma.

CN

178. Canadian National Railway Company ("CN") transports raw materials to the Facility and steel products and from the Facility. Algoma and CN do not currently have a written agreement regarding terms of payment. To date, CN has invoiced Algoma electronically through a website that shows each day's shipping activity and the fees and charges associated therewith. Algoma must pay each day's fees and charges within seven days of the date on which they were incurred. Algoma makes these payments on Monday, Wednesday and Friday of each week, with the result that no amount is outstanding for the full seven days.

179. To secure timely payment in full of all amounts owing from Algoma to CN, CN currently holds a deposit from Algoma in the amount of \$1.5 million (the "**Deposit**"). The

quantum of the Deposit is based on the historical value of payables owing to CN in a given seven-day period.

Cliffs

180. As stated above, on October 5, 2015, Cliffs purported to terminate the Cliffs Contract. Although Algoma has been able to secure some alternative supply of iron ore pellets, the continued supply of pellets from Cliffs is critical to Algoma's continued operations. Without resumption of supply by Cliffs, Algoma will be unable to continue operating at its previous levels through the winter. Algoma has entered into agreements to purchase approximately two-thirds of the iron ore pellets needed to maintain operations throughout the winter, but Algoma must purchase the remaining iron ore pellets from a supplier able to transport the pellets to the Facility by rail. Cliffs is the only supplier of pellets who can provide rail transportation for a price that is economically feasible for Algoma.

181. For the foregoing reasons, the Applicants intend to return to Court seeking an order requiring Cliffs to continue supplying pellets.

D. DIP Lenders' Charge

182. The DIP Agreement is conditional on the issuance of a Court order approving the DIP Facility and granting the DIP Lenders' Charge. The DIP Lenders were specifically asked whether the DIP Lenders would advance under the DIP Facility if the DIP Lenders' Charge was granted without priority, subject to section 11.2 of the CCAA, over all Encumbrances except (a) any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable provincial legislation who did not receive notice of this application; and (b) statutory super-priority deemed trusts and liens for unpaid employee source deductions. The DIP Lenders advised the Applicants that they would not be willing to advance funds without the benefit of this priority. The DIP Lenders' Charge will not secure obligations incurred prior to the CCAA proceeding.

183. The DIP Lenders' Charge is proposed to rank behind the Administration Charge and the Critical Supplier Charge and ahead of the D&O Charge and Evercore Charge. As noted above, the Applicants intend to return to Court to seek an Order granting a super-priority ranking to the DIP Lenders' Charge ahead of the Encumbrances at the Comeback Hearing.

E. D&O Charge

184. To ensure the ongoing stability of Algoma's business during the CCAA proceedings, Algoma requires the continued participation of its directors, officers, managers and employees. However, Algoma's directors and officers (the "D&Os") have indicated that, due to the significant potential personal exposure associated with Algoma's aforementioned liabilities, they cannot continue their service with Algoma unless the Initial Order grants them certain protections commonly granted to directors and officers of companies involved in proceedings under the CCAA.

185. Algoma is seeking typical provisions staying all proceedings against the D&Os and granting the D&Os an indemnity with respect to all post-filing claims that may arise against the D&Os in their capacity as the Applicants' directors or officers.

186. The Applicants maintain directors' and officers' liability insurance (the "D&O Insurance") for the D&Os. The current D&O Insurance policies provide a total of \$100 million in coverage: \$15 million in primary coverage, plus \$40 million in excess coverage and \$45 million in Side A DIC. The Applicants have also granted contractual indemnities in favour of the D&Os, but do not have sufficient funds to satisfy those indemnities should the D&Os be found responsible for the full amount of the potential liabilities they may be exposed to. In addition, under the D&O Insurance, there are retentions for certain claims and the presence of a large number of exclusions creates a degree of uncertainty.

187. Accordingly, the Applicants are seeking a charge on the Property in the amount of \$30 million (the "D&O Charge") to secure payment under the indemnity granted by the Initial Order in favour of the D&Os. The D&O Charge is proposed to rank immediately after the DIP Charge but, subject to section 11.51 of the CCAA, ahead of all other Encumbrances except (a) any person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable provincial legislation; and (b) statutory superpriority deemed trusts and liens for unpaid employee source deductions. The Applicants intend to return to Court and seek an Order granting the DIP Charge super-priority over all Encumbrances.

F. Financial Advisor's Charge

188. As described in greater detail below, Evercore is entitled to receive the Success Fee and the Financing Fee upon the achievement of certain milestones. In addition to the amounts secured by the proposed Administration Charge, the Applicants are seeking a charge (the "Financial Advisor's Charge") on the Property in the amount of US\$8 million to secure payment to Evercore of the Success Fee. The Applicants intend to return to Court and seek an Order granting super-priority ranking to Evercore's Charge.

G. Proposed Ranking of the Court-Ordered Charges

189. Pursuant to the aforementioned charges, the proposed ranking of the Court-ordered Charges is as follows:

- (a) First, the Administration Charge, to a maximum amount of \$5 million;
- (b) Second, the Critical Supplier's Charge, to a maximum amount of \$15 million;
- (c) Third, the DIP Lenders' Charge;
- (d) Fourth, the D&O Charge, to a maximum amount of \$30 million; and
- (e) Fifth, Evercore's Charge, to a maximum amount of US\$8 million.

190. In accordance with the CCAA, the Court-ordered charges will rank ahead of all other existing security interests of any persons, except for any person who is a "secured creditor", as defined in the CCAA, as of the date of the Initial Order and who has not received notice of this Application. As noted previously, the Applicants intend to seek an order granting priority over Encumbrances, on notice, at the Comeback Hearing.

H. Approval of Evercore Engagement Letter

191. The Applicants are seeking an order approving the Evercore Engagement Letter *nunc pro tunc*. Evercore is a well-known and respected firm that provides, among other things, corporate advisory and investment banking services. Evercore has worked closely with Management throughout the weeks leading up to the filing of this application, and has gained a thorough and intimate understanding of the business operated by the Applicants. Evercore's knowledge of and experience with the Applicants would be lost if the Applicants were deprived of the benefit of Evercore's continued advice and assistance and were required to retain a new financial advisor. The loss of Evercore's information and expertise would be

detrimental to the Applicants and would hinder or delay the process of advancing these CCAA proceedings.

192. For the foregoing reasons, the Applicants believe that the continued involvement of Evercore is essential to the completion of the CCAA proceedings in as expeditious and inexpensive a manner as possible.

193. Evercore was engaged after Algoma, with the assistance of counsel, conducted a competitive selection process involving a number of potential advisors to identify the advisor with (among other things) the most and/or best relevant experience and expertise.

194. The fee structure contained in the Evercore Engagement Letter was the subject of significant negotiations between the Applicants (with the assistance of counsel) and Evercore and was approved by the board of directors of Algoma prior to the commencement of the CCAA proceedings.

195. I understand and believe that the proposed Monitor is supportive of Evercore's ongoing engagement by the Applicants because of the significant role that Evercore plays in supporting the Applicants and providing critical financial advice and representation to them.

I. Notice to Pension Plan Beneficiaries

196. I understand that Algoma acts as the "employer" and the "administrator" of the Pension Plans for purposes of the PBA. I am informed by Andrea Boctor of Stikeman Elliott that these roles impose differing responsibilities and duties on Algoma, and that these responsibilities and duties may come into conflict during the course of these CCAA proceedings.

197. In view of these potential issues, and because the Applicants intend to seek an order giving the Court-ordered charges priority over the Encumbrances (including any deemed trusts created by the PBA), the Applicants intend to provide notice to members of the Pension Plans of the Comeback Hearing.

198. The Applicants are seeking a provision in the Initial Order approving their proposed manner of service of pension beneficiaries.

199. In particular, the Applicants propose to serve the Initial Order and the motion record with respect to the relief to be sought on the Comeback Motion, and any subsequent motions within these proceedings, by electronic transmission (where available) or by courier to the parties listed in Schedule “A” to the Initial Order, including the Financial Services Commission of Ontario, the USW, USW Locals 2724 and 2251, the Society of Active Retirees Chapters 7 and 17, and Group 1009 (the “**Beneficiary Representatives**”).

200. In aggregate, the Beneficiary Representatives represent all active employees and retirees, whether union or non-union, who are beneficiaries under the Pension Plans. Algoma proposes, therefore, that service in the manner described above shall be deemed to be sufficient service upon Applicants’ Pension Plan beneficiaries.

201. I believe that the Beneficiary noticing procedure set out in the proposed Initial Order will ensure that notice of the Comeback Hearing and the relief to be sought therein is reasonably likely to come to the attention of the intended recipients.

J. Appointment of Representative Counsel

202. As described in greater detail above, Algoma is unable to continue making monthly special payments to the Defined Benefit Pension Plans and intends to request an order suspending these special payments.

203. Algoma has, in the past, consulted with members of three retiree groups (the “**Retiree Groups**”) regarding the Defined Benefit Pension Plans:

- (a) The Society of Active Retirees (“**SOAR**”) Chapter 7, a USW-sanctioned retiree group relating to former hourly employees;
- (b) SOAR Chapter 17, a USW-sanctioned retiree group relating to former salaried employees; and
- (c) Social Club 1009, an unaffiliated group of former employees of a closed facility in Wawa, Ontario.

The Retiree Groups are comprised of approximately 2500 of the 6250 salaried and hourly retirees, deferred vested and inactive members of the Defined Benefit Pension Plans. The Retiree Groups actively participated in Algoma’s pension restructuring initiatives undertaken

in 2013, acting as the voice of Algoma's retirees. In addition, because most of Algoma's former employees continue to reside in the Sault-Ste. Marie area, Algoma has relied on the Retiree Groups to reach members and non-members through formal and informal networks.

204. In order for the Defined Benefit Pension Plans beneficiaries to be represented at the Comeback Hearing, the Applicants are proposing to:

- (a) Retain representative counsel ("**Representative Counsel**") to advise and act on behalf of the Retiree Groups; and
- (b) Give notice of the Comeback Hearing to the Financial Services Commission of Ontario, the Representative Counsel, the Hourly Union and the Salaried Union.

205. The Retiree Groups will not be required to take advice from Representative Counsel, but Representative Counsel will be available to the Retiree Groups and any other retirees in connection with the Comeback Hearing.

206. The Applicants retained Ursel Phillips Fellows Hopkinson LLP to serve as Representative Counsel. I understand that Susan Ursel, a senior partner with that firm, will have carriage of this matter. Since Ms. Ursel was called to the Bar in 1986, her practice has focused on labour law and related areas, including pensions and benefits law. Ms. Ursel is an experienced litigator who works extensively on behalf of unions and served as Court-appointed counsel to Air Canada union retirees in Air Canada's 2004 proceedings under the CCAA.

207. The Applicants intend to address issues of ongoing representation either at or after the Comeback Hearing.

K. Extension of Stay in Favour of EPC and PortCo

208. The Applicants are seeking an order extending the stay of proceedings imposed by the Initial Order (if granted) to EPC and PortCo. Algoma believes that maintaining the status quo with respect to EPC and PortCo is integral to a successful restructuring. Interference with the Applicants' supply of electricity or access to the Port could have a devastating impact on the Applicants' ability to successfully restructure. In addition, any actions against EPC or PortCo would necessarily require the participation of key personnel of the Applicants. The need to provide such support could be a very significant distraction for members of senior management

who must remain focused on the paramount goal of continuing the Applicants' business as a going concern.

PART 9 - CHAPTER 15 PROCEEDINGS

209. The Applicants intend to commence Chapter 15 Proceedings pursuant to the Bankruptcy Code. As described above, virtually all of Algoma's lenders, certain of Algoma's critical suppliers and approximately half of its customers are located in the United States. Should the Initial Order be granted, Algoma will be put forward as the Applicants' Chapter 15 "foreign representative". J. Robert Sandoval, in his capacity as general counsel of Algoma, will act on behalf of the foreign representative in the Chapter 15 Proceedings.

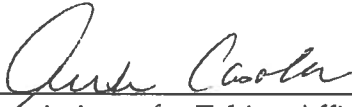
PART 10 - COMEBACK MOTION

210. Algoma intends to return to Court approximately seven to ten days after the Initial Application (the "Comeback Hearing") to seek certain relief on notice to the parties to be affected. Among other things, Algoma intends to seek an Order:

- (a) Granting super-priority ranking to the Administration Charge, the Critical Supplier Charge, the DIP Lenders' Charge, the D&O Charge and Evercore's Charge;
- (b) Permitting Algoma to suspend special payments required to be made to the Defined Benefit Pension Plans, and ordering that the directors, officers, officials and agents of the Applicants shall not incur any liability as a result of the failure of the Applicants to make special payments during the Stay Period; and
- (c) Extending the stay of proceedings granted in the Initial Order.

211. The Applicants are also considering whether to seek approval of a key employee retention plan at the Comeback Hearing, and will give notice to affected parties if the Applicants determine to seek such approval.

SWORN BEFORE ME at the City of
Sault Ste. Marie, Province of Ontario,
on November 8, 2015.



Commissioner for Taking Affidavits



Rajat Marwah

Anita Marie Casola, a Commissioner, etc.,
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

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

Court File No:

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC.,
ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND
ESSAR STEEL ALGOMA INC. USA

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**AFFIDAVIT OF RAJAT MARWAH
(SWORN NOVEMBER 9, 2015)**

STIKEMAN ELLIOTT LLP

Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
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Patrick J. Corney LSUC#: 65462N
Tel: (416) 869-5668
E-mail: pcorney@stikeman.com
Fax: (416) 947-0866


Lawyers for the Applicants

EXHIBIT "A"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

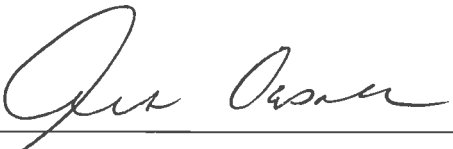
Anita Marie Casola, a Commissioner, etc.,
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

EXHIBIT "B"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

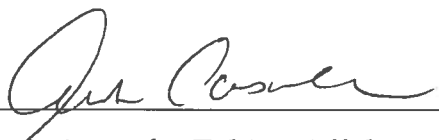
Anita Marie Casola, a Commissioner, etc.,
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

EXHIBIT "C"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

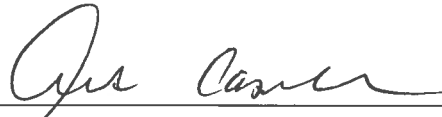
*Anita Marie Casola, a Commissioner, etc.,
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.*

EXHIBIT "D"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

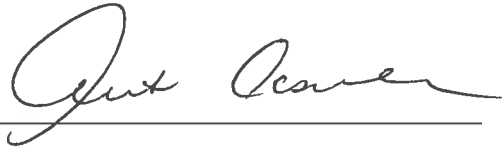
Anita Marie Casola, a Commissioner, etc.,
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

EXHIBIT "E"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

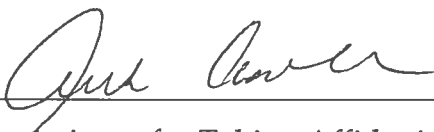
Anita Marie Casola, a Commissioner, etc.,
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

EXHIBIT "F"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

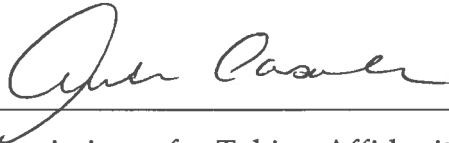
~~Antia Marie Casola, a Commissioner, etc.~~
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

EXHIBIT "G"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

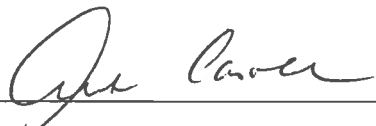
Anita Marie Casola, a Commissioner, etc.,
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

EXHIBIT "H"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

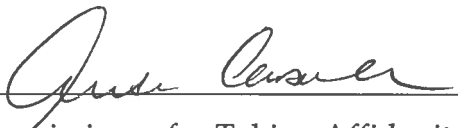
Anita Marie Casola, a Commissioner, etc.
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

EXHIBIT "I"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

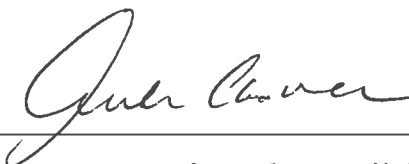
Anita Marie Casola, a Commissioner, ~~etc.~~
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

EXHIBIT "J"

referred to in the Affidavit of

RAJAT MARWAH

Sworn November 9, 2015



Commissioner for Taking Affidavits

Anita Marie Casola, a Commissioner, etc.,
Province of Ontario, for
Essar Steel Algoma Inc.
Expires July 11, 2016.

Tab 14

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

Court File No. _____

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ESSAR STEEL ALGOMA INC.

November 9, 2015

I am satisfied that the applicants are debtors
companies to which the CCAA applies, and as
party appearing says otherwise.

No one who appeared today opposes the
relief sought by the applicants. However, several
have received very short notice and so have
said they may well have issues that
will be raised at the comeback hearing.

On the basis of the material provided, I
am satisfied that the terms in the initial
order to be equal are justified, but this of
course is subject to what may be produced
or argued on the comeback motion. The same
goes for the representation order.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

APPLICATION RECORD
(RETURNABLE NOVEMBER 9 2015)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
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E-mail: ataylor@stikeman.com

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Tel: (416) 869-5556
E-mail: ykatirai@stikeman.com

Patrick J. Corney LSUC#: 65462N
Tel: (416) 869-5668
E-mail: pcorney@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants

Regarding the DIP financing, \$50^{million} is to be advanced before the Conback hearing. Under the terms of the initial order it will have a junior position ahead of all circumstances, including the deemed trust under the Pension Benefits Act, except for perfected PMSIs under the PPSA and statutory deemed trusts for unpaid employee SUI deductions. The Union does not oppose this relief today but reserves its rights for all advances to be made after the Conback hearing to be entered at the Conback hearing.

The urgency of the need for immediate cash is unquestioned, without which the employees will need to be laid off and the plant operations shut down at some point soon. That would be a very unsatisfactory situation at a steel plant in Sault Ste Marie with the impending weather. The ~~union~~ leaders do not object to the DIPal financing, but some reserve the right to object at the Conback hearing. The Minutes support the DIP, and it is agreed with the change to the DIP lenders, subject of course to what may ~~also~~ take place at the Conback hearing.

I am also satisfied that the critical suppliers change should be approved. These suppliers are clearly critical to the applicant ESA's continued operation. The size of the change appears reasonable. No one opposes the granting of the critical supplier change, which is reasonable with minimal protection to the critical suppliers.

The terms under review a lifting of the ^{demand for payment and} stay is the initial order to permit ^{or bankruptcy} application to be made against the ESA.

I frankly do not see the need for such permission at this time. There is no suggestion that there have been any renewal transactions. However it is a term of the DIP facility that such order be made. I grant the need for its limited purpose. Nothing further regarding the bankruptcy application may be done without court approval, and nothing is to be taken from the issuance of the bankruptcy application being permitted ~~that~~⁵⁶ any finding that it was necessary.

2/2/76

Tab 15

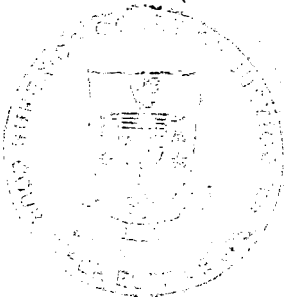
ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.)
) MONDAY, THE 9TH
JUSTICE NEWBOULD)
) DAY OF NOVEMBER, 2015

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 ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ESSAR STEEL ALGOMA
(ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA
INC. USA

Applicants



INITIAL ORDER

THIS APPLICATION, made by Essar Steel Algoma Inc. ("ESAI"), Essar Tech Algoma Inc., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (together, the "Applicants" or "Algoma"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Rajat Marwah sworn November 9, 2015, and the Exhibits attached thereto (the "Marwah Affidavit"), the Pre-filing Report of Ernst & Young Inc., as proposed monitor, and on being advised that those parties listed in Schedule "A" hereto were given notice of this application, and on hearing the submissions of counsel for the Applicants, Ernst & Young Inc. and the DIP Agent (as defined below) and on reading the consent of Ernst & Young Inc. to act as Monitor (the "Monitor").

THIS IS TO CERTIFY THAT THIS DOCUMENT, EACH PAGE OF WHICH IS STAMPED WITH THE SEAL OF THE SUPERIOR COURT OF JUSTICE AT TORONTO, IS A TRUE COPY OF THE DOCUMENT ON FILE IN THIS OFFICE
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DATED AT TORONTO THIS 9 DAY OF November 20 15
FAIT À TORONTO LE 9 JOUR DE NOVEMBRE 20 15

REGISTRAR  Tara Stead
Registrar, Superior Court of Justice

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that any one or more of 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. THIS COURT ORDERS that the Applicants shall 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"). For greater certainty, "Property" includes all raw materials, inventory and other assets of the Applicants currently, or in the future, located at the cargo port facility (the "Port") leased by Algoma to Port of Algoma Inc. ("PortCo") pursuant to the Port Lease between ESAI (as landlord) and PortCo (as tenant) dated November 14, 2014, as amended, restated, supplemented and/or modified from time to time, and the Applicants shall be entitled to continued unimpeded access to all Property located at the Port and use of all equipment used in connection with the operation of the Port. Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "Business") and the Property.

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DATED AT TORONTO THIS 9 DAY OF	NOVEMBER 20 15
FAIT À TORONTO LE	LE 20 NOVEMBRE 2015

[Signature]
REGISTRAR

Tara Stead
REGISTRAR
Registrar, Superior Court of Justice

5. THIS COURT ORDERS that the Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, the "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.

6. THIS COURT ORDERS that the Applicants shall be entitled to continue to utilize the central cash management system currently in place, as described in the Marwah Affidavit, or, subject to the terms of the DIP Agreement (as defined below) and the Definitive Documents (as defined below), replace it with another substantially similar central cash management system (the "Cash Management System") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. THIS COURT ORDERS that, in accordance with the DIP Agreement, the Definitive Documents and the Budget (as defined in the DIP Agreement), the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- (a) all outstanding and future wages, salaries, bonuses, employee and pension benefits (including, without limitation, employee and retiree medical, dental and similar benefit plans or arrangements, employee assistance programs, and other retirement benefits and related contributions), vacation pay and

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DATED AT TORONTO THIS 9 DAY OF November 26 19
 FAIT À TORONTO LE 9 JOUR DE NOVEMBRE 26 19

Tara Stead
 Tara Stead
 Registrar, Superior Court of Justice

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;

- (b) all outstanding or future amounts owing in respect of customer rebates, refunds, discounts or other amounts on account of similar customer programs or obligations; and
- (c) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

8. THIS COURT ORDERS that, in accordance with the DIP Agreement, the Definitive Documents and the Budget, and except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course prior to, on or 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 of insurance (including directors and officers insurance), maintenance and security services; and
- (b) payment for goods or services actually supplied to the Applicants following the date of this Order,

provided that, to the extent such expenses were incurred prior to the date of this Order, the Applicants shall only be entitled to pay such amounts if they are determined by the Applicants, in consultation with the Monitor, to be necessary to the continued operation of the Business or preservation of the Property and such payments are approved in advance by the Monitor or by further Order of the Court.

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DATED AT TORONTO THIS 9 DAY OF November 20 15
 FAIT À TORONTO LE 9 NOVEMBRE 2015

[Signature]
 Tara Stead
 Registrar, Superior Court of Justice

9. THIS COURT ORDERS that the Applicants shall remit, in accordance with legal requirements, or pay:


- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (a) employment insurance, (b) Canada Pension Plan, and (c) income taxes;
- (b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and
- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

10. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicants and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

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DATED AT TORONTO THIS 9 DAY OF November 2015
 FAIT À TORONTO LE 9 JOUR DE NOVEMBRE 2015


Tara Stead
 Registrar, Superior Court of Justice

11. THIS COURT ORDERS that, except as specifically permitted herein and in accordance with the DIP Agreement, the Definitive Documents and the Budget, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. THIS COURT ORDERS that the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the DIP Agreement, Definitive Documents, have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of its business or operations;
- (b) dispose of redundant or non-material assets not exceeding \$5 million in any one transaction or \$10 million in the aggregate, and otherwise with the consent of the Monitor and the DIP Agent and the Requisite Lenders (as defined in the DIP Agreement) or further Order of the Court;
- (c) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and
- (d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "Restructuring").

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DATE: 9 DAY OF November 2015
 HOUR OF _____

Tara Stead
 Registrar, Superior Court of Justice

13. THIS COURT ORDERS that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further Order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

14. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

15. THIS COURT ORDERS that until and including December 9, 2015, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and

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 JUDGE OF THE SUPERIOR COURT OF JUSTICE IN TORONTO, IS A TRUE COPY OF THE DOCUMENT OR FILED IN THIS OFFICE.
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any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended, including the right of any Person who has entered into a consignment arrangement with the Applicants to repossess or remove any property delivered to the Applicants or located on the property owned by the Applicant, except with the written consent of the Applicants and the Monitor or leave of this Court, provided that nothing in this Order shall (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

17. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any Person, against or in respect of PortCo and Essar Power Canada Ltd. ("EPC"), or affecting the business, assets, undertakings or properties of PortCo or EPC that could alter, interfere with or otherwise impede the Business or Property are hereby stayed and suspended except with the written consent of the Monitor or leave of this Court, provided that ESAI continues to perform its contractual obligations to PortCo and EPC.

NO INTERFERENCE WITH RIGHTS

18. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

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CONTINUATION OF SERVICES

19. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, electricity, steam, raw materials, equipment, customs clearing, logistics, port services, cargo handling services, warehouse services, outside processors, or other services to the Business or the Applicants (including for greater certainty PortCo and EPC), are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

20. THIS COURT ORDERS that, notwithstanding anything else in this Order, but subject to paragraphs 21 to 23 below, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

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FILED AT TORONTO THIS 9 DAY OF November 20 15
 J. [Signature]
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CRITICAL SUPPLIERS

21. THIS COURT ORDERS AND DECLARES that each of the entities listed in Schedule "B" hereto is a critical supplier of the Applicants as contemplated by Section 11.4 of the CCAA (each, a "Critical Supplier").

22. THIS COURT ORDERS that each Critical Supplier shall continue to supply the Applicants with goods and/or services in accordance with the terms and conditions of their existing agreement or arrangements, as set out in Schedule "B" hereto. No Critical Supplier may require the payment of a further deposit or the posting of any additional security in connection with the supply of goods and/or services to the Applicants after the date of this Order.

23. THIS COURT ORDERS that each Critical Supplier shall be entitled to the benefit of and is hereby granted a charge (together, the "Critical Supplier Charge") on the Property in an amount equal to the value of the goods and services supplied by such Critical Supplier and received by the Applicants after the date of this Order less all amounts paid to such Critical Supplier in respect of such goods and services; provided that such charge shall not exceed an aggregate amount of \$15 million. The value of the goods and services supplied shall be determined in accordance with the terms of the existing agreement or arrangements between the Applicants and the Critical Supplier or, in the event of any dispute, by the Court. The Critical Supplier Charge shall have the priority set out in paragraphs 47 and 49 hereof.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

24. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is

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filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

25. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any director or officer the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

26. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "D&O Charge") on the Property, which charge shall not exceed an aggregate amount of \$30 million, as security for the indemnity provided to their directors and officers in paragraph 25 of this Order. The D&O Charge shall have the priority set out in paragraphs 47 and 49 hereof.

27. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 25 of this Order.

ENGAGEMENT OF FINANCIAL ADVISOR

28. **THIS COURT ORDERS** that the agreement dated as of October 14, 2015, engaging Evercore Group L.L.C. (the "Financial Advisor") as financial advisor to the Applicants, a copy of which is attached as Exhibit "[E]" to the Marwah Affidavit (the "Evercore Engagement Letter"), and the retention of the Financial Advisor under the terms thereof are hereby approved, including, without limitation, the payment of the Monthly Fee and reasonable expenses, the Success Fee and the Financing Fee (as those terms are defined in the Evercore Engagement Letter). The Financial Advisor shall be

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entitled to the benefit of and is hereby granted a charge (the "Financial Advisor's Charge") on the Property, which charge shall not exceed an aggregate amount of \$8 million, as security for the Success Fee. The Financial Advisor's Charge shall have the priority set out in paragraphs 47 and 49 hereof. The Monthly Fee and reasonable expenses shall be entitled to the benefit of the Administration Charge (as defined below).

APPOINTMENT OF MONITOR

29. THIS COURT ORDERS that Ernst & Young Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

30. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicants' receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist the Applicants, to the extent required by the Applicants, in their dissemination to the DIP Agent and the DIP Lenders and their respective counsel and financial advisors of financial and other information as contemplated to be provided to the DIP Agent and the DIP Lenders pursuant to the DIP Agreement and the Definitive Documents, and the Court orders that such information may be used in these proceedings;

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 WERE FILED WITH THE
 CLERK OF THE COURT OF JUSTICE
 OF ONTARIO AT TORONTO, ON
 THIS 9th DAY OF NOVEMBER, 2015.
 (CLERK OF COURT)

LAURENCE GUYON, CLERK OF
 THE COURT OF JUSTICE
 OF ONTARIO AT TORONTO

DATE AT TORONTO ON 9th DAY OF November 2015
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- (d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Agreement and the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Agent and the DIP Lenders and their respective counsel and financial advisors in accordance with the DIP Agreement and the Definitive Documents;
- (e) advise the Applicants in their development of the Plan and any amendments to the Plan;
- (f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;
- (h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and
- (i) perform such other duties as are required by this Order or by this Court from time to time.

31. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

32. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally

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contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

33. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicants and the DIP Agent with information provided by the Applicants 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 Applicants 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 Applicants may agree.

34. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, 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.

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35. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Applicants and counsel to the Board of Directors of ESAI shall be paid their reasonable fees and disbursements, whether incurred before or after the date of this Order, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings, all subject to assessment by order of the Court. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, counsel to the Applicants and counsel to the Board of Directors on a weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, counsel to the Applicants and counsel to the Board of Directors, retainers in amounts satisfactory to the Monitor or this Court, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

36. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

37. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Applicants, counsel to the Board of Directors of ESAI, the Financial Advisor (in respect of its monthly fees and expenses, but not in respect of the Success Fee or the Financing Fee, as those terms are defined in the Marwah Affidavit) shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of \$5 million, as security for the professional fees and disbursements of the Monitor, counsel to the Monitor, counsel to the Applicants, and counsel to the Board of Directors of ESAI (incurred at their standard rates and charges) and the monthly fees and expenses of the Financial Advisor (in accordance with the Evercore Engagement Letter), 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 47 and 49 hereof.

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DIP FINANCING

38. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to obtain and borrow under the Senior Secured, Priming and Super-Priority Debtor-in-Possession Revolving Credit Agreement, including as amended by the DIP Term Sheet annexed thereto (the "DIP Agreement"), attached to the Marwah Affidavit as Exhibit "[G]", among the Applicants and Deutsche Bank AG New York Branch (the "DIP Agent") and the Lenders party thereto (the "DIP Lenders") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, all in accordance with the Budget, provided that borrowings under the DIP Agreement shall not exceed the principal amount of US\$50 million unless permitted by further Order of this Court.

39. THIS COURT ORDERS that such credit facility shall be on the terms and subject to the conditions set forth in the DIP Agreement and the Definitive Documents (defined below).

40. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the DIP Agreement or as may be reasonably required by the DIP Agent and the DIP Lenders pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Agent and the DIP Lenders under and pursuant to the DIP Agreement and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

41. THIS COURT ORDERS that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and is hereby granted a charge (the "DIP Lenders' Charge") on the Property. The DIP Lenders' Charge shall secure all amounts owing by the Borrower to the

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DIP Agent and the DIP Lenders under the DIP Agreement and the Definitive Documents. The DIP Lenders' Charge shall have the priority set out in paragraphs 47 and 49 hereof.

42. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

- (a) the DIP Agent and the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charge or any of the Definitive Documents;
- (b) upon the occurrence of an event of default under the DIP Agreement, the Definitive Documents or the DIP Lenders' Charge, the DIP Agent and the DIP Lenders may cease making advances to the Applicants, set off and/or consolidate any amounts owing by the DIP Agent and the DIP Lenders to the Applicants against the obligations of the Applicants to the DIP Agent and the DIP Lenders under the DIP Agreement, the Definitive Documents or the DIP Lenders' Charge, make demand, accelerate payment, terminate any unutilized commitments under the DIP Agreement, the Definitive Documents or the DIP Lenders' Charge and give other notices, and upon four (4) days written notice to the Applicants and the Monitor, and with leave of the Court, may exercise any and all of its other rights and remedies against the Applicants or the Property under or pursuant to the DIP Agreement, the Definitive Documents and the DIP Lenders' Charge, including without limitation, the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants;
- (c) in connection with the exercise of any and all of their rights and remedies under paragraph 42(b), the DIP Agent and the DIP Lenders and any receiver, receiver and manager or interim receiver of the Applicants appointed by the Court on the application of the DIP Agent and the DIP Lenders shall be entitled to enter the cargo port facility located at the Port on notice to PortCo and repossess, disable or remove all or any portion of the DIP Collateral located at the Port; and

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(d) the foregoing rights and remedies of the DIP Agent and the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants, the Property or PortCo and its property.

43. THIS COURT ORDERS that the DIP Agent is authorized and directed to make any and all payments required to be made by the DIP Agent under the DIP Agreement, the Definitive Documents and this Order, in each case in accordance with the Budget.

44. THIS COURT ORDERS AND DECLARES that notwithstanding paragraph 3 but subject to paragraph 42, the DIP Agent and the DIP Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-2, as amended (the "BIA"), with respect to any advances made under the DIP Agreement and the Definitive Documents.

45. THIS COURT ORDERS that prior to the hearing of the Comeback Motion (defined below), the Applicants, in consultation with the Monitor, shall prepare such protocols and procedures regarding intercompany transactions, claims and cash transfer (including, without limitation, such protocols regarding transactions with PortCo and EPC), which shall be reasonably acceptable to the DIP Agent and which protocol and procedures shall form part of the Cash Management System.

46. THIS COURT ORDERS AND DECLARES that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Agreement, the Definitive Documents or the DIP Lenders' Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "Variation") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the protections, rights or remedies of the DIP Agent and the DIP Lenders, whether under this Order (as made prior to the Variation), under the DIP Agreement or under any of the documentation delivered hereto or thereto (including the Definitive Documents, if any), with respect to any advances made prior to the DIP Agent and the DIP Lenders being given notice of the

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Variation and the DIP Agent and the DIP Lenders shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lenders' Charge) for all advances so made.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

47. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Critical Supplier Charge, the DIP Lenders' Charge and the D&O Charge, as among them, shall be as follows:

First - Administration Charge (to the maximum amount of \$5 million);

Second - Critical Suppliers' Charge (to the maximum amount of \$15 million);

Third - DIP Lenders' Charge;

Fourth - D&O Charge (to the maximum amount of \$30 million); and

Fifth - Financial Advisor's Charge (to the maximum amount of \$8 million).

48. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the Critical Suppliers' Charge, the DIP Lenders' Charge, the D&O Charge and the Financial Advisor's Charge (collectively, the "Charges") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

49. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and, subject to the charge over real property pursuant to section 11.8(8) of the CCAA (which, for greater certainty, shall not include any personal property of the Applicants or any property or equipment of the Applicants that is now or hereafter on or affixed to any real property of the Applicants, including any property of the Applicants that is or becomes a fixture), and subject to the requirements of s. 11.2 of the CCAA, such Charges shall rank in priority to all other security interests, trusts (including constructive

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trusts), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (including any deemed trust created under the Ontario *Pension Benefits Act*) (collectively, the "Encumbrances") other than (a) any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable provincial legislation that has not been served with notice of the application for this Order; and (b) statutory super-priority deemed trusts and liens for unpaid employee source deductions.

50. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Applicants also obtain the prior written consent of the Monitor, the DIP Agent and the DIP Lenders and the other beneficiaries of the Charges, or further Order of this Court.

51. THIS COURT ORDERS that the Charges and the DIP Agreement and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Agreement or the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

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- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the DIP Agreement or the Definitive Documents, the creation of the Charges, or the execution, delivery or performance of the DIP Agreement and the Definitive Documents; and
- (c) the payments made by the Applicants pursuant to this Order or the DIP Agreement, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.


52. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

CHAPTER 15 PROCEEDINGS

53. THIS COURT ORDERS that ESAI is hereby authorized and empowered, but not required, to act as the foreign representative (the "Foreign Representative") in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside of Canada, including, if deemed advisable by the Applicants, to apply for recognition of these proceedings in the United States pursuant to chapter 15 of title 11 of the *United States Code*, 11 U.S.C. §§ 101- 1532.

SERVICE AND NOTICE

54. THIS COURT ORDERS that the Monitor shall (a) without delay, publish in the national edition of *The Globe and Mail* and the *Sault Star*, a notice containing the information prescribed under the CCAA, (b) within five (5) days after the date of this Order, (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than \$1000 (excluding individual employees, former employees with pension and/or retirement savings plan entitlements, and retirees and other beneficiaries

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who have entitlements under any pension or retirement savings plans), and (iii) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names and addresses of individuals who are creditors publicly available.

55. THIS COURT ORDERS that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "Service List"). The Monitor shall post the Service List, as may be updated from time to time, on the Website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

56. THIS COURT ORDERS the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-serviceprotocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: www.ey.com/ca/essaralgoma (the "Website").

57. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicant and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the

9 December 15
Tara Stead
Registrar, Superior Court of Justice

Applicant and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

58. THIS COURT ORDERS that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

COMEBACK MOTION

59. THIS COURT ORDERS that the Applicants are otherwise authorized to serve their motion materials with respect to a motion at which the Applicants intend to seek, *inter alia*, priority of the Charges over all Encumbrances, an order permitting Algoma to suspend special payments required to be made to its defined benefit pension plans, an extension of the Stay Period and approval of a key employee retention plan (the "Comeback Motion") by forwarding a copy of this Order and any additional materials to be filed with respect to the Comeback Motion by electronic transmission, where available, or by courier to the parties likely to be affected by the relief to be sought at such parties' respective addresses as last shown on the records of the Applicants as soon as practicable.

60. THIS COURT ORDERS that the Comeback Motion shall be heard on November 16, 2015.

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 Tara Stead
 Registrar, Superior Court of Justice

SEALING

61. **THIS COURT ORDERS** that Confidential Exhibits "H", "I", and "J" to the Marwah Affidavit are hereby sealed and shall not form part of the public record until further order of the Court.

GENERAL

62. **THIS COURT ORDERS** that the Applicants and the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

63. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

64. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

65. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

66. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

9 November 15
Tara Stead
Tara Stead
Registrar, Superior Court of Justice

67. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Time on the date of this Order.

[Handwritten signature]

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

NOV 09 2015

[Handwritten mark]

THIS COURT ORDERED THAT THE
 ORDER BEING REGISTERED IN THE
 OFFICE OF THE REGISTRAR OF THE
 COURT OF JUSTICE AT TORONTO, IS A
 TRUE COPY OF THE ORIGINAL
 ORDER IN THIS CASE.

LE JUGE A ORDONNE QUE
 L'ORDRE SOIT INSCRIT AU BUREAU
 DU REGISTRE EN VEUILLEANT
 CONSERVER DANS LE BUREAU
 UN COPIE VRAI DE L'ORDRE
 ORIGINAL EN CE CAS.

ENTERED AT TORONTO THIS 9 DAY OF November 2015
 IN THE OFFICE OF THE REGISTRAR
 AT TORONTO.

[Signature]
Tara Stead
 Registrar, Superior Court of Justice

SCHEDULE "A"

Osler, Hoskin & Harcourt LLP, counsel to Deutsche Bank AG (Canada Branch)
White & Case LLP, counsel to Deutsche Bank AG (New York Branch)
Davis Polk Wardwell LLP, counsel for a Term Lender Group
Goodmans LLP, counsel to an Ad Hoc Group of Senior Noteholders
Cassels Brock & Blackwell LLP, counsel to an Ad Hoc Group of Junior Noteholders
Wilmington Trust, National Association
Essar Power Canada Ltd.
ICICI Bank Canada
BNY Trust Company of Canada
Port of Algoma Inc.
GIP Primus LP
Torys LLP, counsel to Essar Capital Americas Limited and Essar Capital Mauritius Limited
Ministry of Finance (Ontario)
Ministry of the Environment and Climate Change (Ontario)
Independent Electricity System Operator
Department of Justice
Financial Services Commission of Ontario
Paliare Roland Rosenberg Rothstein LLP, counsel to The United Steel Workers, National
USW District 6
USW Local 2251
USW Local 2724
SOAR Chapter 17
SOAR Chapter 7
Group 1009

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SUPERIOR COURT OF JUSTICE
TORONTO
NOV 9 2015
Tara Stead
Registrar, Superior Court of Justice

SCHEDULE "B"

CRITICAL SUPPLIER	SUPPLY TERMS
Shell Energy North America (Canada) Inc.	In accordance with the master natural gas purchase and/or sale contract dated June 1, 2011 between Essar Steel Algoma Inc. and Shell Energy North America (Canada) Inc. (as amended) and the transaction confirmations issued thereunder dated March 16, 2015, June 24, 2015 and August 18, 2015
Noble Americas Gas & Power Corp.	In accordance with the master agreement dated December 3, 2010 between Noble Americas Gas & Power Corp. and Essar Steel Algoma and the physical deal confirmations issued thereunder dated March 3, 2015, April 14, 2015 and August 24, 2015
Praxair, Inc.	In accordance with the agreement dated March 1, 1996 (as amended and extended by an amending agreement dated October 28, 2009) and the agreement March 3, 1999, all among Praxair, Inc. and Essar Steel Algoma Inc.
Southern Coal Sales Corporation	In accordance with the coal supply agreement dated November 1, 2015 between Southern Coal Sales Corporation and Essar Steel Algoma Inc.
Canadian National Railway Company	In accordance with terms and conditions that are consistent with the supply relationship between Canadian National Railway Company and Essar Steel Algoma Inc.

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 9 November 2015
 Tara Stead
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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

Court File No: CV-15-000011169-2

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ESSAR STEEL ALGOMA
(ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC.
USA

9 November 15
Tara Stead
Tara Stead
Registrar, Superior Court of Justice

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

INITIAL ORDER

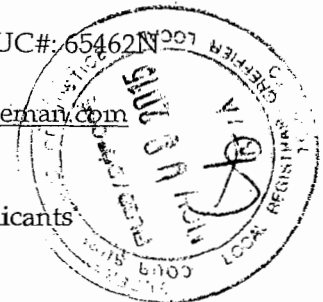
STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
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Patrick J. Corney LSUC#: 65462N
Tel: (416) 869-5668
E-mail: pcorney@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants



Tab 16

2012 ONSC 1299

Ontario Superior Court of Justice [Commercial List]

First Leaside Wealth Management Inc., Re

2012 CarswellOnt 2559, 2012 ONSC 1299, 213 A.C.W.S. (3d) 266

In the Matter of a Plan of Compromise or Arrangement of First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc., Applicants

D.M. Brown J.

Heard: February 23, 2012

Judgment: February 26, 2012

Docket: CV-12-9617-00CL

Counsel: J. Birch, D. Ward, for Applicants
P. Huff, C. Burr, for Proposed Monitor, Grant Thornton Limited
D. Bish, for Independent Directors
B. Empey, for Investment Industry Regulatory Organization of Canada
J. Grout, for Ontario Securities Commission
R. Oliver, for Kenaidan Contracting Limited
J. Dietrich — Proposed Representative Counsel, for the investors
E. Garbe, for Structform International Limited
N. Richter, for Gilbert Steel Limited
M. Sanford, for Janick Electrick Limited
M. Konyukhova, for Midland Loan Services Inc.
C. Prophet, for Canadian Imperial Bank of Commerce

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency

- X Priorities of claims
 - X.2 Preferred claims
 - X.2.c Costs and expenses of administrators
 - X.2.c.ii Priority over other claims

Bankruptcy and insolvency

- XIX Companies' Creditors Arrangement Act
 - XIX.1 General principles
 - XIX.1.b Qualifying company

Bankruptcy and insolvency

- XIX Companies' Creditors Arrangement Act
 - XIX.1 General principles
 - XIX.1.c Application of Act
 - XIX.1.c.iv Miscellaneous

Bankruptcy and insolvency

- XIX Companies' Creditors Arrangement Act
 - XIX.1 General principles
 - XIX.1.d Constitutional issues

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Applicants qualified for CCAA protection — Applicants were "companies" within meaning of CCAA — Total claims against applicants, as affiliated group of companies, was greater than \$5 million — Some applicants were "debtor companies" in sense that they were insolvent — It was necessary and appropriate to extend CCAA protection to other applicants, as well as to LPs — Presence of those entities within ambit of initial order was necessary to effect orderly winding-up of FLG — This conclusion was supported by insolvency of overall FLG and high degree of inter-connectedness amongst members of FLG — Consequently, whether particular applicant fell under initial order as debtor company, or as necessary party as part of intertwined whole, was distinction without practical difference.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous

Liquidation under Act — FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — CCAA was available to applicants in circumstances — Both CRO and proposed monitor possessed extensive knowledge about workings of applicants and supported process conducted under CCAA — No party contested availability of CCAA to conduct orderly winding-up, although some parties questioned whether certain entities should be included within scope of initial order — Given that state of affairs, there was no reason not to accept professional judgment of CRO and proposed monitor that liquidation under CCAA was most appropriate route to take — There was no prejudice to claimant creditors by permitting winding-up under CCAA instead of under Bankruptcy and Insolvency Act in view of convergence between these two Acts on issue of priorities.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Constitutional issues

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Initial order included super-priority for administration charges and director and officer's charges (charges sought) — It was necessary to grant charges sought in order to secure services of estate professionals and to ensure continuation of directors in their offices — Amounts of charges sought were reasonable in circumstances — Adjournment requested by mortgagee and construction lien claimants (opposed creditors) was not granted — Opposed creditors had been given notice required by ss. 11.51(1) and 11.52(1) of CCAA — To ensure integrity of CCAA process, issue of priority of charges sought, including possible issue of paramountcy, should be raised on initial order application — Case relied on by opposed creditors was quite different, as it involved fiduciary duty owed by debtor company to pensioners — Caution had to be exercised before extending holding of that case to ordinary secured creditors — It was difficult to see how constitutional issues of paramountcy arose as between secured creditors and persons granted super-priority charge under ss. 11.51 and 11.52 of CCAA — Applicants were eligible for protection of federal CCAA, which expressly brings mortgagees and construction lien claimants within its regime.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Costs and expenses of administrators — Priority over other claims

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Initial order included super-priority for administration charges and director and officer's charges (charges sought) — It was necessary to grant charges sought in order to secure services of estate professionals and to ensure continuation of directors in their offices — Amounts of charges sought were reasonable in circumstances — Adjournment requested by mortgagee and construction lien claimants (opposed creditors) was not granted — Opposed creditors had been given notice required by ss. 11.51(1) and 11.52(1) of CCAA — To ensure integrity of CCAA process, issue of priority of charges sought, including possible issue of paramountcy, should be raised on initial order application — Case relied on by opposed creditors was quite different, as it involved fiduciary duty owed by debtor company to pensioners — Caution had to be exercised before extending holding of that case to ordinary secured creditors — It was difficult to see how constitutional issues of paramountcy arose as between secured creditors and persons granted super-priority charge under ss. 11.51 and 11.52 of CCAA — Applicants were eligible for protection of federal CCAA, which expressly brings mortgagees and construction lien claimants within its regime.

Table of Authorities**Cases considered by D.M. Brown J.:**

Associated Investors of Canada Ltd., Re (1987), 1987 CarswellAlta 330, 56 Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, 67 C.B.R. (N.S.) 237, (sub nom. *First Investors Corp., Re*) 46 D.L.R. (4th) 669 (Alta. Q.B.) — considered

Brake Pro Ltd., Re (2008), 2008 CarswellOnt 3195 (Ont. S.C.J.) — considered

Canadian Western Bank v. Alberta (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — considered

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — considered

Indalex Ltd., Re (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.*) 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re*) 99 O.R. (3d) 708 (Ont. C.A.) — referred to

Prizm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Rothmans, Benson & Hedges Inc. v. Saskatchewan (2005), [2005] 1 S.C.R. 188, 2005 SCC 13, 2005 CarswellSask 162, 2005 CarswellSask 163, 250 D.L.R. (4th) 411, [2005] 9 W.W.R. 403 (S.C.C.) — considered

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

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

Generally — referred to

s. 2 — considered

s. 2 "secured creditor" — considered

s. 3(1) — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

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

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

APPLICATION by members of insolvent group of companies for initial order under *Companies' Creditors Arrangement Act*.

D.M. Brown J.:

I. Overview: CCAA Initial Order

1 On Thursday, February 23, 2012, I granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, in respect of the Applicants. These are my Reasons for that decision.

II. The applicant corporations

2 The Applicants are members of the First Leaside group of companies. They are described in detail in the affidavit of Gregory MacLeod, the Chief Restructuring Officer of First Leaside Wealth Management ("FLWM"), so I intend only refer in these Reasons to the key entities in the group. The parent corporation, FLWM, owns several subsidiaries, including the applicant, First Leaside Securities Inc. ("FLSI"). According to Mr. MacLeod, the Group's operations centre on FLWM and FLSI.

3 FLSI is an Ontario investment dealer that manages clients' investment portfolios which, broadly speaking, consist of non-proprietary Marketable Securities as well as proprietary equity and debt securities issued by First Leaside (the so-called "FL Products"). All segregated Marketable Securities are held in segregated client accounts with Penson Financial Services Canada Inc.

4 First Leaside designed its FL Products to provide investors with consistent monthly distributions. First Leaside acts as a real estate syndicate, purchasing real estate through limited partnerships with a view to rehabilitating the properties for lease at higher rates or eventual resale. First Leaside incorporated special-purpose corporations to act as general partners in the various LPs it set up. The general partners of First Leaside's Canadian LPs — i.e. those which own property in Canada — are applicants in this proceeding. First Leaside also seeks to extend the benefits of the Initial Order to the corresponding LPs.

5 First Leaside has two types of LPs: individual LPs that acquire and operate a single property or development, and aggregator LPs that hold units of multiple LPs. Investors have invested in both kinds of LPs. In paragraph 49 of his affidavit Mr. MacLeod detailed the LPs within First Leaside. While most First Leaside LPs hold interests in identifiable properties, for a few, called "Blind Pool LPs", clients invest funds without knowing where the funds likely were to be invested. Those LPs are described in paragraph 51 of Mr. MacLeod's affidavit.

6 The applicant, First Leaside Finance Inc. ("FL Finance"), acted as a "central bank" for the First Leaside group of entities.

III. The material events leading to this application

7 In the fall of 2009 the Ontario Securities Commission began investigating First Leaside. In March, 2011, First Leaside retained the proposed Monitor, Grant Thornton Limited, to review and make recommendations about First Leaside's businesses. Around the same time First Leaside arranged for appraisals to be performed of various properties.

8 Grant Thornton released its report on August 19, 2011. For purposes of this application Grant Thornton made several material findings:

(i) There exist significant interrelationships between the entities in the FL Group which result in a complex corporate structure;

(ii) Certain LPs have been a drain on the resources of the Group as a result of recurring operating losses and property rehabilitation costs; and,

(iii) The future viability of the FL Group was contingent on its ability to raise new capital:

If the FL Group was restricted from raising new capital, it would likely be unable to continue its operations in the ordinary course, as it would have insufficient revenue to support its infrastructure, staffing costs, distributions, and to meet their funding requirements for existing projects.

9 As a result of the report First Leaside hired additional staff to improve accounting resources and financial planning. Last November the Board appointed an Independent Committee to assume all decision-making authority in respect of First Leaside; the Group's founder, David Phillips, was no longer in charge of its management.

10 FLSI is regulated by both the OSC and the Investment Industry Regulatory Organization of Canada ("IIROC"). In October, 2011, IIROC issued FLSI a discretionary early warning level 2 letter prohibiting the company from reducing capital and placing other restrictions on its activities. At the same time the OSC told First Leaside that unless satisfactory arrangements were made to deal with its situation, the OSC almost certainly would take regulatory action, including seeking a cease trade order.

11 First Leaside agreed to a voluntary cease trade, retained Grant Thornton to act as an independent monitor, informed investors about those developments, and made available the August Grant Thornton report.

12 Because the cease trade restricted First Leaside's ability to raise capital, the Independent Committee decided in late November to cease distributions to clients, including distributions to LP unit holders, interest payments on client notes/debts, and dividends on common or preferred shares.

13 In December the Independent Committee decided to retain Mr. MacLeod as CRO for First Leaside and asked him to develop a workout plan, which he finalized in late January, 2012. Mr. MacLeod deposed that the downturn in the economy has resulted in First Leaside realizing lower operating income while incurring higher operational costs. In his affidavit Mr. MacLeod set out his conclusion about a workout plan:

After carefully analyzing the situation, my ultimate conclusion was that it was too risky and uncertain for First Leaside to pursue a resumption of previous operations, including the raising of capital. My recommendation to the Independent Committee was that First Leaside instead undertake an orderly wind-down of operations, involving:

(a) Completing any ongoing property development activity which would create value for investors;

- (b) Realizing upon assets when it is feasible to do so (even where optimal realization might occur over the next 12 to 36 months);
- (c) Dealing with the significant inter-company debts; and,
- (d) Distributing proceeds to investors.

Mr. MacLeod further deposed:

[T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues — especially the numerous investor and creditor claims and inter-company claims — can be dealt with in one forum under the supervision of the court.

The Independent Committee approved Mr. MacLeod's recommendations. This application resulted.

IV. Availability of CCAA

A. The financial condition of the applicants

14 According to Mr. MacLeod, First Leaside has over \$370 million in assets under management. Some of those, however, are Marketable Securities. First Leaside is proposing that clients holding Marketable Securities (which are held in segregated accounts) be free to transfer them to another investment dealer during the *CCAA* process. As to the value of FL Products, Mr. MacLeod deposed that "it remains to be determined specifically how much value will be realized for investors on the LP units, debt instruments, and shares issued by the various First Leaside entities."

15 First Leaside's debt totals approximately \$308 million: \$176 million to secured creditors (mostly mortgagees) and \$132 million to unsecured creditors, including investors holding notes or other debt instruments.

16 Mr. MacLeod summarized his assessment of the financial status of the First Leaside Group as follows:

[S]ince GTL reported that the aggregate value of properties in the First Leaside exceeded the value of the properties, there will be net proceeds remaining to provide at least some return to subordinate creditors or equity holders (i.e., LP unit holders and corporation shareholders) in many of the First Leaside entities. The recovery will, of course, vary depending on the entity. At this stage, however, it is fair to conclude that there is a material equity deficit both in individual First Leaside entities and in the overall First Leaside group.

17 In his affidavit Mr. MacLeod also deposed, with respect to the financial situation of First Leaside, that:

- (i) The cease trade placed severe financial constraints on First Leaside as almost every business unit depended on the ability of FLWM and its subsidiaries to raise capital from investors;
- (ii) There are immediate cash flow crises at FLWM and most LPs;
- (iii) FLWM's cash reserves had fallen from \$2.8 million in November, 2011 to \$1.6 million at the end of this January;
- (iv) Absent new cash from asset disposals, current cash reserves would be exhausted in April;
- (v) At the end of December, 2011 Ventures defaulted by failing to make a principal mortgage payment of \$4.25 million owing to KingSett;
- (vi) Absent cash flow from FLWM a default is imminent for Investor's Harmony property;
- (vii) First Leaside lacks the liquidity or refinancing options to rehabilitate a number of the properties and execute on its business plan; and,

(viii) First Leaside generally has been able to make mortgage payments to its creditors, but in the future it will be difficult to do so given the need to expend monies on property development and upgrading activities

18 In his description of the status of the employees of the Applicants, Mr. MacLeod did not identify any issue concerning a pension funding deficiency.¹ The internally-prepared 2010 FLWM financial statements did not record any such liability. Grant Thornton did not identify any such issue in its Pre-filing Report.

19 First Leaside is not proposing to place all of its operations under court-supervised insolvency proceedings. It does not plan to seek Chapter 11 protection for its Texas properties since it believes they may be able to continue operations over the anticipated wind-up period using cash flows they generate and pay their liabilities as they become due. Nor does First Leaside seek to include in this *CCAA* proceeding the First Leaside Venture LP ("Ventures") which owns and operates several properties in Ontario and British Columbia. On February 15, 2012 Ventures and Bridge Gap Konsult Inc. signed a non-binding term sheet to provide some bridge financing for Ventures. First Leaside decided not to include certain Ventures-related limited partnerships in the *CCAA* application at this stage,² while reserving the right to later bring a motion to extend the Initial Order and stay to these Excluded LPs. The Initial Order which I signed reflected that reservation.

20 As noted above, over the better part of the past year the proposed Monitor, Grant Thornton, has become familiar with the affairs of the First Leaside Group as a result of the review it conducted for its August, 2011 report. Last November First Leaside retained Grant Thornton as an independent monitor of its business.

21 In its Pre-filing Report Grant Thornton noted that the last available financial statements for FLWM were internally prepared ones for the year ended December 31, 2010. They showed a net loss of about \$2.863 million. The Pre-filing Report contained a 10-week cash flow projection (ending April 27, 2012) prepared by the First Leaside Group. The Cash Flow Projection does not contemplate servicing interest and principal payments during the projection period. On that basis the Cash Flow Projection showed the Group's combined closing bank balance declining from \$6.97 million to \$4.144 million by the end of the projection period. Grant Thornton reviewed the Cash Flow Projection and stated that it reflected the probable and hypothetical assumptions on which it was prepared and that the assumptions were suitably supported and consistent with the plans of the First Leaside Group and provided a reasonable basis for the Cash Flow Projection.

22 Grant Thornton reported that certain creditors, specifically construction lien claimants, had commenced enforcement proceedings and it concluded:

Given creditors' actions to date and due to the complicated nature of the FL Group's business, the complex corporate structure and the number of competing stakeholders, it is unlikely that the FL Group will be able to conduct an orderly wind-up or continue to rehabilitate properties without the stability provided by a formal Court supervised restructuring process.

...

As the various stakeholder interests are in many cases intertwined, including intercompany claims, the granting of the relief requested would provide a single forum for the numerous stakeholders of the FL Group to be heard and to deal with such parties' claims in an orderly manner, under the supervision of the Court, a CRO and a Court-appointed Monitor. In particular, a simple or forced divestiture of the properties of the FL Group would not only erode potential investor value, but would not provide the structure necessary to reconcile investor interests on an equitable and ratable basis.

A stay of proceedings for both the Applicants and the LPs is necessary if it is deemed appropriate by this Honourable Court to allow the FL Group to maintain its business and to allow the FL Group the opportunity to develop, refine and implement their restructuring/wind-up plan(s) in a stabilized environment.

B. Findings

23 I am satisfied that the Applicants are "companies" within the meaning of the *CCAA* and that the total claims against the Applicants, as an affiliated group of companies, is greater than \$5 million.

24 Are the Applicant companies "debtor companies" in the sense that they are insolvent? For the purposes of the *CCAA* a company may be insolvent if it falls within the definition of an insolvent person in section 2 of the *Bankruptcy and Insolvency Act* or if its financial circumstances fall within the meaning of insolvent as described in *Stelco Inc., Re* which include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".³

25 When looked at as a group the Applicants fall within the extended meaning of "insolvent": as a result of the cease trade their ability to raise capital has been severely restricted; cash reserves fell significantly from November until the time of filing, and the Cash Flow Projection indicates that cash reserves will continue to decline even with the cessation of payments on mortgages and other debt; Mr. MacLeod estimated that cash reserves would run out in April; distributions to unit holders were suspended last November; and, some formal mortgage defaults have occurred.

26 However, a secured creditor mortgagee, Midland Loan Services Inc., submitted that to qualify for *CCAA* protection each individual applicant must be a "debtor company" and that in the case of one applicant, Queenston Manor General Partner Inc., that company was not insolvent. In his affidavit Mr. MacLeod deposed that the Queenston Manor LP is owned by the First Leaside Expansion Limited Partnership ("FLEX"). Queenston owns and operates a 77-unit retirement complex in St. Catherines, has been profitable since 2008 and is expected to remain profitable through 2013. Queenston has been listed for sale, and management currently is considering an offer to purchase the property. Midland Loan submitted that in light of that financial situation, no finding could be made that the applicant, Queenston Manor General Partner Inc., was a "debtor company".

27 Following that submission I asked Applicants' counsel where in the record one could find evidence about the insolvency of each individual Applicant. That prompted a break in the hearing, at the end of which the Applicants filed a supplementary affidavit from Mr. MacLeod. Indicating that one of the biggest problems facing the Applicants was the lack of complete and up-to-date records, in consultation with the Applicants' CFO Mr. MacLeod submitted a chart providing, to the extent possible, further information about the financial status of each Applicant. That chart broke down the financial status of each of the 52 Applicants as follows:

Insolvent	28
Dormant	15
Little or no realizable assets	5
More information to be made available to the court	3
Other: management revenue stopped in 2010; \$70,000 cash; \$270,000 in related-company receivables	1

Queenston Manor General Partner Inc. was one of the applicants for which "more information would be made available to the court".

28 As I have found, when looked at as a group, the Applicants fall within the extended meaning of "insolvent". When one descends a few levels and looks at the financial situation of some of the aggregator LPs, such as FLEX, Mr. MacLeod deposed that FLEX is one of the largest net debtors — i.e. it is unable to repay inter-company balances from operating cash flows and lacks sufficient net asset value to settle the intercompany balances through the immediate liquidation of

assets. The evidence therefore supports a finding that the corporate general partner of FLEX is insolvent. Queenston Manor is one of several assets owned by FLEX, albeit an asset which uses the form of a limited partnership.

29 If an insolvent company owns a healthy asset in the form of a limited partnership does the health of that asset preclude it from being joined as an applicant in a *CCAA* proceeding? In the circumstances of this case it does not. The jurisprudence under the *CCAA* provides that the protection of the Act may be extended not only to a "debtor company", but also to entities who, in a very practical sense, are "necessary parties" to ensure that that stay order works. Morawetz J. put the matter the following way in *Prizm Income Fund, Re*:

The *CCAA* definition of an eligible company does not expressly include partnerships. However, *CCAA* courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehdorff, supra*, and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (S.C.J.).

The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.⁴

30 Although section 3(1) of the *CCAA* requires a court on an initial application to inquire into the solvency of any applicant, the jurisprudence also requires a court to take into account the relationship between any particular company and the larger group of which it is a member, as well as the need to place that company within the protection of the Initial Order so that the order will work effectively. On the evidence filed I had no hesitation in concluding that given the insolvency of the overall First Leaside Group and the high degree of inter-connectedness amongst the members of that group, the protection of the *CCAA* needed to extend both to the Applicants and the limited partnerships listed in Schedule "A" to the Initial Order. The presence of all those entities within the ambit of the Initial Order is necessary to effect an orderly winding-up of the insolvent group as a whole. Consequently, whether Queenston Manor General Partner Inc. falls under the Initial Order by virtue of being a "debtor company", or by virtue of being a necessary party as part of an intertwined whole, is, in the circumstances of this case, a distinction without a practical difference.

31 In sum, I am satisfied that those Applicants identified as "insolvent" on the chart attached to Mr. MacLeod's supplementary affidavit are "debtor companies" within the meaning of the *CCAA* and that the other Applicants, as well as the limited partnerships listed on Schedule "A" of the Initial Order, are entities to which it is necessary and appropriate to extend *CCAA* protection.

C. "Liquidation" *CCAA*

32 While in most circumstances resort is made to the *CCAA* to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all", the reality is that "reorganizations of differing complexity require different legal mechanisms."⁵ That reality has led courts to recognize that the *CCAA* may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership,⁶ or to wind-up or liquidate it. In *Lehdorff General Partner Ltd., Re*⁷ Farley J. observed:

It appears to me that the purpose of the *CCAA* is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Assoc. Investors, supra*, at p. 318; *Re Amirault Co.* (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

33 In the decision of *Associated Investors of Canada Ltd., Re* referred to by Farley J., the Alberta Court of Queen's Bench stated:

The realities of the modern marketplace dictate that courts of law respond to commercial problems in innovative ways without sacrificing legal principle. In my opinion, the Companies' Creditors Arrangement Act is not restricted in its application to companies which are to be kept in business. Moreover, the Court is not without the ability to address within its jurisdiction the concerns expressed in the Ontario cases. The Act may be invoked as a means of liquidating a company and winding-up its affairs but only if certain conditions precedent are met:

1. It must be demonstrated that benefits would likely flow to Creditors that would not otherwise be available if liquidation were effected pursuant to the Bankruptcy Act or the Winding-Up Act.
2. The Court must concurrently provide directions pursuant to compatible legislation that ensures judicial control over the liquidation process and an effective means whereby the affairs of the company may be investigated and the results of that investigation made available to the Court.
3. A Plan of Arrangement should not receive judicial sanction until the Court has in its possession, all of the evidence necessary to allow the Court to properly exercise its discretion according to standards of fairness and reasonableness, absent any findings of illegality.⁸

The editors of *The 2012 Annotated Bankruptcy and Insolvency Act* take some issue with the extent of those conditions:

With respect, these conditions may be too rigorous. If the court finds that the plan is fair and reasonable and in the best interests of creditors, and there are cogent reasons for using the statute rather than the *BIA* or *WURA*, there seems no reason why an orderly liquidation could not be carried out under the *CCAA*.⁹

34 Mr. MacLeod, the CRO, deposed that no viable plan exists to continue First Leaside as a going concern and that the most appropriate course of action is to effect an orderly wind-down of First Leaside's operations over a period of time and in a manner which will create the opportunity to realize improved net asset value. In his professional judgment the *CCAA* offered the most appropriate mechanism by which to conduct such an orderly liquidation:

[T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues — especially the numerous investor and creditor claims and the inter-company claims — can be dealt with in one forum under the supervision of the court.

In its Pre-filing Report the Monitor also supported using the *CCAA* to implement the "restructuring/wind-up plan(s) in a stabilized environment".

35 Both the CRO and the proposed Monitor possess extensive knowledge about the workings of the Applicants. Both support a process conducted under the *CCAA* as the most practical and effective way in which to deal with the affairs of this insolvent group of companies. No party contested the availability of the *CCAA* to conduct an orderly winding-up of the affairs of the Applicants (although, as noted, some parties questioned whether certain entities should be included within the scope of the Initial Order). Given that state of affairs, I saw no reason not to accept the professional judgment of the CRO and the proposed Monitor that a liquidation under the *CCAA* was the most appropriate route to take.

36 Moreover, I saw no prejudice to claimant creditors by permitting the winding-up of the First Leaside Group to proceed under the *CCAA* instead of under the *BIA* in view of the convergence which exists between the *CCAA* and *BIA* on the issue of priorities. As the Supreme Court of Canada pointed out in *Century Services*:

Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful.¹⁰

As the British Columbia Court of Appeal observed in *Caterpillar Financial Services Ltd. v. 360networks Corp.* interested parties also use that priorities backdrop to negotiate successful *CCAA* reorganizations:

While it might be suggested that *CCAA* proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan.¹¹

37 I therefore concluded that the *CCAA* was available to the Applicants in the circumstances, and I so ordered.

V. Representative Counsel, CRO and Monitor

38 The Applicants sought the appointment of Fraser Milner Casgrain ("FMC") as Representative Counsel to represent the interests of the some 1,200 clients of FLSI in this proceeding, subject to the right of any client to opt-out of such representation. The proposed Monitor expressed the view that it would be in the best interests of the FL Group and its investors to appoint Representative Counsel. No party objected to such an appointment. I reviewed the qualifications and experience of proposed Representative Counsel and its proposed fees, and I was satisfied that it would be appropriate to appoint FMC as Representative Counsel on the terms set out in the Initial Order.

39 The Applicants sought the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside. No party objected to that appointment. The Applicants included a copy of the CRO's December 21, 2011 Retention Agreement in their materials. The proposed Monitor stated that the appointment of a CRO was important to ensure an adequate level of senior corporate governance leadership. I agree, especially in light of the withdrawal of Mr. Phillips last November from the management of the Group. The proposed Monitor reported that the terms and conditions of the Retention Agreement were consistent with similar arrangements approved by other courts in *CCAA* proceedings and the remuneration payable was reasonable in the circumstances. As a result, I confirmed the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside.

40 Finally, I appointed Grant Thornton as Monitor. No party objected, and Grant Thornton has extensive knowledge of the affairs of the First Leaside Group.

VI. Administration and D&O Charges and their priorities

A. Charges sought

41 The Applicants sought approval, pursuant to section 11.52 of the *CCAA*, of an Administration Charge in the amount of \$1 million to secure amounts owed to the Estate Professionals — First Leaside's legal advisors, the CRO, the Monitor, and the Monitor's counsel.

42 They also sought an order indemnifying the Applicants' directors and officers against any post-filing liabilities, together with approval, pursuant to section 11.51 of the *CCAA*, of a Director and Officer's Charge in the amount of \$250,000 as security for such an indemnity. Historically the First Leaside Group did not maintain D&O insurance, and the Independent Committee was not able to secure such insurance at reasonable rates and terms when it tried to do so in 2011.

43 The Monitor stated that the amount of the Administration Charge was established based on the Estate Professionals' previous history and experience with restructurings of similar magnitude and complexity. The Monitor regarded the amount of the D&O Charge as reasonable under the circumstances. The Monitor commented that the combined amount of both charges (\$1.25 million) was reasonable in comparison with the amount owing to mortgagees (\$176 million).

44 In its Pre-filing Report the Monitor did note that shortly before commencing this application the Applicants paid \$250,000 to counsel for the Independent Committee of the Board. The Monitor stated that the payment might "be subject to review by the Monitor, if/when it is appointed, in accordance with s. 36.1(1) of the *CCAA*". No party requested an adjudication of this issue, so I refer to the matter simply to record the Monitor's expression of concern.

45 Based on the evidence filed, I concluded that it was necessary to grant the charges sought in order to secure the services of the Estate Professionals and to ensure the continuation of the directors in their offices and that the amounts of the charges were reasonable in the circumstances.

B. Priority of charges

46 The Applicants sought super-priority for the Administration and D&O Charges, with the Administration Charge enjoying first priority and the D&O Charge second, with some modification with respect to the property of FLSI which the Applicants had negotiated with IIROC.

47 In its Pre-filing Report the proposed Monitor stated that the mortgages appeared to be well collateralized, and the mortgagees would not be materially prejudiced by the granting of the proposed priority charges. The proposed Monitor reported that it planned to work with the Applicants to develop a methodology which would allocate the priority charges fairly amongst the Applicants and the included LPs, and the allocation methodology developed would be submitted to the Court for review and approval.

48 In *Indalex Ltd., Re*¹² the Court of Appeal reversed the super-priority initially given to a DIP Charge by the motions judge in an initial order and, instead, following the sale of the debtor company's assets, granted priority to deemed trusts for pension deficiencies. In reaching that decision Court of Appeal observed that affected persons — the pensioners — had not been provided at the beginning of the *CCAA* proceeding with an appropriate opportunity to participate in the issue of the priority of the DIP Charge.¹³ Specifically, the Court of Appeal held:

In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.¹⁴

49 In his recent decision in *Timminco Ltd., Re*¹⁵ ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:

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.¹⁶

50 In its Pre-filing Report the proposed Monitor expressed the view that if the priority charges were not granted, the First Leaside Group likely would not be able to proceed under the CCAA.

51 In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a CCAA proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the CCAA process, certainty must accompany the granting of such super-priority charges. When those important objectives of the CCAA process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.

52 Accordingly I raised that issue at the commencement of the hearing last Thursday and requested submissions on the issues of priority and paramountcy from any interested party. Several parties made submissions on those points: (i) the Applicants, proposed Monitor and proposed Representative Counsel submitted that the Court should address any priority or paramountcy issues raised; (ii) IIROC advised that it did not see any paramountcy issue in respect of its interests; (iii) counsel for Midland Loan submitted that a paramountcy issue existed with respect to its client, a secured mortgagee, because it enjoyed certain property rights under provincial mortgage law; she also argued that the less than full day's notice of the hearing given by the Applicants was inadequate to permit the mortgagee to consider its position, and her client should be given seven days to do so; and, (iv) counsel for a construction lien claimant, Structform International, who spoke on behalf of a number of such lien claimants, made a similar submission, contending that the construction lien claimants required 10 days to determine whether they should make submissions on the relationship between their lien claims and any super-priority charge granted under the CCAA.

53 I did not grant the adjournment requested by the mortgagee and construction lien claimants for the following reasons. First, the facts in *Indalex* were quite different from those in the present case, involving as they did considerations of what fiduciary duty a debtor company owed to pensioners in respect of underfunded pension liabilities. I think caution must be exercised before extending the holding of *Indalex* concerning CCAA-authorized priority charges to other situations, such as the one before me, which do not involve claims involving pension deficiencies, but claims by more "ordinary" secured creditors, such as mortgagees and construction lien claimants.

54 Second, I have some difficulty seeing how constitutional issues of paramountcy arise in in a CCAA proceeding as between claims to the debtor's property by secured creditors, such as mortgagees and construction lien claimants, and persons granted a super-priority charge by court order under sections 11.51 and 11.52 of the CCAA. At the risk of gross over-simplification, Canadian constitutional law places the issue of priorities of secured creditors in different legislative balliwicks depending on the health of the debtor company. When a company is healthy, secured creditor priorities usually are determined under provincial laws, such as personal property security legislation and related statutes, which result from provincial legislatures exercising their powers with respect to "property and civil rights in the province".¹⁷ However, when a company gets sick — becomes insolvent — our *Constitution* vests in Parliament the power to craft the legislative regimes which will govern in those circumstances. Exercising its power in respect of "bankruptcy and insolvency",¹⁸ Parliament has established legal frameworks under the *BIA* and *CCAA* to administer sick companies.

Priority determinations under the *CCAA* draw on those set out in the *BIA*, as well as the provisions of the *CCAA* dealing with specific claims such as Crown trusts and other claims.

55 As it has evolved over the years the constitutional doctrine of paramountcy polices the overlapping effects of valid federal and provincial legislation: "The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers."¹⁹ Since 1960 the Supreme Court of Canada has travelled a "path of judicial restraint in questions of paramountcy".²⁰ That Court has not been prepared to presume that, by legislating in respect of a matter, Parliament intended to rule out any possible provincial action in respect of that subject,²¹ unless (and it is a big "unless"), Parliament used very clear statutory language to that effect.²²

56 I have found that the Applicants have entered the world of the sick, or the insolvent, and are eligible for the protection of the federal *CCAA*. The federal legislation *expressly* brings mortgagees and construction lien claimants within its regime — the definition of "secured creditor" contained in section 2 of the *CCAA* specifically includes "a holder of a mortgage" and "a holder of a ...lien...on or against...all or any of the property of a debtor company as security for indebtedness of the debtor company". The federal legislation also *expressly* authorizes a court to grant priority to administration and D&O charges over the claims of such secured creditors of the debtor.²³ In light of those express provisions in sections 2, 11.51 and 11.52 of the *CCAA*, and my finding that the Applicants are eligible for the protection offered by the *CCAA*, I had great difficulty understanding what argument could be advanced by the mortgagees and construction lien claimants about the concurrent operation of provincial and federal law which would relieve them from the priority charge provisions of the *CCAA*. I therefore did not see any practical need for an adjournment.

57 Finally, sections 11.51(1) and 11.52(1) of the *CCAA* both require that notice be given to secured creditors who are likely to be affected by an administration or D&O charge before a court grants such charges. In the present case I was satisfied that such notice had been given. Was the notice adequate in the circumstances? I concluded that it was. To repeat, making due allowance for the unlimited creativity of lawyers, I have difficulty seeing what concurrent operation argument could be advanced by mortgagee and construction lien claims against court-ordered super-priority charges under sections 11.51 and 11.52 of the *CCAA*. Second, as reported by the proposed Monitor, the quantum of the priority charges (\$1.25 million) is reasonable in comparison with the amount owing to mortgagees (\$176 million) and the mortgages appeared to be well collateralized based on available information. Third, the Applicant and Monitor will develop an allocation methodology for the priority charges for later consideration by this Court. The proposed Monitor reported:

It is the Proposed Monitor's view that the allocation of the proposed Priority Charges should be carried out on an equitable and proportionate basis which recognizes the separate interests of the stakeholders of each of the entities.

The secured creditors will be able to make submissions on any proposed allocation of the priority charges. Finally, while I understand why the secured creditors are focusing on their specific interests, it must be recalled that the work secured by the priority charges will be performed for the benefit of all creditors of the Applicants, including the mortgagees and construction lien claimants. All creditors will benefit from an orderly winding-up of the affairs of the Applicants.

58 In the event that I am incorrect that no paramountcy issue arises in this case in respect of the priority charges, I echo the statements made by Morawetz J. in *Timminco* which I reproduced in paragraph 49 above. In *Indalex* the Court of Appeal accepted that "the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation".²⁴ I find that it is both necessary and appropriate to grant super priority to both the Administration and D&O Charges in order to ensure that the objectives of the *CCAA* are not frustrated.

59 For those reasons I did not grant the adjournment requested by Midland Loan and the construction lien claimants, concluding that they had been given adequate notice in the circumstances, and I granted the requested Administration and D&O Charges.

VII. Other matters

60 At the hearing counsel for one of the construction lien claimants sought confirmation that by granting the Initial Order a construction lien claimant who had issued, but not served, a statement of claim prior to the granting of the order would not be prevented from serving the statement of claim on the Applicants. Counsel for the Applicants confirmed that such statements of claim could be served on it.

61 At the hearing the Applicants submitted a modified form of the model Initial Order. Certain amendments were proposed during the hearing; the parties had an opportunity to make submissions on the proposed amendments.

VIII. Summary

62 For the foregoing reasons I was satisfied that it was appropriate to grant the *CCAA* Initial Order in the form requested. I signed the Initial Order at 4:08 p.m. EST on Thursday, February 23, 2012.

Application granted.

Footnotes

- 1 MacLeod Affidavit, paras. 104 to 106.
- 2 The Excluded LPs were identified in paragraph 134 of Mr. MacLeod's affidavit.
- 3 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]).
- 4 2011 ONSC 2061 (Ont. S.C.J.), paras. 26-27.
- 5 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), paras. 15, 77 and 78.
- 6 *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.), para. 46; see Kevin P. McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), pp. 284 et seq.
- 7 [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]). In *Brake Pro Ltd., Re*, [2008] O.J. No. 2180 (Ont. S.C.J.), Wilton-Siegel J. stated, at paragraph 10: "While reservations are expressed from time to time regarding the appropriateness of a "liquidating" *CCAA* proceeding, such proceedings are permissible under the *CCAA*."
- 8 *Associated Investors of Canada Ltd., Re* (1987), 46 D.L.R. (4th) 669 (Alta. Q.B.), para. 36.
- 9 Houlden, Morawetz & Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act*, N§1, p. 1099.
- 10 *Century Services, supra.*, para. 23.
- 11 (2007), 279 D.L.R. (4th) 701 (B.C. C.A.), para. 42.
- 12 2011 ONCA 265 (Ont. C.A.).
- 13 *Ibid.*, para. 155.
- 14 *Ibid.*, paras. 178 and 179.
- 15 2012 ONSC 506 (Ont. S.C.J. [Commercial List]).
- 16 *Ibid.*, para. 66.
- 17 *Constitution Act, 1867*, s. 92 ¶13.

18 *Ibid.*, s. 91 ¶21.

19 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), para. 69.

20 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 (S.C.C.), para. 21

21 *Canadian Western Bank*, *supra.*, para. 74.

22 *Rothmans*, *supra.*, para. 21.

23 CCAA ss. 11.51(2) and 11.52(2).

24 *Indalex*, *supra.*, para. 176.

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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

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

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

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

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.

Tab 18

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;

- (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 lender 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.

- (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 Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R.

(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,

(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*

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 discretionary 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.

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 Petroleum 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.]:

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 a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership*, 15th ed. (London: Sweet & Maxwell,

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.

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 19

2009 CarswellOnt 1330
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 1330, [2009] O.J. No. 1044, 175 A.C.W.S. (3d) 965

**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 Nortel Networks Corporation,
Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks
International Corporation and Nortel Networks Technology Corporation (the "Applicants")

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Morawetz J.

Heard: March 6, 2009

Judgment: March 12, 2009

Docket: 09-CL-7950, 09-CL-7951

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
J. Pasquariello for Monitor, Ernst & Young Inc.

Jonathan Bell for Informal Group of Nortel Networks Noteholders

R. Moncur, M. Barrack for Flextronics

M. Starnino for Pension Benefits Guarantee Fund

Harvey Chaiton for IBM

D. Ullman for Verizon Communications Inc.

Harvey Garman for U.K. Protection Fund, Nortel Networks UK Pension Trust Limited

Demtrios iokaris for Certain Former Salaried Employees of Nortel Networks

Alex MacFarlane for U.S. Unsecured Creditors' Committee

Subject: Insolvency; Corporate and Commercial

Morawetz J.:

1 This motion was heard on March 6, 2009 and the requested relief was granted, with brief reasons to follow.

2 At the outset of the Nortel proceedings on January 14, 2009, Mr. Tay, on behalf of Nortel Networks Corporation (the "Applicants or Nortel"), indicated that the Applicants would be seeking approval of a Key Employee Incentive Plan ("KEIP") and a Key Employee Retention Plan ("KERP"). Such approval was sought on this motion, together with a request to approve the Calgary Retention Plan (the "Calgary Retention Plan") providing for retention bonus payments promised to employees in connection with the closing of the Westwinds facility.

3 This motion was not opposed.

4 The record establishes that the commitment and retention of key employees will be essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement.

5 The KEIP applies to certain executives of the Senior Leadership Team ("SLTs") and the Executive Leadership Team ("ELTs") and the KERP applies to certain other key employees.

6 The Monitor reports that these plans have been developed to incent those employees who are:

(i) absolutely key to the success of the restructuring; and

(ii) to remain with the Applicants and U.S. Debtors through to the completion of the Canadian and U.S. proceedings

7 In designing the plans, Nortel obtained independent advice from Mercer (U.S.) Inc. ("Mercer") which included benchmarking total direct compensation levels against industry standards in comparing other key employee incentive plans approved by the courts in recent comparable North American restructurings. In addition, the Monitor reports that Nortel's financial advisor, Lezard Frères & Co., as well as the Monitor were consulted by Nortel throughout the development process with respect to the plans and have provided Nortel with appropriate input.

8 A total of 972 employees are eligible for the plans. This represents approximately 5% of Nortel's global workforce (excluding employees of the EMEA Filed Entities and the joint venturers). The KEIP covers 92 participants, of which, 29 are employed by the Applicants. The potential dollar value to be paid out under the KEIP is approximately \$23 million, of which \$6.8 million is allocated to the Canadian Applicants. With respect to the KERP, this plan covers 880 participants, of which 294 are employed by the Canadian Applicants. The total potential dollar value to be paid out under the KERP is approximately \$22 million, of which \$6.2 million is allocated to the Canadian Applicants.

9 The awards under both the KEIP and the KERP will vest based on the achievement of three milestones, namely, achievement of North American objectives; achievement of certain parameters that will result in a leaner and more focussed organization; and court-approved confirmation of a plan of restructuring.

10 The Unsecured Creditors' Committee ("UCC") in the Chapter 11 proceedings has indicated that it supports the plans, although such support with respect to the KEIP for the SLTs is conditional upon the delivery to the UCC of Nortel's 2009 financial projections.

11 Counsel to the Applicants advised that the U.S. Bankruptcy Court has approved the KEIP (except as it relates to the SLTs) and the KERP.

12 In order to maintain consistency between Canada and the U.S., the Applicants' motion to approve the KEIP excludes the SLTs. The Monitor reports that the Applicants have advised that they intend to request approval of the KEIP for the SLTs at a future date.

13 With respect to the Calgary Retention Plan, a decision was made in July 2008 to close the Westwinds facility and transfer R & D and global operations to other facilities over a period of 12 months. In July 2008, Nortel developed the Calgary Retention Plan that provided for retention payments to be made to those Westwinds facility employees who Nortel determined were critical to the successful shutdown of the facility. The Applicants have indicated that the maximum cost of the Calgary Retention Plan is estimated to be approximately \$727,000 to be paid to 45 employees at the time the employees have completed their portion of the project.

14 I am satisfied that the record establishes that the employees who are covered by the KEIP, the KERP and the Calgary Retention Plan are key to the operations of Nortel and are sought after by competitors, even given current market conditions.

15 The Monitor has reviewed the details of the Applicants proposed plans and Mercer's analysis and believes that the proposed plans provide reasonable compensation in the current situation.

16 Full details with respect to the plans are contained in the Confidential Report. I have reviewed this Report and agree with the submissions of both the Applicants and the Monitor that the Report contains sensitive commercial information that would be harmful to the Applicants if it were disclosed in the marketplace. In addition, the Confidential Report

contains sensitive personal information relating to Nortel's employees, the disclosure of which, in my view, would be harmful.

17 The Applicants and the Monitor request that the Confidential Report be sealed, pending further order of the court. I am satisfied that the test for sealing the Confidential Report, as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) has been satisfied and it is appropriate to grant the sealing order.

18 I have been satisfied that it is appropriate to approve the plans in question.

19 An order shall therefore issue approving:

- (i) the KEIP except as it relates to the Applicants' employees whose are designated members of the SLT;
- (ii) the KERP; and
- (iii) the Calgary Retention Plan

20 An order shall issue sealing the Confidential Report pending further order of this court.

Tab 20

2009 CarswellOnt 1519
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 1519, [2009] O.J. No. 1188, 176 A.C.W.S. (3d) 19

**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
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

Morawetz J.

Heard: March 20, 2009

Judgment: March 20, 2009

Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
Mark Zigler, Demetrios Yiokaris for Former Employees of Nortel Networks
Eliezer Karp for Committee for the Nortel Canadian Terminated Employees Owed Termination and Severance Pay
Kevin Zych for Informal Nortel Noteholder Group
Lyndon Barnes for Boards of Directors of Nortel Networks Corporation and Nortel Networks Limited
Rachelle Moncur for Flextronics Telecom Systems Ltd.
Harvey Garman for UK Pension Protection Fund, Nortel Networks UK Pension Trust Limited
Max Starnino for Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund
Alex MacFarlane for Official Committee of Unsecured Creditors
J. Pasquariello for Monitor, Ernst & Young Inc.
Edmond Lamek for Export Development Canada

Subject: Insolvency

Morawetz J.:

1 The Applicants move for approval of the key executive incentive plan ("KEIP") as it relates to the Applicants' senior leadership team ("SLT").

2 Counsel to the Applicants pointed out that the issues surrounding the KEIP have already been the subject of a previous motion. Mr. Tay made extensive references to my endorsement released March 12, 2009 [[2009 CarswellOnt 1330](#) (Ont. S.C.J. [Commercial List])], which provided the reasons for the granting of the order of March 6, 2009, which order approved the KEIP, except as it related to the SLTs and which order also approved the key employee retention plan ("KERP").

3 The issue for today is whether it is appropriate to approve the KEIP as it relates to the SLTs.

4 Counsel advised that this issue is also being considered in the Chapter 11 proceedings today, and that the Chapter 11 application on this point is proceeding without opposition from the Unsecured Creditors' Committee.

5 Counsel also advised that the KEIP applies to 29 employees of the Applicants of which 8 are members of the SLT and that of the potential \$23 million to be paid out under the KEIP, the amount allocated to the Canadian Applicants is \$6.8 million.

6 Although the amounts involved are not insignificant, it is necessary, in my view, to consider the KEIP in the context of the overall restructuring. In this respect, the endorsement should be read in conjunction with my reasons relating to the KERP and KEIP approval motion, (reasons of March 12, 2009) in which certain findings were made that supported the relief granted at that time.

7 The submissions of Mr. Tay were supported by Mr. Barnes on behalf of the Board of Directors. Mr. Barnes added that the Board could not function without an experienced leadership team and that the potential loss of management at this time could be very detrimental. Mr. Barnes also reiterated the complexity of the Nortel restructuring.

8 The Monitor also expressed its support of the Applicants' motion.

9 Mr. Zigler, on behalf of 2000 former employees noted, with some reluctance, that his clients do not object to the relief sought, but in so doing he made it clear that both he and counsel to the Applicants have represented to the Court that none of the milestones which would result in payments under the KEIP program are tied to a reduction of any pension funding payments or benefits currently being paid to or in respect of former employees or pensioners.

10 I note that the same representation was made to the Court during submissions at the March 6, 2009 hearing.

11 The only party who opposed the relief sought on the KEIP issue was Mr. Karp, on behalf of 60 severed employees. This group, according to Mr. Karp, could expand to 1,100 and his status is expected to be the subject of an upcoming motion in which he will be seeking Representative Counsel status. Mr. Karp objects to the proposed payments under the KEIP noting that his clients are not receiving severance payments.

12 Mr. Karp also advised that he has not taken any steps to appeal my decision of March 6, 2009.

13 Having considered the foregoing submissions, the approval sought today in respect of the KEIP is, in my view, consistent with prior approval of the KEIP and that the reasons applicable to the approval and implementation of both the KERP and the KEIP as they relate to the Applicants' employees (other than SLTs) are equally applicable to the Applicants' SLTs. An order shall issue granting the requested relief relating to the KEIP.

14 The Applicants also seek relief relating to the Termination of Change in Control Plan and the treatment of certain personal information of employees. The relief sought in both areas was not opposed and the record establishes that the requested relief is appropriate and it is granted.

15 An order shall issue in the form presented.

Tab 21

2009 CarswellOnt 4806
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4806, 179 A.C.W.S. (3d) 801, 57 C.B.R. (5th) 232, 76 C.C.P.B. 307

**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
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Morawetz J.

Heard: June 16, 2009

Judgment: August 18, 2009

Docket: 09-CL-7950

Counsel: Alan Merskey for Nortel Networks Corp. et al

Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Leanne Williams for Flextronics Inc.

J. Pasquariello for Monitor, Ernst & Young Inc.

B. Wadsworth for CAW-Canada

Thomas McRae for Recently Severed Calgary Employees

A. McKinnon for Former Employees

Mary Arzoymanidis for Bell Canada

Alex MacFarlane for Unsecured Creditors' Committee

Gavin Finlayson for Noteholders

Tina Lie for Superintendent of Financial Services of Ontario

Steven Graff, Ian Aversa for Current and Former Employees

Subject: Insolvency

MOTION by applicants for order extending stay in action; MOTION by moving parties for order lifting stay of proceedings.

Morawetz J.:

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 - 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

Background

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 - 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

- (a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;
- (b) the bulk of documentary discovery issues have been worked out;
- (c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and
- (d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. \$30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

Analysis

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.)) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the

ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against *Morneau* would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extent that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

Motion by applicants granted; motion by moving parties dismissed.

Tab 22

2016 ONSC 6800
Ontario Superior Court of Justice [Commercial List]

Performance Sports Group Ltd., Re

2016 CarswellOnt 17492, 2016 ONSC 6800, 272 A.C.W.S. (3d) 470, 41 C.B.R. (6th) 245

**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 PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC. (Applicants)

Newbould J.

Heard: October 31, 2016
Judgment: November 1, 2016
Docket: CV-16-11582-00CL

Counsel: Peter Howard, Kathryn Esaw, for Applicants
Robert I. Thornton, Rachel Bengino, for Proposed Monitor Ernst & Young Inc.
Bernard Boucher, John Tuzyk, for Sagard Capital Partners, L.P
David Bish, Adam Slavens, for Fairfax Financial Holdings Limited
Robert Staley, for Board of directors of Performance Sports Group Ltd.
Joseph Latham, Ryan Baulke, for Ad Hoc Committee of certain term lenders
Tony Reyes, Evan Cobb, for Bank of America, the ABL DIP lender

Subject: Insolvency

REASONS for granting of debtors' application for protection under *Companies' Creditors Arrangement Act*.

Newbould J.:

1 On October 31, 2016 Performance Sports Group Ltd. ("PSG") and the other Applicants (collectively, the "Applicants" or the "PSG Entities") applied for and were granted protection under the CCAA and an Initial Order was signed, for reasons to follow. These are my reasons.

2 PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the this proceeding.

3 The PSG Entities are leading designers, developers and manufacturers of high performance sports equipment and related apparel. Historically focused on hockey, the PSG Entities expanded their business to include equipment and apparel in the baseball/softball and lacrosse markets. The hockey business operates under the BAUER, MISSION and EASTON brands; the baseball/softball business operates under the EASTON and COMBAT brands, and the lacrosse business operates under the MAVERIK and CASCADE brands.

4 The hockey and baseball/softball markets are the PSG Entities' largest business focus, generating approximately 60% and 30% of the Applicants' sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities' total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

5 The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities. The Applicants have commenced parallel proceedings in the U.S. under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court for the District of Delaware.

Employees and benefits

6 As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

7 The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America Local 967 and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

8 Under the collective bargaining agreement with the unionized employees in Blainville, Quebec, Bauer Canada maintains a simplified defined contribution pension plan registered with Retraite Quebec. Under the plan, Bauer Canada matches employee contributions up to C\$0.35/per hour worked by the employee up to a maximum of 80 hours bi-weekly.

9 Bauer Canada provides a supplemental pension plan (the "Canadian SERP") for nine former executives which is not a registered pension plan and does not accept new participants. There is no funding obligation under these plans. As at May 31, 2016, the Canadian SERP had an accrued benefit obligation of approximately C\$4.53 million. The PSG Entities do not intend to continue paying the Canadian SERP obligations during the CCAA proceedings.

10 The PSG Entities provide a post-retirement life insurance plan to most Canadian employees. The life insurance plan is not funded and as at May 31, 2016 had an accrued benefit obligation of C\$614,000. In February, 2016, the PSG Entities closed a distribution facility in Mississauga, Ontario. Approximately 51 employees belonging to the Glass, Molders, Pottery, Plastics and Allied Workers International Union were terminated in January and February 2016 because of the closure.

11 Due to the consolidation of the COMBAT operations with the EASTON operations, the PSG Entities terminated the employment of an additional 85 individuals between July and October, 2016, of whom approximately 77% were employees located in Canada and 23% were employees located in the U.S. The workforce reductions, primarily related to consolidation of the COMBAT operations, have resulted in the number of the PSG Entities' employees falling by approximately 15% since the end of fiscal 2016 and approximately 19% since the end of calendar 2015.

Assets and liabilities

12 As at September 30, 2016, the Applicants had assets with a book value of approximately \$594 million and liabilities with a book value of approximately \$608 million.

13 The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses. The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines. In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.

14 The major liabilities of the PSG Entities are obligations under:

(a) a term loan facility (the "Term Loan Facility"): PSG is the borrower with a syndicate of lenders (the "Term Lenders") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "Term Loan Agreement"). As at October 28, 2016, approximately \$330.5 million plus \$1.4 million accrued interest was outstanding under the Term Loan Facility.

(b) an Asset-based revolving facility (the "ABL Facility" and together with the Term Loan Facility, the "Facilities"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "ABL Lenders" and, together with the Term Lenders, the "Secured Lenders") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "ABL Agreement"). As at October 28, 2016, approximately \$159 million was outstanding under the ABL Facility.

Problems leading to the CCAA filing

15 A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

a. Several key customers, retailers of sports equipment and apparel and sporting goods stores, abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable and reduced purchase orders.

b. A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines, being the Bauer Business and the Easton Business, has had an extremely negative effect on the PSG Entities' overall profitability.

c. The PSG Entities' financial results have been negatively affected by currency fluctuations.

d. The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.

e. The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

Anticipated stalking horse bid sales process

16 The Applicants, in response to the myriad of issues leading to the current liquidity crisis and in particular in response to their failure to timely file the reporting materials, engaged in a thorough review of the PSG Entities' strategic alternatives. The PSG Entities concluded that negotiating a going-concern sale of their businesses was the optimal course to maximize value, and structured a process by which do so.

17 As part of that process, the PSG Entities have entered into an asset purchase agreement (the "Stalking Horse Agreement") for the sale of substantially all of their assets to a group of investors led by Sagard Capital Partners, L.P., the holder of approximately 17% of the shares of PSG, and Fairfax Financial Holdings Limited for a purchase price of \$575 million. The Stalking Horse Agreement contemplates that the Applicants will continue as a going concern under new ownership, their secured debt will be fully repaid and payment of trade creditors. It further contemplates the preservation of a significant number of jobs in Canada and the U.S. The bid contemplated under the Stalking Horse Agreement will, subject to Court approval, serve as the stalking horse bid in a CCAA/Chapter 11 sales process to take place over the

next 60 days of the proceedings and which is expected to conclude early in 2017. Approval of the sales process will be sought on the come-back motion later in November.

Analysis

18 I am quite satisfied that each of the PSG Entities are debtor companies within the meaning of the CCAA and that they are insolvent with liabilities individually and as a whole over the threshold of \$5 million.

19 There are two DIP loans for which approval is sought, being an ABL DIP and a Term Loan DIP, as follows:

(a) A group comprised of members of the ABL Lenders ("ABL DIP Lenders"), will provide an operating loan facility of \$200 million (the "ABL DIP Facility") pursuant to an ABL DIP Credit Agreement (the "ABL DIP Credit Agreement"). The advances are expected to be made progressively and on an as-needed basis. All receipts of the Applicants will be applied to progressively replace the existing indebtedness under the ABL Credit Agreement, which is in the amount of \$160 million. Accordingly, the facility provided by the ABL DIP Lenders is estimated provide up an additional \$25 million of liquidity as compared to what is currently provided under the ABL Facility.

(b) The Sagard Group (the "Term Loan DIP Lenders" and together with the ABL DIP Lenders, the "DIP Lenders"), will provide a term loan facility (the "Term Loan DIP Facility" and together with the ABL DIP Facility, the "DIP Facilities") in the amount of \$361.3 million pursuant to a Term Loan DIP Credit Agreement (the "Term Loan DIP Credit Agreement" and together with the ABL DIP Credit Agreement, the "DIP Agreements"). The advances are expected to be made progressively as the funds are needed. The Term Loan DIP Facility will be applied to refinance the existing indebtedness under the Term Loan Credit Agreement, in the amount of approximately \$331.3 million, to finance operations and to pay expenditures pertaining to the restructuring process. Accordingly, the Term Loan DIP Facility will provide approximately \$30 million in new liquidity to fund ongoing operating and capital expenses during the restructuring proceedings.

20 The DIP Facilities were negotiated after the Applicants retained Centerview Partners LLC to assist in putting the required interim financing in place. The Applicants, with the assistance of Centerview, determined that obtaining interim financing from a third party would be extremely challenging, unless such facility was provided either junior to the ABL Facility and Term Loan Facility, on an unsecured basis, or paired with a refinancing of the existing indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

21 I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP Facility.

The Monitor¹ is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

22 Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts

to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

23 The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

- (a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;
- (b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;
- (c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;
- (d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 — all of whom are entitled to be paid for their services under U.S. bankruptcy law; and
- (e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

24 There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. See *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 43.

25 I am satisfied that an order should be made permitting the payments as requested. Any interruption of supply or service by the critical suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern. Certain of the critical suppliers may not be able to continue to operate if not paid for pre-filing goods and services. The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services. There is a substantial risk that certain of the critical suppliers, including foreign suppliers, will interrupt supply if the pre-filing arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns. Payment of amounts in excess of \$10,000 will require Monitor approval.

26 The PSG Entities seek approval to continue the use of their current Transfer Pricing Model to operate their business in the ordinary course. The Transfer Pricing Model is intended to ensure that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business. The Applicants say that to ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model. No doubt section 11 of the CCAA gives the Court jurisdiction to make the order sought and to continue the business as it has been operated prior to the CCAA and in this case it is desirable in light of the intention to sell the business as a going concern. I approve the continued use of the Transfer Pricing Model. In doing so, I am not to be taken as making any judgment as to the validity of the Transfer Pricing Model, i.e. whether it would pass muster with the relevant taxing authorities.

27 The PSG Entities seek an administrative charge in the amount of \$7.5 million, and it is supported by the Monitor. The charge is to cover the fees and disbursements of the Monitor, U.S. and Canadian counsel to the Monitor, U.S. and Canadian counsel to the Applicants and counsel to the directors of the Applicants, and as defined in the APL DIP Agreement, and is to cover the fees and disbursements incurred both before and after the making of the Initial Order.

28 I realize that the model order provides for an administration charge to protect fees and disbursements incurred both before and after the order is made by of the Monitor, counsel to the Monitor and the Applicant's counsel. In this case, I raised a concern that past fees for a broad number of lawyers, including defence class action counsel in the U.S., could be paid from cash whereas it appeared from the material that there may be unpaid severance or other payments owing to employees in Canada that would not be paid.

29 Normally it is not an issue what an administration charge covers, with professionals taking care when advising companies in financial trouble and contemplating CCAA proceedings that they remain current with their billings. The CCAA does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, but the language would appear to imply that it is to cover only current fees and disbursement. Section 11.52(1) provides:

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

30 Regarding (a), a Monitor is appointed in the Initial Order and its duties are performed during the CCAA proceeding, not before. Regarding (b), the language "for the purpose of proceedings under this Act" would appear to relate to proceedings, and not some other work such as a lawyer for the debtor defending litigation against the debtor. The same can be said regarding the language in (c) "effective participation in proceedings under this Act".

31 In response to my concerns about the Canadian employees being protected against past unpaid obligations, I was advised that it is the intention of the applicants to bring a motion on the come-back hearing to permit all past outstanding amounts to be paid to the Canadian employees. No counsel appearing for any of the other parties voiced any concern with that. In the circumstances I permitted the administration charge to be granted. If no such motion is brought on the come-back hearing or it is not granted, the administration charge should be revisited.

32 It appears clear, however, that an administration charge under section 11.52(1) can only be granted to cover work done in connection with a CCAA proceeding. Thus it is not possible for such a charge to protect fees of lawyers in other jurisdictions who may be engaged by the debtor either in foreign insolvency proceedings or other litigation. In the circumstances, the administration charge in this case shall not be used to cover the fees and disbursements of any of the applicants' lawyers in the U.S. chapter 11 proceedings or in any class action or other suit brought against any of the applicants. It may be that in the future, thought should be given as to whether it is appropriate at all to provide for an administration charge to cover pre-filing expenses.

33 The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of that money will be used to fund the deficit expected to be experienced by the US PSG Entities during the same

period. At this time of year, due to hockey sales, the Canadian PSG Entities fund the US PSG Entities. The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.

34 Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 to make such order as the court considers appropriate. See *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) and *Fraser Papers Inc., Re* [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], 2009 CanLII 32698.

35 In this case, I also raised the issue about cash leaving Canada during the CCAA process while unpaid amounts owing to employees in Canada were outstanding. Apart from the comfort of the anticipated motion on the come-back hearing to pay these unpaid amounts, the Monitor is of the view that the intercompany charge is the best way to protect the Canadian creditors. The Monitor states that while it is difficult at this juncture to ascertain whether the intercompany charge is sufficient to protect the interest of each individual estate, considering that the Stalking Horse bid contemplates that there should be substantial funds available after the payment of the secured creditors' claims, the intercompany charge appears to offer some measure of protection to the individual estates. In view of the foregoing, the Proposed Monitor considers that the intercompany charge is reasonable in the circumstances. I approve the intercompany charge.

36 A standard directors' charge for \$7.5 million is supported by the Monitor and it is approved, as is the request that Brian J. Fox of Alvarez & Marsal North America, LLC be appointed as the Chief Restructuring Officer of the PSG Entities. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO.

Order accordingly.

Footnotes

- 1 Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst & Young in this decision as the Monitor.

Tab 23

2011 ONSC 2061
Ontario Superior Court of Justice

Priszm Income Fund, Re

2011 CarswellOnt 2258, 2011 ONSC 2061, [2011] O.J. No. 1491, 200 A.C.W.S. (3d) 626, 75 C.B.R. (5th) 213

**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 Priszm Income Fund,
Priszm Canadian Operating Trust, Priszm Inc. and Kit Finance Inc. (Applicants)

Morawetz J.

Heard: March 31, 2011

Judgment: March 31, 2011

Docket: CV-11-915900CL

Counsel: A.J. Taylor, M. Konyukhova for Priszm Entities
G. Finlayson — Conflict Counsel for the Priszm Entities
M. Wasserman for Proposed Monitor, FTI Consulting Canada Inc.
P. Shea for Prudential Insurance
P. Huff for Directors of Priszm
C. Cosgriffe for Yum! Restaurants International (Canada) LP
D. Ullmann for 2279549 Ontario Inc.

Subject: Insolvency

APPLICATION by affiliated debtor companies for relief under Companies' Creditors Arrangements Act and to have stay of proceedings of initial order extended to limited partnership.

Morawetz J.:

1 Priszm Income Fund ("Priszm Fund"), Priszm Canadian Operating Trust ("Priszm Trust"), Priszm Inc. ("Priszm GP") and KIT Finance Inc. ("KIT Finance") (collectively, the "Applicants") seek relief under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants also seek to have the stay of proceedings and other benefits of an initial order under the CCAA extended to Priszm Limited Partnership ("Priszm LP"). Priszm Fund, Priszm Trust, Priszm GP, Priszm LP and KIT Finance are collectively referred to as the "Priszm Entities".

Background

2 The Priszm Entities own and operate 428 KFC, Taco Bell and Pizza Hut restaurants in seven provinces across Canada. As a result of declining sales and the inability to secure additional or alternate financing, the Priszm Entities cannot meet their liabilities as they come due and are therefore insolvent.

3 The Priszm Entities seek a stay of proceedings under the CCAA to allow them to secure a going concern solution for the business including approximately 6,500 employees and numerous suppliers, landlords and other creditors and to maximize recovery for the Priszm Entities' stakeholders.

4 On the return of the motion, the only party that took issue with the proposed relief was Yum! Restaurants International (Canada) LP (the "Franchisor"). Counsel to the Franchisor indicated that the Franchisor was not opposing

the form of order, but explicitly does not consent to the stated intention of the Priszm Entities not to pay franchise royalties to the Franchisor.

5 The background facts with respect to this application are set out in the Affidavit of Deborah J. Papernick, sworn March 31, 2011 (the "Papernick Affidavit"). Further details are also contained in a pre-filing report submitted by FTI Consulting Canada Inc. ("FTI") in its capacity as proposed monitor. FTI has been acting as financial advisor to the Priszm Entities since December 13, 2010.

6 Priszm LP is a franchisee of the Franchisor and is Canada's largest independent quick service restaurant operator. Priszm LP is the largest operator of the KFC concept in Canada, accounting for approximately 60% of all KFC product sales in Canada. In addition, Priszm LP operates a number of multi-branded restaurants that combine a KFC restaurant with either a Taco Bell or a Pizza Hut restaurant.

7 As of March 25, 2011, the Priszm Entities operated 428 restaurants in seven provinces: British Columbia, Alberta, Manitoba, Ontario, Quebec, Nova Scotia and New Brunswick.

8 The business of Priszm LP is to develop, acquire, make investments in and conduct the business and ownership, operation and lease of assets and property in connection with the quick service restaurant business in Canada.

9 Priszm Fund is an income trust indirectly holding approximately 60% of Priszm LP's trust units.

10 Priszm Trust is an unincorporated, limited purpose trust wholly-owned by Priszm Fund created to acquire and hold 60% of the outstanding partnership units of Priszm LP, as well as approximately 60% of Priszm GP's units, for Priszm Fund.

11 Priszm GP is a corporation which acts as general partner of Priszm LP.

12 KIT Finance is a corporation created to act as borrower for the Prudential Loan, described below.

13 The principal and head offices of Priszm Fund, Priszm LP and Priszm GP are located in Vaughan, Ontario.

14 As at March 31, 2011, the Priszm Entities had short-term and long-term indebtedness totalling: \$98.8 million pursuant to the following instruments:

(a) Note purchase and private shelf agreement dated January 12, 2006 ("Note Purchase Agreement") between KIT Finance, Priszm GP and Prudential Investment Management ("Prudential") - \$67.3 million;

(b) Subordinated Debentures issued by Priszm Fund due June 30, 2012 - \$30 million - \$31.5 million.

15 The indebtedness under the Note Purchase Agreement (the "Prudential Loan") is guaranteed by and secured by substantially all of the assets of Priszm GP, KIT Finance and Priszm LP and by limited recourse guarantees and pledge agreements granted by Priszm Fund and Priszm Trust.

16 In addition, the Priszm Entities have approximately \$39.1 million of accrued and unpaid liabilities.

17 As a result of slower than forecast sales, on September 5, 2010, Priszm Fund breached the Prudential Financial covenant and remains in non-compliance. As a result, the Prudential Loan became callable.

18 Priszm Fund has also failed to make an interest payment of \$975,000 due on December 31, 2010 in respect to the Subordinated Debentures.

19 The Priszm Entities have also ceased paying certain obligations to the Franchisor as they come due.

Findings

20 I am satisfied that Priszm GP and KIT Finance are "companies" within the definition of the CCAA. I am also satisfied that Priszm Fund and Priszm Trust fall within the definition of "income trust" under the CCAA and are "companies" to which the CCAA applies.

21 I am also satisfied that the Priszm Entities are insolvent. In arriving at this determination, I have considered the definition of "insolvent" in the context of the CCAA as set out in *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]), leave to appeal refused, 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused 2004 CarswellOnt 5200 (S.C.C.). In *Stelco*, Farley J. applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying the definition of "insolvent person" within the meaning of s. 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") to include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

22 In this case, the Priszm Entities are unable to meet their obligations to creditors and have ceased paying certain obligations as they become due.

23 Further, the Priszm Entities are affiliated debtor companies with total claims against in excess of \$100 million.

24 I accept the submission put forth by counsel to the Applicants to the effect that the Applicants are "debtor companies" to which the CCAA applies.

25 At the present time, the Priszm Entities are in the process of coordinating a sale process for certain assets. In these circumstances, I have been persuaded that a stay of proceedings is appropriate. In arriving at this determination, I have considered *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]).

26 The CCAA definition of an eligible company does not expressly include partnerships. However, CCAA courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehndorff, supra*, and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]).

27 The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.

28 Having reviewed the affidavit of Ms. Papernick, I have been persuaded that it is appropriate to extend CCAA protection to Priszm LP.

29 The Priszm Entities are also seeking an order: (a) declaring certain of their suppliers to be critical suppliers within the meaning of the CCAA; (b) requiring such suppliers to continue to supply on terms and conditions consistent with existing arrangements and past practice as amended by the initial order; (c) granting a charge over the Property as security for payment for goods and services supplied after the date of the Initial Order.

30 Section 11.4 of the CCAA provides the court jurisdiction to declare a person to be a critical supplier. The CCAA does not contain a definition of "critical supplier" but pursuant to 11.4(1), the court must be satisfied that the person sought to be declared a critical supplier "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 operations".

31 Counsel submits that the Priszm Entities' business is virtually entirely reliant on their ability to prepare, cook and sell their products and that given the perishable nature of their products, the Priszm Entities maintain very little inventory and rely on an uninterrupted flow of deliveries and continued availability of various products. In addition, the

Priszm Entities are highly dependent on continued and timely provision of waste disposal and information technology services and various utilities.

32 With the assistance of the proposed monitor, the Priszm Entities have identified a number of suppliers which are critical to their ongoing operation and have organized these suppliers into five categories:

- (a) chicken suppliers;
- (b) other food and restaurant consumables;
- (c) utility service providers;
- (d) suppliers of waste disposal services;
- (e) providers of appliance repair and information technology services.

33 A complete list of the suppliers considered critical by the Priszm Entities (the "Critical Suppliers") is attached at Schedule "A" to the proposed Initial Order.

34 Having reviewed the record, I have been satisfied that any interruption of supply by the Critical Suppliers could have an immediate material adverse impact on the Priszm Entities business, operations and cash flow such that it is, in my view, appropriate to declare the Critical Suppliers as "critical suppliers" pursuant to the CCAA.

35 Further, I accept the submission of counsel to the Priszm Entities that it is appropriate to grant a Critical Suppliers' Charge to rank behind the Administrative Charge.

36 The Priszm Entities also seek approval of the DIP Facility in the amount up to \$3 million to be secured by the DIP Lenders' Charge.

37 Subsection 11.2(4) of the CCAA sets out the factors to be considered by the court in deciding whether to grant a DIP Financing Charge. These factors include:

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

38 Counsel submits that the following factors support the granting of the DIP Lenders' Charge:

- (a) the Priszm Entities expect to continue daily operations during the proceedings;
- (b) management will be overseen by the monitor who will oversee spending under the DIP Financing;
- (c) while it is not anticipated that the Priszm Entities will require any additional financing prior to June 30, 2011, actual funding requirements may vary;

(d) the ability to borrow funds from a court-approved DIP Facility will be crucial to retain the confidence of stakeholders;

(e) secured creditors have either been given notice of the DIP Lenders' Charge or are not affected by it;

(f) the DIP Lenders' Charge does not secure an obligation that existed before the granting of the Initial Order; and

(g) the proposed monitor is supportive of the DIP Facility and the DIP Lenders' Charge.

39 Based on the foregoing, I am of the view that it is appropriate to approve the DIP Facility and grant the DIP Lenders' Charge.

40 The trustees and directors of the Priszm Entities have stated their intention to resign. In order to ensure ongoing corporate governance, the Priszm Entities seek an order appointing 2279549 Ontario Inc. as the CRO. They have also requested that the Chief Restructuring Officer be afforded the protections outlined in the draft Initial Order.

41 The Applicants are seeking an Administration Charge over the property in the amount of \$1.5 million to secure the fees of the proposed monitor, its counsel, counsel to the Priszm Entities and the CRO. It is proposed that this charge will rank in priority to all other security interests in the Priszm assets, other than any "secured creditor", as defined in the CCAA, who has not received notice of the application for CCAA protection.

42 The authority to provide such a charge is set out in s. 11.5(2) of the CCAA.

43 The Priszm Entities submit that the following factors support the granting of the Administration Charge:

(a) the Priszm Entities operate an extensive business;

(b) the beneficiaries will provide essential legal and financial advice and leadership;

(c) there is no anticipated unwarranted duplication of roles;

(d) secured creditors likely to be affected by the charge were provided with notice and do not object to the Administration Charge; and

(e) the proposed monitor, in its pre-filing report, supports the Administration Charge.

44 I am satisfied that this is an appropriate case in which to grant the Administration Charge in the form requested.

45 I am also satisfied that it is appropriate to grant a Directors' Charge in the amount of \$9.8 million to protect directors and officers and the CRO from certain potential liabilities. In arriving at this determination, I have considered the provisions of s. 11.5(1) of the CCAA which addresses the issue of directors' and officers' charges. I have also considered that the Priszm Entities maintain directors' and officers' liability insurance ("D&O Insurance"). The current policy provides a total of \$31 million in coverage. It is expected that the D&O Insurance will provide coverage sufficient to protect the directors and officers and the draft Initial Order provides that the Directors' Charge shall only apply to the extent that the D&O Insurance is not adequate.

46 For the foregoing reasons, I am satisfied that it is appropriate to grant the CCAA Initial Order in the form requested.

47 Paragraph 14 of the form of order provides for a stay of proceedings up to and including April 29, 2011. Paragraph 59 provides for the standard comeback provision.

48 The Initial Order was signed 9:30 a.m. Eastern Daylight Time on March 31, 2011.

Application granted.

End of Document

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Tab 24

2014 ONSC 2004
Ontario Superior Court of Justice

Redstone Investment Corp., Re

2014 CarswellOnt 5119, 2014 ONSC 2004, 239 A.C.W.S. (3d) 848

**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 Redstone
Investment Corporation and Redstone Capital Corporation

Morawetz R.S.J.

Heard: March 28, 2014
Judgment: March 28, 2014
Docket: CV-14-10495-00CL

Counsel: Craig J. Hill, Roger Jaipargas, for Redstone Investment Corporation and Redstone Capital Corporation
Steven Graff, Ian Aversa, for Proposed Monitor, Grant Thornton Ltd.

Subject: Insolvency

APPLICATION for protection under Companies' Creditors Arrangement Act.

Morawetz R.S.J.:

1 This application was heard, without notice, on March 28, 2014. At the conclusion of the hearing, I endorsed the record as follows: "CCAA protection granted. Order has been signed. Reasons will follow. These are the reasons.

2 Redstone Investment Corporation ("RIC") and Redstone Capital Corporation ("RCC", and together with RIC, the "Companies" or the "Applicants") apply for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

3 The Companies' seek an Initial Order under the CCAA to permit the Companies to protect their business, ensure ongoing operations and preserve value while the Companies seek to restructure their affairs.

4 The facts relevant to this application are set out in the Affidavit of Eric Hansen sworn March 27, 2014 (the "Hansen Affidavit") and are summarized below.

5 Capitalized terms not defined herein have the meanings ascribed to them in the Hansen Affidavit.

Factual Background

6 RIC is an Ontario Corporation with a registered office in Toronto, Ontario.

7 RCC is an Ontario corporation with a registered office in Toronto, Ontario.

8 The shareholders of RCC are Mr. Ed So and Target Capital Inc. The shareholders of RIC are Mr. So and Mr. Eric Hansen.

9 Mr. Hansen states that RIC is a commercial lender to Canadian based small to medium sized businesses and established entrepreneurs that wish to obtain additional working capital on a short-term basis from third party lenders such as RIC.

10 Mr. Hansen reports that as of February 28, 2014, RIC's lending portfolio (the "RIC Portfolio") includes 35 accounts with loans totalling approximately \$24,648,000. Mr. Hansen further reports that all of the loans completed by RIC (the "RIC Loans") to its borrowers are secured and, typically, are supported by personal guarantees from shareholders where the borrower is a corporation. The RIC Loans are fully assignable.

11 Mr. Hansen further reports that RIC sought to raise capital for its lending activities by way of a continuous offering (the "RIC Offering") of unsecured promissory notes of RIC (the "RIC Notes") pursuant to exemptions from the prospectus requirements of applicable securities legislation in each of the provinces and territories of Canada.

12 Mr. Hansen reports that RIC is not registered in any capacity with any provincial or territorial securities regulatory authority and certain of the trades resulting from the distribution of RIC Notes have been made through an agent who is a registered Exempt Market Dealer ("EMD") or made to a registered EMD who is purchasing as principal or in reliance on other dealer registration exemptions.

13 Mr. Hansen further reports that RIC pays compensation realized on the sale of the RIC notes to a number of parties, including the EMD. In addition, 1710814 Ontario Inc. ("Redstone Management Services" or "RMS"), who acts as manager may pay certain EMD's an additional fee over and above payment by RIC or assisting in the sale of RIC Notes.

14 Each of the RIC Notes has a principal amount equal to the amount that its holder paid to RIC to acquire that RIC Note. The RIC Notes mature and become payable at varying times from 180 days up to 5 years, as selected by the subscriber of the RIC Notes.

15 RCC was established for the purpose of loaning funds to RIC. Forty percent of the shares of RCC are owned by Mr. Edward So and 60% of the issued and outstanding shares are owned by Target Capital Inc., a publically traded investment company with its shares listed on the TSX Venture Exchange.

16 RCC has sought to raise capital for its lending activities by way of a continuous offering (the "RCC Offering") of unsecured, fixed rate bonds of RCC (the "RCC Bonds") pursuant to exemptions from the prospectus requirements of applicable securities legislation in each of the provinces and territories of Canada. Since its inception, RCC has issued 710 RCC Bonds raising \$16,486,000.

17 RCC's debt obligations represented by the RCC Bonds are unsecured obligations and rank *pari passu* amongst themselves. Mr. Hansen advises that RCC Bonds will mature and become payable at varying times from 6 months up to 5 years as selected by the subscriber of the RCC Bonds.

18 Mr. Hansen sets out that prior to January 2014, Mr. So was the sole officer and director of the Applicants. He states that certain events arose in December 2013 that resulted in a determination that someone other than Mr. So had to oversee the operations of the Applicants to ensure the protection of the interests of the investors, including the preservation of investor capital. Mr. Hansen reports that with Mr. So's concurrence, he became the sole officer and director of the Applicants, as well as President and CEO of both of the Applicants in January 2014.

19 Shortly after Mr. Hansen assumed the management roles, a review of RIC's and RCC's financial position commenced and has been ongoing to date.

20 During the review period, previously unreported loan losses for RIC for the year ended August 31, 2013 were discovered and concerns developed with respect to the transfer of the Applicants' funds to RMS and the Applicants' funds by RMS at the direction of Mr. So.

21 Mr. Hansen reports that one of the primary reasons giving rise to the financial problems of the Applicants is the recent discovery of the movement of assets from RIC to RMS. As of March 10, 2014, Mr. Hansen states that RMS owes the Applicants approximately \$6.5 million.

22 Mr. Hansen also reports that for the three month period commencing April 1, 2013, RIC will have promissory note maturities of \$3,139,000 and RCC will have bond maturities of \$1,130,300 for a total of \$4,269,300.

23 For the three month period commencing April 1, 2014, RIC will have interest payments on promissory notes of approximately \$570,000 and RCC will have interest payments on bonds of approximately \$377,000 for a total of \$947,00.

24 In addition, Mr. Hansen reports that RIC and RCC have not repaid all of the promissory note and bond maturities for March 2014 totalling \$850,000 and RIC and RCC have not paid the interest owing for the month of March, totalling \$296,000.

25 From the period September 1, 2013 to January 31, 2013, Mr. Hansen reports that the Applicants have experienced a loss of approximately \$1,970,000. Anticipated losses for the months of February and March 2014 are expected to be approximately \$330,000 in each month.

26 On January 6, 2014, KPMG LLP, the Applicants' auditors, resigned. As a result of the resignation, the auditors did not report on the financial statements for the Applicants for the year ended August 31, 2013 and the most recent audited financial statements are for the period ending August 31, 2012, which statements were attached to the affidavit of Mr. Hansen.

27 Mr. Hansen reports that RCC has no secured creditors. RIC has granted security to RCC in respect of obligations under a loan agreement.

28 As of February 28, 2014, RIC's unsecured obligations to the RIC Noteholders was approximately \$23.3 million dollars, inclusive of interest to February 28, 2014.

29 As of February 28, 2014, RCC's unsecured obligations to the RCC Bond Holders was approximately \$16.3 million, inclusive of interest to February 28, 2014.

30 There are no employees for RIC and RCC, as the services to each of the Applicants were provided by RMS pursuant to the Management Services Agreement. There are a number of consultants to RIC and RCC who have historically been paid either by RMS or RIC.

31 The Applicants have no pension plans.

32 RIC has trade debt of approximately \$126,000 and RCC has trade debt of approximately \$98,000.

33 Grant Thornton Ltd. ("GTL") was engaged by the Applicants on March 17, 2014 and Mr. Hansen states that GTL has assisted the Applicants in preparing the *CCAA* application. GTL is the proposed monitor.

34 The affidavit of Mr. Hansen also sets out the basis for an administration charge (paras. 57-58) and a Directors' and Officers' Charge (paras. 59-62).

35 Mr. Hansen concludes his affidavit by stating that given that RCC and RIC are not currently making any interest or maturity payments to RIC Noteholders or RCC Bondholders and that he was receiving a number of inquiries from EMD's on a daily basis as to the financial state of both of the Applicants, he is of the view that it is necessary to make application for *CCAA* protection on an urgent basis.

36 GTL filed a report which provides some commentary on the financial position, the cash-flow projection, the Administration Charge and the D&O Charge.

37 Mr. Hansen is of the view that the Applicants are insolvent and in order to ensure the best possible recovery for stakeholders, the Applicants have determined that either a sale of the RIC portfolio is required or an orderly wind-down is required. It is the intention of the Applicants to work closely with a *CCAA* monitor with a view to developing a sale and marketing process for the RIC Portfolio and return to court in the coming weeks to seek directions with respect to a realization strategy for the RIC Portfolio.

38 The Applicants are of a view that a *CCAA* stay of proceedings is needed to ensure that the RIC Portfolio can be sold in an efficient manner under the protection of the Court without the threat of proceedings against the Applicants or a discontinuation of essential services.

39 GTL has concluded that a stay of proceedings is necessary to allow the Applicants to maintain their business and to provide the Applicants with the opportunity to implement their restructuring and realization plan in a stable environment.

40 GTL has also outlined a communication strategy which will be necessary in these circumstances as the Applicants have in excess of 1000 investors, most of whom are unsecured debtholders of RIC Notes and unsecured debtholders of RCC Bonds. These investors have not received notice of this application and I accept the Monitor's recommendation that it is necessary to ensure that an effective communication strategy is in place to deal with the anticipated concerns of investors.

Analysis

41 The primary issues to be determined on this application are whether the Court should:

- (a) grant protection to the Applicants under the *CCAA*;
- (b) grant the Administration Charge; and
- (c) grant the D&O Charge.

42 RIC is a "company" within the meaning of the *CCAA* because it is a corporation incorporated under the laws of Ontario. Similarly, RCC is a "company" within the meaning of the *CCAA* because it is a corporation incorporated under the laws of Ontario.

43 The *CCAA* does not define "insolvent". *CCAA* courts have taken guidance from the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") in assessing whether an applicant is a debtor company in the context of the *CCAA*. The definition of "insolvent person" in the BIA means a person (a) who is not bankrupt; and (2) who resides, carries on business or has property in Canada; and (iii) whose liability to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

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

(see: *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) ["*Stelco*"] at paras. 21-22)

44 A company is also insolvent for the purposes of the *CCAA* if there is a reasonably foreseeable expectation, at the time of filing, that there is a looming liquidity crisis that would result in the company being unable to pay its debts as

they generally become due if a stay of proceedings and ancillary protection are not granted by the court (see: *Stelco*, *supra*, para 40).

45 Taken together, RIC and RCC face current claims in the total approximate amount of \$6,362,300.

46 In this case, the Applicants meet both the test of insolvency under the BIA and the expanded test for insolvency as the Applicants will eventually not have the funds necessary to make the interest and maturity payments under the RIC Notes and the RCC Bonds.

47 I am satisfied that the Applicants are each a "debtor company" within the meaning of the CCAA and qualify for protection under the CCAA.

48 The Applicants have filed the required financial information, including the cash flow information and accordingly meet the requirements of the CCAA in this regard.

49 Among the relief sought by the Applicants in this application is a stay of proceedings. Section 11.02 of the CCAA provides that the Court may, on an initial application, for a period of not more than thirty days, impose a stay of proceedings in respect of the Applicants if the Applicants satisfy the Court that circumstances exist which make the order appropriate.

50 The purpose of any stay of proceedings issued pursuant to section 11 of the CCAA is to maintain the status quo for a period of time so that proceedings can be taken under the CCAA for the wellbeing of the debtor company and of the creditors. Further, the stay order is intended to prevent any creditor from obtaining an advantage over other creditors while the company is attempting to reorganize its affairs (see: *Comstock Canada Ltd., Re* (2013), 8 C.B.R. (6th) 142 (Ont. S.C.J. [Commercial List])).

51 Having reviewed the record and hearing submissions, I am satisfied that it is just and reasonable to grant the requested stay of proceedings in this case because a stay of proceedings will:

- (a) ensure that the RIC Portfolio can be sold or wound down in an efficient manner under the protection of the Court without the threat of proceedings against the Applicants or the discontinuation of essential services;
- (b) restrain, temporarily, the exercise of rights and remedies under agreements with which the Applicants are a party, preserve the status quo and restrain existing creditors from taking unfair advantage in the circumstances; and
- (c) would be beneficial so that the RIC Portfolio can be monetized by either a sale of the RIC Portfolio or a wind down of the RIC Portfolio, with a view to an orderly distribution of the assets of the Applicants to their stakeholders.

Charges

52 The Applicants are seeking approval of Court-ordered charges over their assets for costs relating to the administration of the CCAA proceedings and for the indemnification of their directors and officers. Save and except for RCC (with respect to its secured claim against RIC), there are no secured creditors which would be affected by such Court-ordered charges.

53 The Applicants are seeking a charge over their assets, property and undertaking in the amount of \$750,000 (the "Administration Charge") to secure the fees and disbursements at the standard rates and charges of the Monitor, the Monitor's counsel and the Applicants' legal counsel. The Administration Charge would rank in priority to all other charges set out in the Initial Order.

54 Section 11.52 of the CCAA provides this Court with the jurisdiction to grant the Administration Charge.

55 In addition to the considerations provided for in section 11.52 of the *CCAA*, in *Canwest Publishing Inc./Publications Canwest Inc., Re* [2010 CarswellOnt 212 (Ont. S.C.J. [Commercial List])], the Court set out a non-exhaustive list of factors for a *CCAA* Court to consider in deciding to grant an administration charge, which include:

- (a) the size and complexity of the business 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.

56 In this case, I am satisfied the Administration Charge is warranted and necessary, and it is appropriate to grant the Administration Charge because:

- (a) the beneficiaries of the Administration Charge will provide essential legal and financial advice and support the Applicants throughout the *CCAA* proceedings;
- (b) the roles of the Applicants legal counsel, the monitor and the monitor's legal counsel are distinct and there is no anticipated or unwarranted duplication;
- (c) the Administration Charge does not purport to prime any secured party who has not received notice of this Application; and
- (d) the proposed Monitor supports the granting of the Administration Charge.

57 The Applicant is also seeking a charge in the amount of \$100,000 (the "D&O Charge") over the assets, property and undertakings of the Applicants to indemnify the directors and officers of the Applicants in respect of certain potential liabilities they may incur in such capacities after the date of an Initial Order. The sole director and officer of the Applicants has indicated that his ongoing involvement is conditional upon the granting of an order under the *CCAA*. The D&O Charge is subordinate to the Administration Charge.

58 Section 11.51 of the *CCAA* provides this Court with the jurisdiction to grant the D&O Charge.

59 In *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]), the Court outlined the test for granting a charge under section 11.51 of the *CCAA*:

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.

60 In this case, I am satisfied the D&O Charge is warranted and necessary, and it is appropriate to grant the D&O Charge because:

- (a) the existing Policy contains several exclusions and limitations to the coverage it provides and there is potential for there to be insufficient coverage in respect of the potential liabilities;

(b) a comparable level of insurance coverage is not available through any other insurance provider at rates more favourable than those currently in place; and

(c) the D&O Charge is required in order to provide a level of protection with respect to possible liabilities that may be imposed on the sole director and officer of the Applicants.

61 In making this determination, I have also taken into account that the proposed Monitor support the requested relief and that the D & O Charge does not purport to prime any secured party who has not received notice of this application.

62 GTL has also reported that they have been advised by the Applicants' consultants that the Applicants may be unable to compile a mailing list of the investors within 5 business days of the making of the order. I have acknowledged this concern and accordingly, the initial order extends the date for the required notice to 10 business days from the date of the initial order.

Disposition

63 For the foregoing reasons, the Initial Order is granted and has been signed.

64 This initial order was granted without notice. Paragraph 46 of the initial order is the usual come-back language. The parties wishing to schedule court hearings should do so through the Commercial List Office.

Application granted.

Tab 25

2009 CarswellOnt 391
Ontario Superior Court of Justice [Commercial List]

Smurfit-Stone Container Canada Inc., Re

2009 CarswellOnt 391, [2009] O.J. No. 349, 174 A.C.W.S. (3d) 933, 50 C.B.R. (5th) 71

**In the Matter of a Plan of Compromise or Arrangement
of Smurfit-Stone Container Canada Inc. and others**

Pepall J.

Judgment: January 27, 2009
Docket: CV-09-7966-00CL

Counsel: Sean F. Dunphy, Alexander D. Rose for Applicants
Robert J. Chadwick, Christopher G. Armstrong for Proposed Monitor
Susan Grundy for DIP Lenders

Subject: Insolvency

APPLICATION by debtor companies for relief under *Companies' Creditor Arrangement Act* and order for extension of terms of initial CCAA order to two affiliated partnerships.

Pepall J.:

1 Smurfit-Stone Container Canada Inc. ("SSC Canada"), Stone Container Finance Company of Canada II, MBI Limited, 3083527 Nova Scotia Company, BC Shipper Supplies Ltd., Specialty Containers Inc., 639647 British Columbia Limited, 605681 N.B. Inc. Canada, and Francobec Company (the "Applicants") seek relief under the CCAA. They also request that the terms of the Initial CCAA order apply to two Canadian partnerships affiliated with the Applicants, namely Smurfit-MBI and SLP Finance General Partnership (the "CCAA Entities"). Each of these CCAA Entities has filed for Chapter 11 protection in the U.S. Deloitte and Touche Inc. has consented to act as Monitor in the CCAA proceedings.

2 On January 26, 2009, Smurfit-Stone Container Corporation ("Smurfit-Stone") and certain of its affiliates including SSC Canada commenced Chapter 11 proceedings in the U.S. Smurfit-Stone is based in St. Louis, Missouri and in Chicago, Illinois. It is a leading North American producer of paperboard products, market pulp, corrugated containers and other specialty packaging products. It is also one of the world's biggest recyclers of paper. It currently holds approximately 18% of the North American container board market. Its operations have been negatively affected by the global economic downturn, the decrease in consumer spending, the manufacturing exodus from North America, a rise in costs, and a general market shift away from paper-based packaging. It has numerous direct and indirect subsidiaries.

3 SSC Canada and Smurfit-MBI, an Ontario limited partnership, are its principal Canadian operating entities. SSC Canada operates mills and plants producing liner board, corrugating medium and food board. Smurfit-MBI is a converting operation that produces corrugated containers using liner board from the mills. Its general partner is MBI Limited which carries on no business other than acting as Smurfit-MBI's general partner and has no assets other than its interest in Smurfit-MBI.

4 3083527 Nova Scotia Company is wholly-owned by SSC Canada. It does not carry on business except that it is one of the two Smurfit-MBI limited partners (the other being SSC Canada). BC Shipper Supplies Ltd. is no longer active.

Specialty Containers Inc.'s assets were all sold in 2008. 639647 British Columbia Limited has no operations and holds the shares of BC Shippers Supplies Ltd. and Specialty Containers Inc.

5 SLP Finance General Partnership is owned by two Delaware companies. It does not carry on operations but owns the shares of 605681 N. B. Inc. which was liquidated in 2005 and of Francobec Company, a Nova Scotia company which previously operated a hardwood chipping facility which is now inactive. It has US\$574 million in investment assets.

6 Stone Container Finance Company of Canada II does not carry on business except that it issued notes, the proceeds of which were remitted to SSC Canada. It has assets of US\$62 million and liabilities of US\$207 million. Collectively all of these companies and partnerships are referred to as the CCAA Entities.

7 The CCAA Entities employ approximately 2,600 people across Canada many of whom are unionized.

8 Smurfit-Stone operates as a North American company rather than as a collection of individual business units. The U.S. and Canadian operations are fully integrated. In this regard, they have a centralized cash management system. All high level management decisions are made by a U.S. management team and it will have responsibility for the restructuring plan for the CCAA entities.

9 A secured credit facility covers both the Canadian and American operations. The amount outstanding on this pre-filing secured credit facility as of January 23, 2009 was approximately US\$1 billion of which approximately US\$367 million is attributable to SSC Canada. Security over all material Canadian assets had been provided as part of this facility.

10 The debt of the CCAA Entities also includes Canadian notes of US\$200 million and trade creditor payables of US\$53.4 million. In addition, there is a Canadian accounts receivable securitization programme, the outstanding balance of which is US\$38 million as of January 23, 2009. There are six defined benefit registered pension plans in Canada for which there is an aggregate solvency deficiency of approximately \$132 million as at December 31, 2007.

11 The Applicants are insolvent, have indebtedness in excess of \$5 million and qualify pursuant to the CCAA. The proposed outline for a plan includes continuing the process of selling and realizing value in respect of closed and discontinued operations and coordinating with the US entities to achieve a balance sheet restructuring.

12 As a result of the Chapter 11 filing, the pre-filing secured credit facility is no longer available. In addition, the Chapter 11 filing constitutes an event of termination under the receivables agreement that governs the accounts receivable securitization programme. As such, absent some additional facility, the CCAA Entities would be required to repay amounts owing under the pre-filing credit agreement. In addition, they would no longer be able to benefit from the accounts receivable securitization programme, would have no access to operating credits, would be unable to operate in the ordinary course, and would be unable to satisfy ongoing obligations.

13 Under the DIP facility that is proposed, both SSC Canada and the U.S. company, Smurfit-Stone Container Enterprises, Inc. ("SSCUS") are borrowers; the total commitment is US\$750 million comprised of US\$315 million in revolving facilities available to both SSCUS and SSC Canada, a US\$400 million term loan available to SSCUS; and a US\$35 million term loan available to SSC Canada. The term loan facilities are being used to take out the accounts receivable securitization programme. The loans to SSCUS are guaranteed by SSCC and most of the U.S. debtors and by SSC Canada and the latter provides a charge over its assets for all advances made to SSCUS. There would be rights of subrogation. The loans to SSC Canada are guaranteed by SSCUS and most of its U.S. subsidiaries and secured by a charge over substantially all of the assets of Smurfit-Stone's U.S. entities. The borrowings of SSC Canada are guaranteed by the other CCAA entities.

14 While some of the DIP lenders also participated in the pre-filing secured credit facility, the DIP financing involves new money and is not a refinancing. New lenders are also participating in the DIP facility. The lenders of the pre-filing secured credit facility are unopposed to the order sought.

15 The DIP lenders are unwilling to extend the DIP facility to SSC Canada absent its guarantee of the obligations of SSCUS under the DIP facility. In addition, the business is fully integrated making it impracticable particularly in the current credit environment to secure alternate financing on a stand-alone basis. To continue operations, the DIP facility is required. Estimated cash on hand for the Canadian operating entities at January 23, 2009 was \$704,517 and the accounts payable balance is estimated to be in excess of US\$53 million.

16 The amount borrowed is to be secured by a charge on the Applicants' property following an Administration charge of \$1 million and a Directors' charge of \$8.6 million. Until a final order has been granted by the U.S. court approving continued lending under the DIP facility and until approved by this court, and prior to February 18, 2009, no more than \$100,000 million of the U.S. revolving commitment and \$15 million of the SSC Canada revolving commitment will be available for borrowing. During the initial 30-day stay period, the CCAA Entities anticipate they will require US \$50 million of which US\$31 million of the term loan is to be used to refinance the account receivables securitization programme. This will result in an increase in cash receipts.

17 The proposed Monitor filed a report. It described the extensive process undertaken to obtain new debt financing. It further understands that Smurfit-Stone, having thoroughly canvassed the market, does not have any satisfactory alternative financing arrangements available. The proposed Monitor is of the view that the restructuring and continuation of Smurfit-Stone and the CCAA Entities as a going concern is the best option available given that a going concern restructuring would preserve the value of Smurfit-Stone and the CCAA Entities whereas a liquidation and wind-down would likely result in a substantial diminution in value that could ultimately reduce creditors' recoveries. Significantly, the liquidation and wind-down of the CCAA Entities could eliminate a significant number of jobs, many of which would be preserved if the CCAA Entities are able to continue as a going concern. The proposed Monitor has also been advised that the CCAA Entities have recently been "net debtors", relying on advances from SSCUS to fund working capital requirements. Based on the information available to it, it is supportive of the DIP facility including SSC Canada's guarantee. In this regard, however, it is unable to provide views of the value of the guarantee or the probability that it will be called upon. Smurfit-Stone has advised the Monitor that SSC Canada's guarantee of SSCUS' obligations is contingent and that the DIP facility was negotiated with a third-party lender on the basis that there would be full recovery of all loans advanced to SSCUS under the DIP facility from the U.S. assets of Smurfit-Stone.

18 The successful restructuring of the CCAA Entities appears to be inextricably intertwined with the successful restructuring of the Smurfit-Stone enterprise in the Chapter 11 proceeding. In order to continue day-to-day operations and to facilitate the company's restructuring, the U.S. debtors and the CCAA Entities require access to significant funding. Given all of these facts, I am prepared to grant the relief requested.

19 As mentioned, the requested order extends the benefits of the protections provided by the order to Smurfit-MBI and SLP Finance General Partnership, both of which are partnerships but not Applicants. The operations of the partnerships are integral and closely interrelated with that of the Applicants and in my view the request is appropriate in the circumstances outlined. See also *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

20 As to the centralized cash management system, the proposed Monitor has reviewed it and will be able to adequately monitor the transfers of cash, including transfers within the system so that transactions applicable to SSC Canada and Smurfit-MBI can be ascertained, traced and properly recorded. The Monitor will review and monitor the system and report to the court from time to time. As of January 23, 2009, SSC Canada was estimated to have US\$121,000 and CDN \$185,000 in cash and Smurfit-MBI was estimated to have US\$97,000 and CDN\$414,000 in cash.

21 The CCAA Entities seek to pay certain pre-filing amounts owed to critical suppliers. The proposed Monitor has been advised that SSC Canada's operations depend on a ready supply of key materials such as wood, chemicals, fuel and energy from third party suppliers and, in addition, SSC Canada's and Smurfit-MBI's operations are reliant on rail

and trucking services, custom brokers and third party warehouses. I am satisfied that the request to pay these pre-filing amounts is appropriate.

22 According to Smurfit-Stone, it is very difficult to separate the creditors of the U.S. debtors from the creditors of the CCAA Entities. Smurfit-Stone intends to engage Epiq Bankruptcy Solutions LLC to send notice of the Chapter 11 proceedings to all creditors owed more than \$1,000. The proposed Monitor has suggested that such notice include notice of the CCAA proceedings to the creditors of the CCAA Entities. I am in agreement with this proposed course of action but request that the Monitor report to the court when service has been effected.

23 I also note and rely upon the comeback provision found in paragraph 57 of the order which allows any interested party to apply to the court to vary or amend this order on not less than seven days' notice.

24 There are obviously numerous other provisions in the order that I have not addressed specifically as I believe they are all self-evident. In all of the circumstances I am prepared to grant the order requested. Counsel will re-attend on Wednesday at 10:00 a.m. to address a further recognition order.

Application granted.

Tab 26

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

Stelco Inc., Re

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

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

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

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

Farley J.

Heard: March 5, 2004

Judgment: March 22, 2004

Docket: 04-CL-5306

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

Subject: Insolvency

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

Farley J.:

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

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

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

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

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

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

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

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

"debtor company" means any company that:

(a) is bankrupt or insolvent;

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

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

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

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

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

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

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

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

s. 2(1) . . .

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

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

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

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

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

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

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

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

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

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

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

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

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

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

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

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

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

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

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

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

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

some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of \$80 million now to a projected loss of \$192 million and cash has gone from a positive \$209 million to a negative \$114 million.

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

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

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

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

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

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

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

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

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

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

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

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

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

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

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

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

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

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

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

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

Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's

property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Motion dismissed.

APPENDIX

Tab 27

1997 CarswellOnt 1914
Ontario Court of Justice, General Division

T. Eaton Co., Re

1997 CarswellOnt 1914, [1997] O.J. No. 6411, 46 C.B.R. (3d) 293

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

And in the Matter of the Courts of Justice Act, R.S.O. 1990, c. C.43

And in the Matter of a Plan of Compromise or Arrangement of the T.
Eaton Company Limited and All other Companies Set out in Schedule "A"

The T. Eaton Company Limited, et al., Applicants

Houlden J.A.

Oral reasons: May 8, 1997

Docket: RE 7483/97

Counsel: *Jonathan Stainsby* and *Kenneth D. Kraft*, for moving parties.

Lyndon Barnes, *R.G. Marantz* and *John MacDonald*, for The T. Eaton Company Limited.

J.A. Carfagnini and *Robert J. Chadwick*, for The Cadillac Fairview Corporation Limited.

Robert Arcand, for Cambridge Leaseholds Limited and other landlords.

Jeff Carhart, for Ontario Pension Board Subsidiary Corporations.

R. Thornton, for 2725354 Canada Inc.

Kevin Zych, for Hammerson Canada Inc.

Hilary Clarke, for G.E. Capital Heard.

Subject: Insolvency; Property; Civil Practice and Procedure

MOTION to vary the order to allow D to exercise its rights under co-tenancy clauses in its leases.

Houlden J.A. (orally):

1 On February 27, 1997, I made an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, (the "CCAA") to permit the T. Eaton Company Limited ("Eaton's") to present a plan of compromise and arrangement to its creditors. The order contained a clause preventing tenants at retail shopping centres in which Eaton's was an anchor tenant from terminating their leases during the restructuring period. When the clause was put in the order, counsel for Eaton's explained the purpose of the clause and the necessity for it being part of the plan. However, as Mr. Stainsby has pointed out, Dylex (and for convenience I will refer to the moving parties by that name) was not served with notice of the application nor was it represented. Accordingly, I believe that Dylex has the status to request the variation of my order.

2 As part of its restructuring plan, Eaton's must close uneconomic stores. To carry out a successful restructuring, Eaton's will have to terminate the leases of those stores and obtain the support of its former landlords for its plan of compromise and arrangement.

3 Dylex operates retail stores in regional shopping centres of which Eaton's is one of the anchor stores. The Dylex leases contain co-tenancy clauses. While the clauses vary, generally they permit Dylex to terminate or otherwise alter the

terms of their leases if Eaton's ceases to operate its store in a shopping centre. When Eaton's closes a store, Dylex will suffer a loss of traffic flow and this will have a deleterious affect on Dylex's sales and profitability.

4 In this motion, Dylex is seeking an order amending my order of February 27, 1997 to permit Dylex to exercise its rights under the co-tenancy clauses in its leases. Co-tenancy clauses in shopping centre leases are not uncommon. If I were to grant the order requested by Dylex, I would have to grant the same relief to other tenants in a similar position. There is material before me that indicates that if this were to happen, Eaton's restructuring plan would be seriously jeopardized and might prove to be impossible. As Mr. Carhart pointed out, if tenants are permitted by the exercise of co-tenancy clauses to reduce rents or terminate leases, the claims of the landlords against Eaton's will be greatly increased and this will have a serious impact on a restructuring plan.

5 Although I have considerable sympathy for the problem facing Dylex as a result of the closing of anchor stores by Eaton's, I must do all in my power to bring about a successful plan of compromise and arrangement. Eaton's has more than 15,000 full and part-time employees. It has sales of about \$1,500,000,000 a year and the continuation of that source of business is of great importance to Eaton's suppliers.

6 Two grounds are advanced for varying my order of February 27th. First, it is submitted that I had no jurisdiction to make the order since Dylex is not a creditor of Eaton's. With respect, I believe that s. 11 of the *CCAA* and the inherent jurisdiction of the court are sufficiently wide to permit the making of orders against third parties who are not creditors where their actions would potentially prejudice the success of a plan: *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

7 Secondly, it is submitted that, even if I had jurisdiction to make the order, the prejudice to the moving parties outweighs the benefits of maintaining the stay. Again, with respect, I do not agree. In the factum filed by the Cadillac Fairview Corporation Limited and a number of other landlords, the following reasons, which I find to be accurate, are given for maintaining the stay:

- (a) no Plan has been filed and it is unclear at this time how the claims of all the stakeholders will be addressed;
- (b) the exercise of rights of the Moving Parties and others in similar circumstances at this time would have a negative impact on Eaton's ability to restructure, potentially jeopardizing the success of the plan and thereby the continuance of the company;
- (c) if Eaton's were prevented from concluding a successful restructuring with its landlords, the economic harm would be far-reaching and devastating;
- (d) the exodus of tenants could result in malls being forced to close; this could have a significant ripple effect throughout the local economies and cause further job loss;
- (e) Eaton's bankruptcy would have an even more devastating impact on all of Eaton's stakeholders, including its employees, suppliers, shareholders, creditors and landlords.

In connection with (a), Mr. Stainsby acknowledges that, as yet, no stores have been closed so that Dylex has in fact suffered no prejudice. In my opinion, the benefits of maintaining the stay, far outweigh the prejudice to Dylex.

8 For these reasons, the motion will be dismissed. There will, in the circumstances, be no order for costs. Mr. Stainsby requested that if I dismissed the motion, I should do so without prejudice to Dylex raising the same objections when the plan is presented for approval. I do not believe that it is appropriate to make such an order at this time. Dylex will, of course, have the right to oppose the sanctioning of the plan, and to raise such grounds as it sees fit. How the court will deal with those grounds is a matter to be decided when, and if, the issue arises on the application for approval.

Motion dismissed.

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Tab 28

2013 ONSC 5461
Ontario Superior Court of Justice [Commercial List]

Tamerlane Ventures Inc., Re

2013 CarswellOnt 12213, 2013 ONSC 5461, 232 A.C.W.S. (3d) 32, 6 C.B.R. (6th) 328

**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 Tamerlane Ventures Inc. and Pine Point Holding Corp.

Newbould J.

Heard: August 23, 2013
Judgment: August 28, 2013
Docket: CV-13-10228-00CL

Counsel: S. Richard Orzy, Derek J. Bell, Sean H. Zweig for Applicants
Robert J. Chadwick, Logan Willis for Proposed Monitor, Duff & Phelps Canada Restructuring Inc.
Joseph Bellissimo for Renvest Mercantile Bankcorp Inc.

Subject: Insolvency; Contracts; Corporate and Commercial

APPLICATION by insolvent corporations for initial order and stay under s. 11 of *Companies' Creditors Arrangement Act*.

Newbould J.:

1 The applicants applied on August 23, 2013 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.

Tamerlane business

2 At the time of the application, Tamerlane Ventures Inc. ("Tamerlane") was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. ("Tamerlane Pine Point"), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

3 The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

4 The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of

its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

5 The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

6 The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

7 As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of \$24,814,433. The assets included consolidated current assets of \$2,007,406, and consolidated non-current assets with a net book value of \$22,807,027. Non-current assets included primarily the investment in the Pine Point property of \$20,729,551 and the Los Pinos property of \$1,314,936.

8 Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of \$12 to \$15 million using a 0.3% copper cut-off grade, or \$17 to \$21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of \$30 to \$56 million based on market comparables, with a value as high as \$229 million considering precedent transactions.

Secured and unsecured debt

9 Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. ("Global Resource Fund" or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD \$10,000,000. The secured indebtedness under the credit agreement is guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

10 The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

11 The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD \$850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

Events leading to filing

12 Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

13 It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for \$1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

14 As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance

on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

15 Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a \$1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was \$11,631,948.90.

16 On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

17 On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was \$12,100,254.26.

18 Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

Discussion

19 There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. 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.

20 The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

21 Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) and Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]). Recently Morawetz J. has made such orders in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]), *Sino-Forest Corp., Re*, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) and *SkyLink Aviation Inc., Re*, 2013 ONSC 1500 (Ont. S.C.J. [Commercial List]). I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

22 Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISF will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or

all of the applicants' assets. The proposed Monitor supports the SIST and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

23 The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of \$300,000, a financial advisor charge of \$300,000, a directors' charge of \$45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

DIP facility and charge

24 The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

25 The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net \$1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

26 Section 11.2(4) of the *CCAA* lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the *CCAA* process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the *CCAA* proceedings. That involves the sunset clause, to which I now turn.

Sunset clause

27 During the negotiations leading to this consensual *CCAA* application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any *CCAA* initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the *CCAA* proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

28 The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the *CCAA* proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

29 Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these *CCAA* proceedings is conditional on these terms.

30 Section 11 of the CCAA authorizes a court to make any order "that it considers appropriate in the circumstances." In considering what may be appropriate, Deschamps J. stated in *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.):

70. ...Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

31 There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

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

32 The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

33 It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J.) and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

34 What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Application granted.

Tab 29

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

**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 Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015

Judgment: January 16, 2015

Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Jay Swartz for Target Corporation

Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.e Proceedings subject to stay](#)

[XIX.2.e.vi Miscellaneous](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.h Miscellaneous](#)

Headnote

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

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. Canadian operations suffered significant loss in every quarter T Co. decided to stop funding Canadian operations Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA)

Application granted Initial order granted Stay of proceedings granted Stay extended to certain limited

partnerships, which were related to or carried on operations integral to applicants' business Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.

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

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. Canadian operations suffered significant loss in every quarter T Co. decided to stop funding Canadian operations Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA)

Application granted Initial order granted Stay of proceedings granted It was appropriate to grant broad relief to ensure status quo was maintained Applicants were all insolvent Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances Creation of employee trust to cover payments to employees was approved Key employee retention program (KERP) and charge as security for KERP payments were approved Appointment of Employee Representative Counsel was approved DIP Lenders' Charge and DIP Facility were approved Administration charge and Directors' and Officers' charge approved.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) referred to

Prizm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) followed

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, [2004] O.T.C. 284, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) followed

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) considered

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465 (Ont. S.C.J.) considered

Statutes considered:

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

Generally referred to

s. 2 "insolvent person" considered

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

Generally referred to

s. 11 considered

s. 11.02 [en. 2005, c. 47, s. 128] considered

s. 11.02(1) [en. 2005, c. 47, s. 128] considered

s. 11.2 [en. 1997, c. 12, s. 124] considered

s. 11.2(4) [en. 1997, c. 12, s. 124] considered

s. 11.7(1) [en. 1997, c. 12, s. 124] considered

s. 11.51 [en. 2005, c. 47, s. 128] considered

s. 36 considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally referred to

Words and phrases considered:

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (CCAA)]. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act* . . . or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

APPLICATION for relief under *Companies' Creditors Arrangement Act*.

Morawetz R.S.J.:

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

- a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than \$2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately \$5.408 billion and total liabilities of approximately \$5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately \$2.5 billion. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of \$62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of \$4 billion. TCC owed NE1 approximately \$3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately \$1.632 billion and total liabilities of approximately \$1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately \$1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. \$89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

- a) Does this court have jurisdiction to grant the CCAA relief requested?
 - a) Should the stay be extended to the Partnerships?
 - b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
 - c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
 - d) Should the Court approve protections for employees?

- e) Is it appropriate to allow payment of certain pre-filing amounts?
- f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
- g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
- h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Prizm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Prizm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the

same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of \$70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined

with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of \$6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)*], and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

- (i) the vulnerability and resources of the groups sought to be represented;
- (ii) the social benefit to be derived from the representation of the groups;
- (iii) the avoidance of multiplicity of legal retainers; and
- (iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

- a) Logistics and supply chain providers;
- b) Providers of credit, debt and gift card processing related services; and
- c) Other suppliers up to a maximum aggregate amount of \$10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. \$175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. \$175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCAA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of \$6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- a. The size and complexity of the business 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.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to \$64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

End of Document

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Tab 30



Court File No.
CV-15-10032-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE) THURSDAY, THE 15TH
REGIONAL SENIOR JUSTICE)
MORAWETZ) DAY OF JANUARY, 2015

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (the "**Applicants**")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Mark J. Wong sworn January 14, 2015 and the Exhibits thereto (the "**Wong Affidavit**") and the pre-filing report dated January 14, 2015 of Alvarez & Marsal Canada Inc. ("**A&M**") in its capacity as Proposed Monitor of the Applicants (the "**Pre-Filing Report**"), and on hearing the submissions of counsel for the Applicants and the partnerships listed on Schedule "A" hereto (the "**Partnerships**", and collectively with the Applicants, the "**Target Canada Entities**"), Target Corporation, A&M, the Directors and Employee Representative Counsel, and on reading the consent of A&M to act as the Monitor,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies. Although not Applicants, the Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicants, individually or collectively, 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**"), between, *inter alia*, one or more of the Target Canada Entities and one or more classes of their applicable secured and/or unsecured creditors as the Applicants deem appropriate.

4. THIS COURT ORDERS that the amounts owing by Target Canada Co. ("**TCC**") to Nicollet Enterprise 1 S.à r.l. shall be subordinated and postponed to the proven claims of the unsecured creditors of TCC.

POSSESSION OF PROPERTY AND OPERATIONS

5. THIS COURT ORDERS that the Target Canada Entities shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Target Canada Entities shall continue to carry on business in a manner consistent with the preservation of the value of their business (the "**Business**") and Property. The Target Canada Entities shall each be authorized and empowered to continue to retain and employ the employees, advisors, consultants, agents, experts, appraisers, valuers, brokers, 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.

6. THIS COURT ORDERS that the Target Canada Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the Wong Affidavit or, with the consent of the Monitor and the DIP Lender (as defined herein), replace it with another substantially similar central cash management system (the “**Cash Management System**”) and that any present or future bank providing the Cash Management System (including, without limitation, Royal Bank of Canada, The Toronto-Dominion Bank, Bank of America and JPMorgan Chase Bank, National Association (“**JPMorgan**”)) shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Target Canada Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Target Canada Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. THIS COURT ORDERS that the Target Canada Entities (other than Target Canada Property LLC and Target Canada Property LP) (collectively, the “**DIP Entities**”) shall segregate all cash and non-cash receipts arising out of or in connection with the sale of the following Property of the DIP Entities (the “**DIP Property**”), which receipts shall be held in trust by the DIP Entities as follows:

- (a) net cash proceeds of any sale or other disposition (including as a result of casualty or condemnation) by the DIP Entities of any DIP Property other than inventory (whether such inventory is sold or disposed of through return to the vendor or wholesaler, the liquidation of the inventory by a liquidation agent if appointed by the Court in connection with the Liquidation Agent Solicitation Process (as defined herein) or otherwise), which shall be held in trust for and on behalf of the DIP Lender (as defined herein) and applied, except as otherwise agreed by the DIP Lender in

writing as follows, pursuant to and in accordance with the Term Sheet (as defined herein):

- (i) first, to pay accrued and unpaid interest on, and expenses in respect of, the DIP Obligations (as defined herein);
- (ii) second, to repay any principal amounts or other DIP Obligations outstanding; and
- (iii) third, the balance to be paid to the DIP Entities.

8. THIS COURT ORDERS that the Target Canada Entities shall be entitled but not required to pay the following expenses whether incurred prior to, on or after this Order to the extent that such expenses are incurred and payable by the Target Canada Entities:

- (a) all outstanding and future wages, salaries, employee benefits (including, without limitation, employee medical, dental and similar benefit plans or arrangements), 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 all other payroll processing expenses;
- (b) all outstanding or future amounts owing in respect of customer rebates, refunds, discounts or other amounts on account of similar customer programs or obligations;
- (c) all outstanding or future amounts related to honouring gift cards issued before or after the date of this Order;
- (d) the fees and disbursements of any Assistants retained or employed by the Target Canada Entities at their standard rates and charges;
- (e) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Target Canada Entities prior to the date of this Order by:
 - (i) logistics or supply chain providers, including customs brokers and freight forwarders and security and armoured truck carriers;
 - (ii) providers of credit, debit and gift card processing related services; and

- (iii) other third party suppliers up to a maximum aggregate amount of \$10,000,000, if, in the opinion of the Target Canada Entities, the supplier is critical to the Orderly Wind-down (as defined herein); and
- (f) any and all sums due and owing to Amex Bank of Canada and JPMorgan in respect of credit cards issued to management and employees of the Target Canada Entities.

9. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Target Canada Entities shall be entitled but not required to pay all reasonable expenses incurred by them in carrying on the Business in the ordinary course during the Orderly Wind-down after this Order, and in carrying out the provisions of this Order and any other Order of this Court, 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 of insurance (including directors' and officers' insurance), maintenance and security services; and
- (b) payment for goods or services actually supplied to the Target Canada Entities following the date of this Order.

10. THIS COURT ORDERS that the Target Canada Entities shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from the Target Canada Entities' employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services taxes, harmonized sales taxes or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Target Canada Entities in connection with the sale of goods and services by the Target Canada Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or

where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business, workers' compensation or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Target Canada Entities; and

(d) taxes under the *Income Tax Act* (Canada) or other relevant taxing statute giving rise to any statutory deemed trust amounts in favour of the Crown in right of Canada or any Province thereof or any political subdivision thereof or any other taxation authority.

11. THIS COURT ORDERS that, except as specifically permitted herein, the Target Canada Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any one of the Target Canada Entities to any of their creditors as of the date of this Order; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business or pursuant to this Order or any other Order of the Court.

ORDERLY WIND-DOWN

12. THIS COURT ORDERS that the Target Canada Entities shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the term sheet (the "**Term Sheet**") governing the DIP Facility (as defined herein), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their respective businesses or operations, and to dispose of redundant or non-material assets not exceeding \$1,000,000 in any one transaction or \$5,000,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as the relevant Target Canada Entity deems appropriate;

- (c) pursue all offers for sales of material parts of the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any sale (except as permitted by paragraph 12(a)) above;
- (d) in consultation with, and with the oversight of, the Monitor, engage in discussions with and solicit proposals and agreement(s) from third parties in respect of the liquidation of the inventory, furniture, equipment and fixtures located in and/or forming part of the Property (the "**Liquidation Agent Solicitation Process**") and return to Court for approval of such agreement(s); and
- (e) to apply to this Court for such approval, vesting or other Orders as may be necessary to consummate sale transactions for all or any part of the Property,

all of the foregoing to permit the Target Canada Entities to proceed with an orderly wind-down of the Business (the "**Orderly Wind-down**").

REAL PROPERTY LEASES

13. THIS COURT ORDERS that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Target Canada Entities shall pay, without duplication, all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts normally payable to the landlord under its lease, but for greater certainty, excluding accelerated rent) or as otherwise may be negotiated between the applicable Target Canada Entity and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

14. THIS COURT ORDERS that the Target Canada Entities shall provide each of the relevant landlords with notice of the relevant Target Canada Entity's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the relevant Target Canada Entity's entitlement to remove any such fixture under the provisions of the lease, such fixture

shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the relevant Target Canada Entity, or by further Order of this Court upon application by the Target Canada Entities on at least two (2) days' notice to such landlord and any such secured creditors. If any of the Target Canada Entities disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the relevant Target Canada Entity's claim to the fixtures in dispute.

15. THIS COURT ORDERS that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA by any of the Target Canada Entities, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the relevant Target Canada Entity and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Target Canada Entities in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

16. THIS COURT ORDERS that, notwithstanding anything to the contrary in any real property lease or elsewhere, the Target Canada Entities shall have no obligation to stock or re-stock and/or operate from any of its locations and/or remodel, fixture or open any new or renovated stores during these proceedings.

STAY OF PROCEEDINGS

17. THIS COURT ORDERS that until and including February 13, 2015, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Target Canada Entities or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Target Canada Entities and the Monitor, or with leave of this Court, and any and

all Proceedings currently under way against or in respect of the Target Canada Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

18. THIS COURT ORDERS that during the Stay Period, no Person having any agreements or arrangements with the owners, operators, managers or landlords of commercial shopping centres or other commercial properties (including retail, office and industrial (warehouse) properties) in which there is located a store, office or warehouse owned or operated by the Target Canada Entities shall take any Proceedings or exercise any rights or remedies under such agreements or arrangements that may arise upon and/or as a result of the making of this Order, the declarations of insolvency by the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to this Order and, without limiting the generality of the foregoing, no Person shall terminate, accelerate, suspend, modify, determine or cancel any such arrangement or agreement or be entitled to exercise any rights or remedies in connection therewith.

19. THIS COURT ORDERS that during the Stay Period, no Proceeding shall be commenced or continued against or in respect of Target Corporation and its direct and indirect subsidiaries (other than the Target Canada Entities) (collectively, "**Target US**") arising out of or in connection with any right, remedy or claim of any Person (as defined herein) against Target US in connection with any indebtedness, indemnity, liability or obligation of any kind whatsoever of Target US under contract, statute or otherwise, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by indemnity, guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution, indemnity or otherwise, with respect to any matter, action, cause or chose in action, whether existing at present or commenced in future, which indebtedness, indemnity, liability or obligation is derivative of the primary liability of the Target Canada Entities except with the written consent of the Target Canada Entities and Target US and the Monitor, or with leave of this Court; provided that this paragraph shall not apply to any present or future bank providing the Cash Management System (including, without limitation, Royal Bank of Canada, The Toronto-Dominion Bank, Bank of America and

JPMorgan) in connection with any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

NO EXERCISE OF RIGHTS OR REMEDIES

20. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Target Canada Entities or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the prior written consent of the Target Canada Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Target Canada Entities to carry on any business which the Target Canada Entities are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien, and provided further that this paragraph shall not apply to any present or future bank providing the Cash Management System (including, without limitation, Royal Bank of Canada, The Toronto-Dominion Bank, Bank of America and JPMorgan) in connection with any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

NO INTERFERENCE WITH RIGHTS

21. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence or permit in favour of or held by the Target Canada Entities, except with the written consent of the relevant Target Canada Entity and the Monitor, or leave of this Court. Without limiting the foregoing, no right, option, remedy, and/or exemption in favour of the relevant Target Canada Entity shall be or shall be deemed to be negated, suspended, waived and/or terminated as a result of this Order.

CONTINUATION OF SERVICES

22. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Target Canada Entities or statutory or regulatory mandates for the supply

of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, cash management services, payroll and benefits services, pharmaceutical services, insurance, warranty services, transportation services, freight services, security and armoured truck carrier services, utility, customs clearing, warehouse and logistics services or other services to the Business or the Target Canada Entities, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Target Canada Entities, and that the Target Canada Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Target Canada Entities in accordance with normal payment practices of the Target Canada Entities or such other practices as may be agreed upon by the supplier or service provider and each of the Target Canada Entities and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

23. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Target Canada Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

KEY EMPLOYEE RETENTION PLAN

24. THIS COURT ORDERS that the Key Employees Retention Plan (the "**KERP**"), as described in the Wong Affidavit, is hereby approved and the Target Canada Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

25. THIS COURT ORDERS that the key employees referred to in the KERP shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Property, which charge shall not exceed an aggregate amount of \$6.5 million to secure

amounts owing to such key employees under the KERP. The KERP Charge shall have the priority set out in paragraphs 63 and 65 herein.

EMPLOYEE TRUST

26. THIS COURT ORDERS that the creation of the Employee Trust, as defined and described in the Wong Affidavit, is hereby approved on substantially the terms and conditions set out in the Employee Trust Agreement, including without limitation the appointments of Hon. John D. Ground as trustee and the Monitor as administrator (the “**Administrator**”) of the Employee Trust and authorizes and directs the Monitor to act in such capacity.

27. THIS COURT ORDERS that TCC is authorized to process or cause to be processed all amounts received from the Employee Trust, including making payments to the Beneficiaries (as defined in the Employee Trust Agreement), subject to and in accordance with the terms and conditions of the Employee Trust Agreement.

28. THIS COURT ORDERS that the amounts received by TCC from the Employee Trust in the hands of TCC and when paid to any payment processor shall be deemed to be held in trust for and on behalf of the Beneficiaries, subject to and in accordance with the Employee Trust Agreement and shall not constitute property of TCC, including, without limitation, under the CCAA and the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) and shall not be subject to the claims of any person other than as provided under the Employee Trust Agreement.

29. THIS COURT ORDERS that the creation, establishment, funding and administration of the Employee Trust shall not, in whole or in part, directly or indirectly, (a) cause Target US to be or be deemed to be, or (b) in any way be relied upon to claim or assert that Target US is or is deemed to be, either (i) an employer or (ii) a common or related employer under contract, statute, common law or otherwise of any employee of the Target Canada Entities.

30. THIS COURT ORDERS that:

- (a) each Beneficiary shall be deemed to release the Releasees (as defined in the Employee Trust Agreement) on the payment of a distribution from the Employee Trust in respect of such Beneficiary’s Eligible Employee Claim (as defined in the

Employee Trust Agreement), to the extent of such distribution (the “**Payment Release**”); and

- (b) each Beneficiary shall be deemed to release the Releasees in respect of the full amount of the Beneficiary’s Eligible Employee Claim 60 days after the final payment to such Beneficiary under the Employee Trust or such later date as the Monitor in its sole discretion may designate, provided that the Beneficiary has not, on or before such date, provided notice of dispute to the Monitor and Employee Representative Counsel (as defined herein) substantially in the manner and form attached as Schedule “B”; provided further that in the event of any insufficiency of Trust funds to cover an individual’s total Eligible Employee Claim, only the Payment Release shall be effective and there shall be no deemed full and final release of the full Eligible Employee Claim.

EMPLOYEE REPRESENTATIVE COUNSEL

31. THIS COURT ORDERS that Koskie Minsky LLP (“**Employee Representative Counsel**”) is hereby appointed as counsel for all employees other than officers and directors (the “**Employees**”) of the Target Canada Entities in these proceedings, any proceeding under the BIA or in any other proceeding respecting the insolvency of the Applicants which may be brought before this Honourable Court (the “**Insolvency Proceedings**”), for any issues affecting the Employees in the Insolvency Proceedings including, without limitation, with respect to the Employee Trust Agreement and the Claims Process (as defined in the Employee Trust Agreement).

32. THIS COURT ORDERS that the Employee Representative Counsel shall commence the process of identifying no more than 7 Employees to be nominated as Court-appointed representatives (the “**Employee Representatives**”) as soon as practicable. The Employee Representatives, once appointed, shall represent the Employees in the Insolvency Proceedings, including, without limitation, for the purpose of settling or compromising claims by the Employees in the Insolvency Proceedings.

33. THIS COURT ORDERS that notice of the appointment of Employee Representative Counsel shall be provided to the Employees by:

- (a) referring thereto in a letter to be sent to the Employees, other than former employees, by Target Canada Entities, no later than January 19, 2015;
- (b) postings in each place of work;
- (c) notice on the Monitor's Website (as defined herein) and on the Representative Counsel's website; and
- (d) referring thereto in the notices provided for in paragraph 69 below.

34. THIS COURT ORDERS that the Target Canada Entities shall provide to Employee Representative Counsel, without charge:

- (a) the names, last known address and last known email addresses (if any) of all the Employees as well as applicable data regarding their entitlements, subject to a confidentiality agreement and to only be used for the purposes of these proceedings; and
- (b) upon request of Employee Representative Counsel, such documents and data as may be relevant to matters relating to the issues in these proceedings, including documents and data pertaining to the various benefits, termination allowance plans, severance and termination payments and other arrangements for group health, life insurance, retirement and severance payments, including up to date financial information regarding the funding and investments of any of these arrangements.

35. THIS COURT ORDERS that all reasonable fees and disbursements as may have been incurred by the Employee Representative Counsel prior to the date of this Order or which shall be incurred by the Employee Representative Counsel shall be paid by the Target Canada Entities on a weekly basis, forthwith upon the rendering of accounts to the Target Canada Entities. In the event of any disagreement regarding such fees, such matters may be remitted to this Court for determination.

36. THIS COURT ORDERS that Employee Representative Counsel is authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including

dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

37. THIS COURT ORDERS that Employee Representative Counsel shall have no liability as a result of its appointment or the fulfilment of its duties in carrying out the provisions of this Order save and except for any gross negligence or wilful misconduct on its part.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

38. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Target Canada Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Target Canada Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Target Canada Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Target Canada Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

39. THIS COURT ORDERS that the Target Canada Entities shall jointly and severally indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Target Canada Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

40. THIS COURT ORDERS that the directors and officers of the Target Canada Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of \$64 million, as security for the indemnity provided in paragraph 39 of this Order. The Directors' Charge shall have the priority set out in paragraphs 63 and 65 herein.

41. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 39 of this Order.

APPROVAL OF ADVISOR AGREEMENTS

42. THIS COURT ORDERS that the agreement dated January 14, 2015 engaging Lazard Freres & Co. LLC ("**Lazard**") as financial advisor to TCC in connection with the sales process for the real property assets held by the Target Canada Entities (the "**Real Property Portfolio Sales Process**") in the form attached as a confidential appendix to the Pre-Filing Report (the "**Financial Advisor Agreement**"), and the retention of Lazard under the terms thereof, is hereby ratified and approved and the Target Canada Entities are authorized and directed to make the payments contemplated thereunder in accordance with the terms and conditions of the Financial Advisor Agreement.

43. THIS COURT ORDERS that Confidential Appendix "A" to the Pre-Filing Report shall be and is hereby sealed, kept confidential and shall not form part of the public record.

44. THIS COURT ORDERS that the agreement dated January 14, 2015 engaging Northwest Atlantic (Canada) Inc. ("**Northwest**") to provide real estate advisory services, including any required brokerage services, to TCC in respect of the Real Property Portfolio Sales Process in the form attached as Exhibit V to the Wong Affidavit (the "**Real Estate Advisor Agreement**"), and the retention of Northwest under the terms thereof, is hereby ratified and approved and the Target Canada Entities are authorized and directed to make the payments contemplated thereunder in accordance with the terms and conditions of the Real Estate Advisor Agreement.

45. THIS COURT ORDERS that Lazard and Northwest shall consult with and report to the Monitor on a regular basis in connection with the Real Property Portfolio Sales Process.

APPOINTMENT OF MONITOR

46. THIS COURT ORDERS that Alvarez & Marsal Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Target Canada Entities with the powers and obligations set out in the CCAA or set forth herein and that the Target Canada Entities and their direct and indirect shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Target Canada Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

47. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Target Canada Entities' receipts and disbursements;
- (b) assist with the wind-down of the Business and operations of the Target Canada Entities;
- (c) liaise with Assistants with respect to all matters relating to the Property, the Business and such other matters as may be relevant to the proceedings herein;
- (d) oversee and consult with Lazard and Northwest with respect to the Real Property Portfolio Sales Process;
- (e) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the Shared Services, the Orderly Wind-down and such other matters as may be relevant to the proceedings herein;
- (f) assist the Target Canada Entities, to the extent required by the Target Canada Entities, in their dissemination to the DIP Lender and its counsel of financial and other information as agreed to between the Target Canada Entities and the DIP Lender

which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender;

- (g) advise the Target Canada Entities in their preparation of the Target Canada Entities' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis in accordance with the Term Sheet;
- (h) advise the Target Canada Entities in their development of the Plan and any amendments to the Plan;
- (i) assist the Target Canada Entities, to the extent required by the Target Canada Entities, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (j) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Target Canada Entities, to the extent that is necessary to adequately assess the Target Canada Entities' business and financial affairs or to perform its duties arising under this Order;
- (k) oversee and consult with the Target Canada Entities, any liquidation agent selected through the Liquidation Agent Solicitation Process and any Assistants retained (including brokers), to the extent required, with any and all wind-down activities and/or any marketing or sale of the Property and the Business or any part thereof;
- (l) administer the Employee Trust, in its role as Administrator thereof, in consultation with the Trustee thereof, TCC and Employee Representative Counsel;
- (m) be at liberty to engage independent legal counsel or such other persons, or utilize the services of employees of its affiliates, as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

- (n) be at liberty to serve as a “foreign representative” of the Applicants in any proceeding outside Canada;
- (o) assist the Target Canada Entities, to the extent required by the Target Canada Entities, with any matters relating to any foreign proceeding commenced in relation to any of the Target Canada Entities, including retaining independent legal counsel, agents, experts, accountants or such other persons as the Monitor deems necessary or desirable respecting the exercise of this power; and
- (p) perform such other duties as are required by this Order or by this Court from time to time.

48. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

49. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, “**Possession**”) of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the “**Environmental Legislation**”), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor’s duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

50. THIS COURT ORDERS that that the Monitor shall provide any creditor of the Target Canada Entities and the DIP Lender with information provided by the Target Canada Entities 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 Target Canada Entities 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 Target Canada Entities may agree.

51. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for greater certainty in the Monitor's capacity as Administrator of the Employee Trust, 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.

52. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Target Canada Entities and counsel to the Directors shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or subsequent to the date of this Order by the Target Canada Entities as part of the costs of these proceedings. The Target Canada Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Target Canada Entities and counsel to the Directors on a weekly basis and, in addition, the Target Canada Entities are hereby authorized to pay to the Monitor, counsel to the Monitor, counsel to the Target Canada Entities and counsel to the Directors retainers in the aggregate amount of \$1,000,000 to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

53. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

54. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Target Canada Entities, counsel to the Directors, Employee Representative Counsel, Lazard (with respect to its Monthly Fee set out in the Financial Advisor Agreement) and Northwest shall be entitled to the benefit of and are hereby granted a charge (the “**Administration Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$6.75 million, as security for their professional fees and disbursements incurred at their respective standard rates and charges, 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 63 and 65 hereof.

55. THIS COURT ORDERS that Lazard shall be entitled to the benefit of and is hereby granted a charge (the “**Financial Advisor Subordinated Charge**”) on the Property with respect to its fees under the Financial Advisor Agreement other than its Monthly Fee thereunder (the “**Transaction Fee**”), which charge shall not exceed an aggregate amount of \$3 million, as security for the Transaction Fee. The Financial Advisor Subordinated Charge shall have the priority set out in paragraphs 63 and 65 hereof.

DIP FINANCING

56. THIS COURT ORDERS that the DIP Entities are hereby authorized and empowered to obtain and borrow, on a joint and several basis, under a credit facility from Target Corporation (the “**DIP Lender**”) in order to finance the DIP Entities’ working capital requirements and other general corporate purposes and allow them to make such other payments as permitted under this Order and the Term Sheet (the “**DIP Facility**”), provided that borrowings under the DIP Facility shall not exceed US\$175 million unless permitted by further Order of this Court.

57. THIS COURT ORDERS that the DIP Facility shall be on the terms and subject to the conditions set forth in the Term Sheet.

58. THIS COURT ORDERS that the DIP Facility and the Term Sheet be and are hereby approved and the DIP Entities are hereby authorized and directed to execute and deliver the Term Sheet.

59. THIS COURT ORDERS that the DIP Entities are hereby authorized and empowered to execute and deliver the promissory note as is contemplated by the Term Sheet (the

“**Promissory Note**”), and the DIP Entities are hereby authorized and directed to pay and perform all of their respective indebtedness, interest, liabilities and obligations to the DIP Lender under and pursuant to the Term Sheet and the Promissory Note as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

60. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the “**DIP Lender’s Charge**”) on the DIP Property, as security for any and all obligations of the DIP Entities under the DIP Facility, the Term Sheet and the Promissory Note (including on account of principal, interest, fees, expenses and other liabilities) (the aggregate of all such obligations being the “**DIP Obligations**”), which DIP Lender’s Charge shall be in the aggregate amount of the DIP Obligations outstanding at any given time. The DIP Lender’s Charge shall not secure an obligation that exists before this Order is made. The DIP Lender’s Charge shall have the priority set out in paragraphs 63 and 65 hereof.

61. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

- (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender’s Charge or the Promissory Note;
- (b) upon the occurrence of an event of default under the Term Sheet, the Promissory Note or the DIP Lender’s Charge, the DIP Lender, upon 3 business days’ prior written notice to the DIP Entities and the Monitor and on application to the Court, may exercise any and all of its rights and remedies against the DIP Entities or the DIP Property under or pursuant to the Term Sheet, the Promissory Note and the DIP Lender’s Charge, including without limitation, to cease making advances to the DIP Entities and set off and/or consolidate any amounts owing by the DIP Lender to the DIP Entities against the obligations of the DIP Entities to the DIP Lender under the Term Sheet, the Promissory Note or the DIP Lender’s Charge, to give notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the DIP Entities and for the appointment of a trustee in bankruptcy of the DIP Entities; and

- (c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the DIP Entities or the DIP Property.

62. THIS COURT ORDERS AND DECLARES that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA, with respect to any advances made under the DIP Facility, the Term Sheet or the Promissory Note.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

63. THIS COURT ORDERS that the priorities of the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$6.75 million);

Second – KERP Charge (to the maximum amount of \$6.5 million);

Third – Directors' Charge (to the maximum amount of \$64 million);

Fourth – Financial Advisor Subordinated Charge (to the maximum amount of \$3 million); and

Fifth – DIP Lender's Charge.

64. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, and the DIP Lender's Charge, (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

65. THIS COURT ORDERS that each of the Administration Charge, the KERP Charge, the Directors' Charge and the Financial Advisor Subordinated Charge shall constitute a charge

on the Property and the DIP Lender's Charge shall constitute a charge on the DIP Property and such Charges (other than the DIP Lender's Charge) shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any Person who is a "secured creditor" as defined in the CCAA. For greater certainty, the DIP Lender's Charge shall rank behind all Encumbrances in favour of any Person.

66. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Target Canada Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Administration Charge, the KERP Charge, the Directors' Charge and the Financial Advisor Subordinated Charge, unless the Target Canada Entities also obtain the prior written consent of the Monitor and the beneficiaries of the Administration Charge, the KERP Charge, the Directors' Charge and the Financial Advisor Subordinated Charge, or further Order of this Court.

67. THIS COURT ORDERS that the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, the Term Sheet, the Promissory Note and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Target Canada Entities, or any of them, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Term Sheet or the Promissory Note shall create or be deemed

to constitute a breach by any of the Target Canada Entities of any Agreement to which they are a party;

- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Target Canada Entities entering into the Term Sheet, the creation of the Charges, or the execution, delivery or performance of the Promissory Note; and
- (c) the payments made by the Target Canada Entities pursuant to this Order, the Term Sheet or the Promissory Note, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

68. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the relevant Target Canada Entity's interest in such real property leases.

SERVICE AND NOTICE

69. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) and La Presse a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against the Target Canada Entities of more than \$1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names and addresses of individuals who are creditors publicly available.

70. THIS COURT ORDERS that any employee of any of the Target Canada Entities that receives a notice of termination from any of the Target Canada Entities shall be deemed to have received such notice of termination by no more than the seventh day following the date such notice of termination is delivered, if such notice of termination is sent by ordinary mail, expedited parcel or registered mail.

71. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the “**Guide**”) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-commercial/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL: <http://www.alvarezandmarsal.com/targetcanada> (the “**Monitor’s Website**”).

72. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Guide is not practicable, the Target Canada Entities and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Target Canada Entities’ creditors or other interested parties at their respective addresses as last shown on the records of the Target Canada Entities and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

73. THIS COURT ORDERS that the Target Canada Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

74. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Target Canada Entities, the Business or the Property.

75. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give

effect to this Order and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Target Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Target Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

76. THIS COURT ORDERS that each of the Target Canada Entities and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as the foreign representative of the Target Canada Entities to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended, and to act as foreign representative in respect of any such proceedings and any ancillary relief in respect thereto.

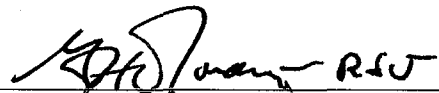
77. THIS COURT ORDERS that any interested party (including the Target Canada Entities and the Monitor) may apply to this Court to vary or amend this Order at the comeback motion scheduled for February 11, 2015, on not less than seven (7) calendar days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

78. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JAN 15 2015

MJ

 R.S.U.

SCHEDULE "A"
PARTNERSHIPS

Target Canada Pharmacy Franchising LP

Target Canada Mobile LP

Target Canada Property LP

SCHEDULE "B"
NOTICE OF DISPUTE REGARDING ELIGIBLE EMPLOYEE CLAIM

I, _____ (*insert name and employee number if known*), am disputing that I have been paid in full in respect of my Eligible Employee Claim, as such term is defined in the Employee Trust Agreement. ****Please see the Monitor's website at www.alvarezandmarsal.com/targetcanada or Employee Representative Counsel's website at www.kmlaw.ca for further information.****

I am a _____ (*insert position*) in the Target Canada Co. store located at _____ (*insert address/location*).

The basis for my objection is:
(*insert full particulars regarding dispute, including all facts and calculations on which you are relying*)

Based on the foregoing, I claim that I am owed the sum of \$_____.

Dated at _____ this _____ day of _____, 2015.

Signature: _____

Address: _____

Tel: _____

Email: _____

METHOD OF DELIVERY:

This notice of dispute must be sent to Employee Representative Counsel and to the Monitor at the following addresses:

To Employee Representative Counsel:

Koskie Minsky LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Attention: Susan Philpott
Fax: (416) 204-2897
Email: targetemployees@kmlaw.ca

To the Monitor at:

Alvarez & Marsal Canada Inc.
Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
P.O. Box 22
Toronto, ON M5J 2J1

Attention: Target Canada Monitor
Fax: (416) 847-5201
Email: targetcanada.monitor@alvarezandmarsal.com

NOTE: THIS MUST BE SENT TO EMPLOYEE REPRESENTATIVE COUNSEL AND THE MONITOR NO LATER THAN 45 DAYS AFTER YOU RECEIVE YOUR LAST PAYMENT FROM TCC PAYROLL.

**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 TARGET CANADA CO., et al.**

Applicants

Court File No. **CV-15-10832001**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

INITIAL ORDER

OSLER, HOSKIN & HARCOURT LLP

Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)
Jeremy Dacks (LSUC #: 41851R)
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Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Applicants

Matter No: 1159785

Tab 31

2016 ONSC 3288

Ontario Superior Court of Justice [Commercial List]

Urbancorp Toronto Management Inc., Re

2016 CarswellOnt 8410, 2016 ONSC 3288, 267 A.C.W.S. (3d) 23, 37 C.B.R. (6th) 44

**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 Urbancorp Toronto Management Inc., Urbancorp (St. Clair Village) Inc., Urbancorp (Patricia) Inc., Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp Downsview Park Development Inc., Urbancorp Residential Inc., Urbancorp (952 Queen West) Inc., King Residential Inc., Urbancorp 60 St. Clair Inc., High Res. Inc., Bridge on King Inc. (Collectively the "Applicants") and The Affiliated Entities Listed in Schedule "A" Hereto

In the Matter of Urbancorp Inc. Application of Guy Gissin, The Foreign Representative of Urbancorp Inc., under Section 46 of the Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36, as Amended

Newbould J.

Heard: May 18, 2016

Judgment: May 25, 2016

Docket: CV-16-11389-00CL, CV-16-11392-00CL

Counsel: Edmund F.B. Lamek, Rachael Belanger, for Applicants

L. Joseph Latham, Tamryn Jacobson, for Guy Gissin, Foreign Representative of Urbancorp Inc.

Robin B. Schwill, Jay Swartz, for KSV Kofman Inc.

Jane Dietrich, for Mattany (Downsview) Inc.

Scott Bomhof, for King Liberty North Corporation

Adam Slavens, for Tarion Warranty Corporation

Heather Meredith, for Bank of Nova Scotia

Clifton P. Prophet, Frank Lamie, for Canadian Imperial Bank of Commerce

John Paul Ventrella, for Atrium Mortgage Investment Mortgage

Aubrey E. Kauffman, for Travelers Guarantee Company of Canada

Brian Empey, for Parc Downsview Park Inc.

Subject: Insolvency; International

APPLICATION by company subsidiaries for continuation of notice of intent to make bankruptcy proposal in *Companies' Creditors Arrangement Act* proceeding.

Newbould J.:

1 A number of Urbancorp Inc. ("UC Inc.") subsidiaries applied on May 18, 2016 for relief under the CCAA, including relief in respect of a number of non-applicant affiliated limited partnerships which may not be insolvent.¹ Some of the applicants earlier filed a notice of intent to make a proposal under section 50.4(1) of the BIA. These applicants apply to continue the NOI proceedings in this CCAA proceeding.

2 UC Inc. is not an applicant in this CCAA proceeding. However, it issued debentures which traded on the Tel Aviv Stock Exchange. The trustee of those bonds alleged default by UC Inc. and, after the NOI proceedings were started

in Canada, initiated a claim for relief in the District Court of Tel Aviv-Yafo, Israel (the "Israeli Court"). Orders were made granting relief to the trustee and Mr. Guy Gissin was appointed by the Israeli Court as the functionary officer and foreign representative of UC Inc. He has brought proceedings under Part IV of the CCAA for an initial recognition order and a supplemental order recognizing orders made by the Israeli Court.

3 It is evident that these two competing applications, if not resolved in some consensual way, would cause great difficulty in any restructuring of the Urbancorp Group. Fortunately, due to the efforts of Mr. Gissin and KSV, the proposal trustee and now the proposed Monitor, and their counsel, an agreement in principle to co-operate on a process to realize upon the assets of the Urbancorp Group has been reached and is contained in a Co-operation Protocol signed by Mr. Gissin and KSV.

4 At the conclusion of the hearing, I granted the Initial Order and the recognition and supplemental orders sought by Mr. Gissin as the foreign representative, including the approval of the Co-Operation Protocol, for reasons to follow. These are my reasons.

Factual background

5 The Urbancorp Group was founded in 1991 by Alan Saskin. As is typical in the real estate development industry, the Urbancorp Group generally uses single purpose project specific corporations to engage in the development, construction and sale of residential properties in the greater Toronto area. Since 2015, the Urbancorp Group has essentially been organized into two branches — the corporations which are owned directly or indirectly by Mr. Saskin or members of his family, which includes UTMI, and the entities that, as of December 2015, became UC Inc. subsidiaries. The majority of the Urbancorp corporations that are applicants in this proceeding have been formed as single purposes entities in connection with the construction and ownership of specific development projects.

6 The Urbancorp Group has redeveloped over 100 acres of former industrial lands in the GTA, turning them into downtown neighbourhoods. The Urbancorp Group was the first developer in the King West village area of Toronto and created the neighbourhood named "King West Village". In the West Queen West Triangle area of Toronto, across from the Drake hotel, the Urbancorp Group developed most of the homes, over 1,600 in that neighbourhood. In partnership with Artscape, a nonprofit provider of affordable artist housing, the Urbancorp Group developed 72 units of affordable artist housing in West Queen West. The Urbancorp Group has donated land and paid for public parks in the City of Toronto, including four public parks in the King and Queen West areas.

7 The Urbancorp Group has built over 5500 homes. It delivered 1,028 homes in the past two years, and currently has 1,058 additional homes under construction.

8 However, as a result of the recent lack of liquidity described in detail in the affidavit of Mr. Siskin, the applicants are insolvent and cannot meet their liabilities generally as they become due, and as a result, the operations of all of the Urbancorp applicants and related entities has been put at risk.

9 Mr. Saskin in his affidavit states that the primary financial challenge facing the Urbancorp applicants and related entities at this time, particularly the entities that filed NOI proceedings, is their inability to raise the necessary financing to advance their major projects beyond their current stages of development. This is due to a number of events, including the recent steps by Tarion Warranty Corporation to revoke certain Tarion registration certificates, and events relating to UC Inc. and its issuance of debentures in Israel. These events and the publicity and press surrounding them have materially threatened the ability of the non-applicant UC entities to carry on business in the ordinary course.

10 UC Inc. is an Ontario company created for the purpose of issuing debentures to the Israeli public on the Tel Aviv Stock Exchange. Prior to listing the debentures Mr. Saskin and his family members agreed to transfer into UC Inc. their interests in five corporations within the Urbancorp Group that directly or indirectly held interests in several investment properties, rental properties and geothermal assets in Toronto

11 UC Inc. issued NIS 180,583,000 (approx. \$64 million based on the exchange rate at that time) par value of debentures which traded on the Tel Aviv Stock Exchange. The terms of the debentures contemplate UC Inc. repaying the debentures in five unequal installments on December 31, 2017, June 30, 2018, December 31, 2018, June 30, 2019 and December 31, 2019. The exclusive jurisdiction to determine all matters related to the debentures lies with a competent court in the State of Israel and pursuant to the governing laws of Israel.

12 On March 31, 2015, Tarion Warranty Corporation, which provides warranties on new residential builds in Ontario for registered builders, issued a notice of proposal to revoke 17 of the Urbancorp Group's registrations as a result of concerns about the Urbancorp Group's financial position and the high number of warranty claims made against two non UC Inc. entities. The Urbancorp Group has since appealed Tarion's decision for 11 of the 17 registrations, and allowed the balance to expire. No decision has been rendered in connection with the appeal as of this date.

13 The indenture trustee of the Israeli debentures alleged that UC Inc. had defaulted under the terms of the debenture trust. On April 24, 2016, the trustee initiated court proceedings against UC Inc. in the Israeli Court. Prior to those proceedings being initiated, the Urbancorp Group's Israeli auditors, Israeli legal counsel and UC Inc.'s board of directors resigned, leaving Mr. Saskin as the sole director of UC Inc. The trustee's application was initially heard on the morning of Sunday, April 24, 2016, at which time the Vice President of the Israeli Court issued an injunction to prevent UC Inc. or Mr. Saskin from taking any further steps to deal with UC Inc.'s assets.

14 On Monday, April 25, 2016, the Israeli Court appointed Mr. Gissin as the functionary officer of UC Inc., with full management control and powers over its subsidiaries. The authority granted to Mr. Gissin under the order included the authority to seize all of UC Inc.'s assets, to exercise UC Inc.'s power of control over its subsidiaries and to approach the Canadian court as an authorized representative of UC Inc. The orders of the Israeli Court would clearly have prevented Mr. Siskin from taking steps to cause the subsidiaries of UC Inc. to file for protection under the CCAA and would have permitted Mr. Gissin to take steps to prevent the applicants from doing so.

15 On May 4, 2016, Mr. Gissin and his counsel met with KSV and its counsel, the result of which was an agreement in principle to co-operate on a process to realize upon the assets of the Urbancorp Group through a CCAA process, with KSV having augmented powers to control management and operations of the Urbancorp Group entities which would be filing, effectively removing Saskin as a decision-maker for those companies, all as set forth in a Co-operation Protocol finalized on May 13, 2016.

16 On May 13, 2016, each of the Urbancorp CCAA applicants and related entities, as borrowers, and UC King South, as lender, entered into an intercompany interim credit facility term sheet whereby UC King South agreed to make available to the Urbancorp entities that had filed a NOI proceeding a revolving credit facility in the amount of \$1.9 million to finance their day-to-day operations and ongoing projects. UC King South is not an applicant in this proceeding. All proceeds of the interim loan continue to be held by KSV in its trust account. Based upon the anticipated cash flow needs of the Urbancorp CCAA applicants and related entities during these restructuring proceedings, including professional fees associated with these proceedings, it is likely that the \$1.9 million may not be sufficient to see the restructuring through to its completion. As a result, the applicants intend to commence a process to secure third party debtor-in-possession financing in the near term.

Issues and analysis

(1) Recognition of Foreign Proceeding

17 Section 46(1) of the CCAA provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to section 47(1) of the CCAA, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding and (ii) the applicant is a foreign representative of that proceeding.

18 A foreign proceeding is broadly defined in section 47(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

19 It is clear in this case that the proceeding in the Israeli Court is a foreign proceeding within the meaning of the CCAA. It is a judicial proceeding brought under Israel's regulations relating to requests for compromise or arrangements, and the relief granted by the Israeli Court, including the appointment of a functionary officer, was for the purpose of enhancing creditors' collective interests.

20 Section 45(1) of the CCAA defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

21 It is also the case that the Mr. Gissin is a foreign representative in respect of the foreign proceeding. He was appointed to monitor UCI's business and financial affairs and to act as a representative in respect of the foreign proceeding. He was provided with the express authority to seize all of UC Inc.'s assets, to exercise UC Inc.'s power of control of its subsidiaries and to approach the Canadian court as an authorized representative of UC Inc.

22 Thus the foreign proceeding in the Israeli Court is to be recognized as a foreign proceeding under section 47(1) of the CCAA.

23 Section 47(2) requires a finding as to whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in section 48(1) of the CCAA against law suits concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made under section 49(1) to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. Mr. Gissin in this case has made such a request.

24 A foreign main proceeding is defined in section 45(1) as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests (COMI). Section 45(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

25 In this case, UC Inc.'s registered office is in Ontario. Pursuant to the Co-operation Protocol Mr. Gissin as the foreign representative has applied to have the Israeli Court proceeding recognized as a foreign main proceeding.

26 The Co-operation Protocol sets out in some detail an agreement to work cooperatively to maximize recoveries through an orderly process for the stakeholders of UC Inc. and the applicants. Without such an agreement, there would no doubt have been contentious proceedings between the two spheres, being the Israeli sphere and the Canadian sphere. That has been avoided. The Co-operation Protocol provides that Mr. Gissin will apply under Part IV of the CCAA to be recognized as the foreign representative of a foreign main proceeding. The applicants in the CCAA proceedings will propose that the Monitor have augmented powers to control the ordinary course management and receipt and disbursements of funds for the applicants and acknowledge that Mr. Gissin shall have standing in these proceedings to represent UC Inc. The Monitor and Mr. Gissin shall attempt to agree on the restructuring or sale process but if they cannot agree the decision will be made by this Court on the application of the Monitor. It is agreed that so long as the Monitor acts in good faith and has not engaged in wilful conduct or gross negligence, Mr. Gissin will not take any steps to remove KSV as the Monitor or to suggest that KSV must take instruction from Mr. Gissin or the Israeli Court.

27 Thus the parties have agreed that while the Israeli proceeding will be considered to be a foreign main proceeding, Mr. Gissin as the foreign representative has agreed that his sole control of UC Inc. and its assets that was granted

to him by the Israeli Court will to a large extent be exercised by the Monitor acting under the CCAA so long as the Monitor acts in good faith collaboratively with Mr. Gissin in accordance with the Co-operation Protocol. This is a very unusual situation in that as a practical matter it is not intended that orders will be made in the future in the foreign main proceeding directing the restructuring of UC Inc. and its subsidiaries with recognition orders being sought in Canada to have such orders carried out in Canada.

28 It is not clear that the COMI of UC Inc. is in Israeli. The proceedings started in Israel because the Prospectus and the Deed of Trust made clear that Israeli courts were to have exclusive jurisdiction to deal with matters related to UC Inc., and that insolvency proceedings regarding UC Inc. could only be brought in the State of Israel.

29 I am reluctant however to upset the balance that has been struck in this case by the Co-operation Protocol. Mr. Gissin in his affidavit has emphasized the importance of the proceedings to the stakeholders of UC Inc. in Israel and the importance of the different legal regimes working together. He has stated:

32. This matter is one of incredible significance to stakeholders in the State of Israel, including the real estate capital markets in general. To date, to the best of my knowledge, a total of 17 North American real estate companies have issued over NIS 11 billion of bonds in Israel. UCI [UC Inc.] was the first such North American company to have gone into insolvency proceedings, and that within four months from the issuance of the Debentures. Given the size of this industry in Israel, this case is being watched very carefully to see how the different legal regimes can work together. I am hopeful that the co-operation evidenced to date in this matter, and in particular through the Co-Operation Protocol, can be continued for the benefit of all affected stakeholders.

30 In this case, so long as the Co-operation Protocol exists, it may not be of much importance in Canada whether the foreign proceeding is a foreign main proceeding, as Mr. Gissin would be entitled as a matter of discretion under a foreign non-main proceeding to a granting of a stay of proceedings against UC Inc. and to an order prohibiting a sale of its property in Canada without leave of the Court. It probably is of more importance in Israel in insuring that if the co-operation between the foreign representative and the Monitor no longer exists and the Monitor acts in bad faith or engages in wilful conduct or gross negligence, the foreign representative will have the ability to go back to the Israeli Court as the court in a foreign main proceeding to seek appropriate relief that could then be sought to be recognized in Canada.

31 The applicants, the Monitor and the foreign representative are all in agreement that an order be sought declaring the Israeli proceedings as the foreign main proceedings and no one appearing is opposing the order sought. In these unusual circumstances I am prepared to make an order that the proceeding in Israel is a foreign main proceeding. It follows that the initial recognition order is to provide a stay of any proceedings against UC Inc. and prohibit UC Inc. from selling or disposing of property in Canada without leave of the Court.

32 It would be expected that if the Israeli Court in the future changed Mr. Gissin's mandate to increase or decrease his authorities or functions or provide any additional mandate in respect of UC Inc., such orders would be brought to the attention of this Court and any application made in connection with them would be made in these Part IV proceedings.

33 It is also appropriate that a supplemental order be made (i) recognizing the decision made in the foreign proceeding by the Israeli Court, (ii) appointing KSV as the information officer, (iii) approving the Co-operation Protocol, (iv) staying any proceedings against or in respect of Mr. Gissin as foreign representative of UC Inc., (v) granting an administration charge of \$400,000 for the costs of the foreign representative, its legal and financial advisors and of the information officer and its counsel and (vi) approval of the funding of the costs of the foreign representative, its legal and financial advisors and of the information officer and its counsel to be covered by the interim funding charge.

34 With respect to the administration charge, there are no secured creditors of UC Inc. The principal creditors are the Israeli bondholders under the debentures. The foreign representative and the information officer are important to the process and the quantum of the charge is reasonable.

35 With respect to the interim financing and the charge for it, KSV presently has the amount of CAD \$1,900,000 in a trust account, which funds KSV received from UC KING SOUTH, and which funds KSV proposes to utilize as a form of interim funding for certain costs in connection with the CCAA proceedings. It is appropriate for this charge to also cover the professional fees and other reasonable costs incurred by the foreign representative in the CCAA proceedings and of the Information Officer and its counsel.

(2) Continuation under the CCAA

36 Section 11.6(a) provides:

11.6 Notwithstanding the Bankruptcy and Insolvency Act,

(a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part;

37 None of the Urbancorp entities that filed a notice of intention under Subsection 50.4(1) of the BIA has filed a proposal.

38 In *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522 (Ont. S.C.J. [Commercial List]), Brown J. (as he then was) expressed the view that on a motion to continue under the CCAA an applicant company should place before the court evidence that the proposed continuation would be consistent with the purposes of the CCAA. Morawetz J. (as he then was) referred to and adopted the same point of view in *Comstock Canada Ltd., Re* (2013), 4 C.B.R. (6th) 47 (Ont. S.C.J.). I take this to be a reflection of the fact that an initial order should be made in a CCAA proceeding only if the purpose of the application is consistent with the purposes of the CCAA.

39 In my view, the proposed continuation of the NOI proceedings as a CCAA proceeding is in accordance and consistent with the purposes of the CCAA. The purpose here is to attempt a restructuring of the Urbancorp business which is the subject of this application, including those entities which had filed NOI proceedings and other highly interconnected entities. It is under the CCAA and the jurisprudence that has developed that permits protection being provided both to the applicant companies and its related limited partnership entities that may not be insolvent. The continuation also assists in the co-operative proceeding with Mr. Gissin as the foreign representative of UC Inc. who is being recognized under Part IV of the CCAA.

40 I am satisfied that the NOI proceedings commenced under the BIA should be taken up and continued under the CCAA.

(3) Protection under the CCAA

41 The applicants and their related entities have total claims against them in excess of \$5 million.

42 I am satisfied that the applicants meet the *Stelco* test of insolvency enunciated by Justice Farley in *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused, [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to SCC refused, [2004] S.C.C.A. No. 336 (S.C.C.). The applicants are currently unable or will imminently be unable to meet such claims generally as they become due. The primary financial challenge facing the Urbancorp applicants and their related entities is their inability to raise the necessary financing to advance their major projects beyond their current stages of development. This is due to a number of events, including the recent steps by Tarion to revoke certain Tarion registration certificates, and events relating to UC Inc. and the Israeli debentures. These events and the publicity and press surrounding them have materially threatened the ability of the non-applicant Urbancorp entities to carry on business in the ordinary course.

43 A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Priszm Income Fund, Re* (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and has been followed in several cases, including *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]), *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) and *4519922 Canada Inc., Re* (2015), 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]).

44 I am satisfied that the stay of proceedings provided for in the Initial Order should extend to the related limited partnerships. Each is significantly interrelated to the business of the insolvent applicants as they and their stakeholders, assets (in many cases beneficial ownership of the assets of applicants), and intercompany payables and receivables in particular, form an integral part of the operations of the Urbancorp Group. Although they are not currently technically insolvent, the evidence is that it was reasonably expected at the time of filing that, without the benefit of a stay of proceedings, they will run out of liquidity before the time that would reasonably be required to implement a restructuring.

45 The applicants seek an interim lender's charge to secure the interim funding from UC King South. It is to be secured against those Urbancorp entities that utilize any of the funds. The applicants also seek the authority for the Monitor to utilize an aggregate of up to \$1 million of cash which exists within the Urbancorp CCAA entities, to fund the cash flow requirements of other Urbancorp CCAA affiliates on an intercompany basis during these proceedings, secured by an intercompany lender's charge over the borrower entity's assets, properties and undertakings in favour of the lender entity, to rank *pari passu* with the interim lender's charge.

46 I am satisfied after a consideration of the factors set out in section 11.2(4) of the CCAA that these charges should be granted. The charges will be subordinate to existing secured creditors and lienholders and will not secure any pre-filing obligations². The money is clearly needed for the restructuring process and the charges are supported by the proposed Monitor who will have enhanced powers to operate the business during the restructuring with the authority to approve the advances.

47 Other charges normal in CCAA cases are proposed. They are a director's and officer's charge in the amount of \$300,000 for the sole remaining director of the applicants after Mr. Siskin's retirement as a director and an administrative charge in the amount of \$750,000. These charges are reasonable and supported by the proposed Monitor. They are approved.

48 At the conclusion of the hearing on May 18, 2016 I signed the Initial Order in the applicants' CCAA application and the Initial Order and supplemental orders on the application of Mr. Gissin under Part IV of the CCAA.

Application granted.

Footnotes

- 1 Urbancorp New Kings Inc. was inadvertently included as an applicant when this proceeding was first commenced. It has been removed as an applicant as it is not an insolvent corporation.
- 2 An exception to the subordination to secured creditors is the Reznick Trust under the Israeli debenture which is to be subordinate to the Charges. Apparently there is still some issue because of the lack of time to deal with it as to what security if any there is to support the Reznick Trust. It may be that some future motion may be necessary to deal with this subordination exception.

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Tab 32

2014 ONSC 6145
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2014 CarswellOnt 16465, 2014 ONSC 6145, 20 C.B.R. (6th) 116, 247 A.C.W.S. (3d) 266

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to U.S. Steel Canada Inc.

H. Wilton-Siegel J.

Heard: October 8, 2014
Judgment: October 8, 2014
Docket: CV-14-10695-00CL

Counsel: R. Paul Steep, Jamey Gage, Heather Meredith for Applicant

Kevin Zych for Monitor

Michael Barrack, Robert Thornton, Grant Moffat for United States Steel Corporation and the proposed DIP Lender
Gale Rubenstein, Robert J. Chadwick, Logan Willis for Her Majesty the Queen in Right of Ontario and the
Superintendent of Financial Services (Ontario)

Ken Rosenberg, Lily Harmer for United Steelworkers International Union and the United Steelworkers Union, Local
8782

Sharon L.C. White for United Steelworkers Union, Local 1005

Shayne Kukulowicz, Larry Ellis for City of Hamilton

Steve Weisz, Arjo Shalviri for Caterpillar Financial Services Limited

S. Michael Citak for Various Trade Creditors

Kathryn Esaw, Patrick Corney for Independent Electricity System Operator

Andrew Hatnay for Certain retirees and, for the proposed representative counsel

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

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.1 General principles](#)

[XIX.1.d Constitutional issues](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.b Grant of stay](#)

[XIX.2.b.vii Extension of order](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

XIX.2.h Miscellaneous

Headnote

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

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — At comeback motion, applicant sought approval of debtor-in-possession (DIP) loan facility; order as to priority of administration charge and director's charge; approval of key employee retention payments; appointment of six representatives and representative counsel to represent interests of group of active and retiree beneficiaries not represented by union U — DIP financing approved — Financing facility was critically important to ensure stable continuing operations — Condition precedent to DIP loan was order granting charge giving DIP lender priority over all security interests and encumbrances, other than administration charge, director's charge and certain priority liens — DIP lender's priority charge granted, as it would not prejudice any other parties with security interests in applicant's property — Doctrine of paramountcy invoked so provisions of CCAA would override provisions of Pension Benefits Act in respect of priority of DIP lender's charge, administration charge and director's charge — Super-priority for administration and director's charges was necessary to further objectives of CCAA proceedings — Beneficiaries of such charges would not provide services to applicant without security for fees and disbursements — Key employee retention program approved in sum of \$2,570,378 — Representatives were appointed — Unrepresented group of beneficiaries were important stakeholders and deserved meaningful representation, especially as there was solvency deficiency in applicant's pension plans.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Constitutional issues

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — Condition precedent to debtor-in-possession (DIP) loan was order granting charge in favour of DIP lender giving priority over all encumbrances, other than administration charge, director's charge and certain priority liens — At comeback motion hearing, applicant sought, inter alia, approval of DIP loan facility and charge, and order as to priority of administration charge and director's charge — Doctrine of paramountcy invoked so that CCAA provisions would override provisions of Pension Benefits Act in respect of priority of DIP lender's charge, administration charge and director's charge — Super-priority for administration charge and director's charge was necessary to further objectives of CCAA proceedings — Beneficiaries of such charges would not provide services to applicant without proposed security for fees and disbursements — Financing was of critical importance to applicant to ensure stable continuing operations — DIP lender's charge did not secure any unsecured pre-filing obligations owed to DIP lender, and would not prejudice any other parties with security interests in applicant's property.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — At comeback motion, applicant sought extension of initial order, including stay provisions — Extension granted as it would further purposes of CCAA — Stay was necessary to provide stability required to allow applicant opportunity to work towards plan of arrangement — Without stay, applicant would have cash flow deficiency that would render successful restructuring unattainable — Applicant was acting in good faith and with due diligence to facilitate restructuring.

Table of Authorities

Cases considered by *H. Wilton-Siegel J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — followed

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 354 D.L.R. (4th) 581, 2 C.C.P.B. (2nd) 1, 96 C.B.R. (5th) 171, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, D.T.E. 2013T-97, 301 O.A.C. 1, 8 B.L.R. (5th) 1 (S.C.C.) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — followed

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 1466, 2012 ONSC 948, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2 C.B.R. (6th) 332, 2012 CarswellOnt 9633, 2012 ONCA 552 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

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

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 10.01 — considered

R. 12.07 — considered

Regulations considered:

Pension Benefits Act, R.S.O. 1990, c. P.8
Stelco Inc. Pension Plans, O. Reg. 99/06

Generally — referred to

RULING on comeback motion regarding terms of initial order.

H. Wilton-Siegel J.:

1 U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

2 The Comeback Motion was adjourned from October 6, 2014 to October 7, 2014, and further adjourned on that date to October 8, 2014. On October 8, 2014, the Court heard various motions of the Applicant and addressed certain other additional scheduling matters, indicating that written reasons would follow with respect to the substantive matters addressed at the hearing. This endorsement constitutes the Court's reasons with respect to the five substantive matters addressed in two orders issued at the hearing.

3 In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Initial Order.

DIP Loan

4 The Applicant seeks approval of a debtor-in-possession loan facility (the "DIP Loan"), the terms of which are set out in an amended and restated DIP facility term sheet dated as of September 16, 2014 (the "Term Sheet") between the Applicant and a subsidiary of USS (the "DIP Lender").

5 The Term Sheet contemplates a DIP Loan in the maximum amount of \$185 million, to be guaranteed by each of the present and future, direct or indirect, wholly-owned subsidiaries of the Applicant. The Term Sheet provides for a maximum availability under the DIP Loan that varies on a monthly basis to reflect the Applicant's cash flow requirements as contemplated in the cash flow projections attached thereto. Advances bear interest at 5% per annum, 7% upon an event of default, and are prepayable at any time upon payment of an exit fee of \$5.5 million together with the lender's fees and costs described below. The Term Sheet provides for a commitment fee in the amount of \$3.7 million payable out of the first advance. The Applicant is also obligated to pay the lender's legal fees and any costs of realization or disbursement pertaining to the DIP Loan and these CCAA proceedings.

6 The Term Sheet contains a number of affirmative covenants, including compliance with a timetable for the CCAA proceedings. The DIP Loan terminates on the earliest to occur of certain events, including: (1) the implementation of a compromise or plan of arrangement; (2) the sale of all or substantially all of the Applicant's assets; (3) the conversion of the CCAA proceedings into a proceeding under the *Bankruptcy and Insolvency Act*; (4) December 31, 2015, being the end of the proposed restructuring period according to the timetable; and (5) the occurrence of an event of default, at the discretion of the DIP lender.

7 A condition precedent to funding under the DIP Loan is an order of this Court granting a charge in favour of the DIP lender (the "DIP Lender's Charge") having priority over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (herein, collectively "Encumbrances") other than the Administration Charge (Part I), the Director's Charge and certain permitted liens set out in the Term Sheet, which include existing and future purchase money security interests and certain equipment financing security registrations listed in a schedule to the Term Sheet (the "Permitted Priority Liens").

8 The terms and conditions of the DIP Loan, as set out in the Term Sheet, have been the subject of extensive negotiation in the period prior to the hearing of this motion. The DIP Loan is supported by the monitor and USS, and is not opposed by any of the other major stakeholders of the Applicant, including the Province of Ontario and the United Steelworkers International Union and the United Steelworkers Union, Locals 1005 and 8782 (collectively, the "USW").

9 The existence of a financing facility is of critical importance to the Applicant at this time in order to ensure stable continuing operations during the CCAA proceedings and thereby to provide reassurance to the Applicant's various stakeholders that the Applicant will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course. As such, debtor-in-possession financing is a pre-condition to a successful restructuring of the Applicant. In particular, the Applicant requires additional financing to build up its raw materials inventories prior to the Seaway freeze to avoid the risk of operating disruptions and/or sizeable cost increases during the winter months.

10 The Monitor, who was present during the negotiations regarding the terms of the DIP Loan, the Chief Restructuring Officer (the "CRO") and the Financial Advisor to the Applicant have each advised the Court that in their opinion the terms of the DIP Loan are reasonable, are consistent with the terms of other debtor-in-possession financing facilities in respect of comparable borrowers, and meet the financial requirements of the Applicant. The Monitor has advised in its First Report that it does not believe it likely that a superior DIP proposal would have been forthcoming.

11 The Court has the authority to approve the DIP Loan under s. 11 of the CCAA. I am satisfied that, for the foregoing reasons, it is appropriate to do so in the present circumstances.

12 The Court also has the authority under s. 11.2 of the CCAA to grant the requested priority of the DIP Lender's Charge to secure the DIP Loan. In this regard, s. 11.2(4) of the CCAA sets out a non-exhaustive list of factors to be considered by a court in addressing such a motion. In addition, Pepall J. (as she then was) stressed the importance of three particular criteria in *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at paras. 32-34, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*]. In my view, the DIP Lender's Charge sought by the Applicant is appropriate based on those factors for the reasons that follow.

13 First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

14 Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

15 Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

16 Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

17 Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

18 Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd., Re*, 2012 ONSC 948 (Ont. S.C.J. [Commercial List]) at paras. 46-47, (Ont. C.A.) [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.) [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

Administration Charge and Director's Charge

19 The Initial Order provides for an Administration Charge (Part I) to the maximum amount of \$6.5 million, a Director's Charge to a maximum amount of \$39 million, and an Administration Charge (Part II) to a maximum amount of \$5.5 million plus \$1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

20 The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s. 11.51 of the CCAA provides the authority to grant a similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

21 As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

22 It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

23 In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

24 In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

The KERP

25 The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

26 The maximum amount payable under the KERP is \$2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

27 The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

28 First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

29 Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

30 Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved.

31 Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para.73, (Ont. S.C.J. [Commercial List]). In addition, USS, the only secured creditor of the Applicant, supports the KERP.

32 Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has

also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

33 Sixth, the terms of the KERP, as described above, are effectively payable upon completion of the restructuring process.

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

34 The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

35 The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. I am satisfied that such an order should be granted in the circumstances.

36 In reaching this conclusion, I have considered the factors addressed in *Canwest Publishing Inc./Publications Canwest Inc., Re, 2010 ONSC 1328, [2010] O.J. No. 943* (Ont. S.C.J. [Commercial List]). In this regard, the following considerations are relevant.

37 The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

39 Third, the contemplated representation will avoid a multiplicity of retainers to the extent separate representation is not required. In this regard, I note that at the present time, there is a commonality of interest among all the non-USW Active and Retiree Beneficiaries in accordance with the principles referred to in *Nortel Networks Corp., Re, 2009 CarswellOnt 3028* (Ont. S.C.J. [Commercial List]) at para. 62, (Ont. S.C.J. [Commercial List]) [*Nortel*]. In particular, at the present time, none of the CRO, the proposed representative counsel and the proposed representatives see any material conflict of interest between the current and former employees. In these circumstances, as in *Nortel*, I am satisfied that representation of the employees' interests can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims. If the interests of such parties do in fact diverge in the future, the Court will be able to address the need for separate counsel at such time. In this regard, the proposed representative counsel has advised the Court that it and the proposed representatives are alert to the possibility of such conflicts potentially arising and will bring any issues of this nature to the Court's attention.

40 Fourth, the balance of convenience favours the proposed order insofar as it provides for notice and an opt-out process. The proposed representation order thereby provides the flexibility to members of this stakeholder group who do

not wish to be represented by the proposed representatives or the proposed representative counsel to opt-out in favour of their own choice of representative and of counsel.

41 Fifth, the proposed representative counsel, Koskie Minsky LLP, have considerable experience representing employee groups in other restructurings under the CCAA. Similarly, the proposed representatives have considerable experience in respect of the matters likely to be addressed in the proceedings, either in connection with the earlier restructuring of the Applicant or in former roles as employees of the Applicant.

42 Sixth, the proposed order is supported by the Monitor and a number of the principal stakeholders of the Applicant and is not opposed by any of the other stakeholders appearing on this motion.

Extension of the Stay

43 Lastly, the Applicant seeks an order extending the provisions of the Initial Order, including the stay provisions thereof, until January 23, 2015. Section 11.02(2) of the CCAA gives the Court the discretionary authority to extend a stay of proceedings subject to satisfaction of the conditions set out in s. 11.02(3). I am satisfied that these requirements have been met in the present case, and that the requested relief should be granted, for the following reasons.

44 First, the stay is necessary to provide the stability required to allow the Applicant an opportunity to work towards a plan of arrangement. Since the Initial Order, the Applicant has continued its operations without major disruption. In the absence of a stay, however, the evidence indicates the Applicant will have a cash flow deficiency that will render the objective of a successful restructuring unattainable. As mentioned, the Monitor has advised that, based on its review, the Applicant should have adequate financial resources to continue to operate in the ordinary course and in accordance with the terms of the Initial Order during the stay period.

45 Second, I am satisfied that the Applicant is acting in good faith and with due diligence to facilitate the restructuring process. In this regard, the Applicant has had extensive discussions with its principal stakeholders to address significant objections to the initial draft of the Term Sheet that were raised by such stakeholders.

46 Third, the Monitor and the CRO support the extension.

47 Lastly, while it is not anticipated that the restructuring will have proceeded to the point of identification of a plan of arrangement by the end of the proposed stay period, the Applicant should be able to make significant steps toward that goal during this period. In particular, the Applicant intends to commence a process of discussions with its stakeholders as well as to explore restructuring options through a sales or restructuring recapitalization process (the "SARP") contemplated by the Term Sheet. An extension of the stay will ensure stability and continuity of the applicant's operations while these discussions are conducted, without which the Applicant's restructuring options will be seriously limited if not excluded altogether. In addition, the Applicant should be able to take steps to provide continuing assurance to its stakeholders that it will be able to continue to operate in the ordinary course during the anticipated restructuring period, without interruption, notwithstanding the current proceedings under the CCAA.

48 Accordingly, I am satisfied that an extension of the Initial Order will further the purposes of the Act and the requested extension should be granted.

Order accordingly.

Tab 33

CITATION: U.S. Steel Canada Inc. (Re), 2016 ONSC 4838
COURT FILE NO.: CV-14-10695-00CL
DATE: 20160729

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Paul Steep and Heather Meredith*, for the Applicant U.S. Steel Canada Inc.

Robert Staley and Kevin J. Zych, for the Monitor Ernst & Young Inc.

Alan Mark and Gale Rubenstein, for the Province of Ontario

Max Starnino and Karen Jones, for the United Steel Workers International Union
and the United Steel Workers International Union Local 8782

Sharon White, for the United Steel Workers International Union, Local 1005

Andrew Hatnay, Representative Counsel for the non-unionized active employees
and retirees

Michael E. Barrack, Jeff Galway and Kiran Patel, for United States Steel
Corporation

Sonja Pavic, for Brookfield Capital Partners Ltd.

HEARD: July 27, 2016

ENDORSEMENT

[1] The applicant, U.S. Steel Canada Inc. (the "applicant"), has brought a motion seeking (1) an extension of the stay of proceedings granted pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"); (2) authorization, and approval, of the second amending and extension agreement dated as of July 15, 2016 (the "Second Extension Agreement"), which amends and extends the amended and restated DIP financing term sheet between the applicant and Brookfield Capital Partners Ltd. (the "DIP Lender") dated November 4, 2015; and (3) approval of a second key employee retention plan (the "KERP"). The United Steel Workers International Union (the "USW"), USW Local 8782 and USW Local 1005 and Representative Counsel for the non-unionized employees and retirees (the "Representative

Counsel”) have brought a motion to lift the suspension of the funding of post-employment benefit plans (the “OPEBs”) as ordered by the Court by order dated October 9, 2015.

[2] The motion of the applicant and the motion of the USW and Representative Counsel were both adjourned to a date to be set at a case conference, if required, pending discussions to be conducted between the parties and the filing of responding materials and a report of the Monitor if necessary. The remaining relief sought by the applicant was granted at the conclusion of the hearing. This Endorsement sets out the Court’s reasons for these determinations.

The Motion to Extend the Stay of Proceedings

[3] The motion to extend the stay of proceedings granted under the Initial Order in these proceedings is supported by the USW, USW Local 1005, the Province of Ontario and Representative Counsel, as well as the Monitor, and is not opposed by the remaining parties at this hearing or otherwise. However, United States Steel Corporation (“USS”) seeks a shorter stay period.

[4] The Court’s authority to extend the stay is found in section 11.02(2) of the CCAA, which gives a court the discretion to extend a stay where circumstances make it appropriate and the applicant has acted, and is acting, in good faith and with due diligence.

[5] The applicant is clearly acting in good faith and with due diligence to seek a plan of reorganization that will allow the applicant’s business to continue as a going-concern. The applicant has set a target date of August 5, 2016 to complete the period of consultation and negotiation between the bidders and the key stakeholders. The stay extension is sought to further the prospects of a viable going-concern restructuring, if agreement is reached for such a transaction after August 5, by enabling the completion of such a transaction. The stay extension would also be necessary if such an agreement were not reached. As the applicant has indicated, in such event, the applicant would consider alternative transactions, or a combination thereof, in the sales process for a portion of its business or lands.

[6] The applicant’s cash flows contemplate that it will have sufficient liquidity to operate during the proposed stay extension period. I note, as well, that the Monitor has provided its usual form of comfort with respect to these cash flows and supports the proposed extension period.

[7] As mentioned, USS seeks a shorter stay extension period. In its notice of motion, USS argues that the extension should expire on August 12 in view of the August 5 target date described above, and submits that the applicant should come back to court to seek a further extension based on the status of the SISP at that time. USS believes that, without a deadline, the applicant will not be in a position to bring the SISP process to a completion within a reasonable timeframe. At the hearing of this motion, USS argued for an “evidence-based” deadline, by which I understand it to mean a deadline described in terms of the process that is currently contemplated.

[8] It is important that the current SISP reach a point in the near-term at which it is clear to the stakeholders whether or not a going-concern restructuring is a viable option for the applicant. It may also be that, at some point, a court-ordered deadline may be required, upon a motion of

the applicant or another stakeholder, to achieve such a decision. However, I do not believe that a court-ordered deadline, whether firm or “evidence-based”, is either necessary or would be useful to the restructuring process at the present time for the following reasons.

[9] First, and most important, significant progress has been made since the termination of Phase II of the SISP. Discussions and negotiations are on-going between the bidders and the key stakeholders. There is a target date of August 5, 2016 for completing this activity. After that, the applicant will be in a position to assess the options before it – which are basically to work toward completion of a going-concern transaction with a bidder it selects or to consider alternative transactions involving the applicant’s assets on a more limited basis. That decision will have a significant impact on the next phase of these restructuring proceedings.

[10] At the present time, however, without knowing which road the applicant will be going down, it is premature to try to craft conditions to the requested stay extension order. It is obvious that the imposition of a deadline of August 12, 2016 is impracticable. It may not be a reasonable time frame for the applicant to conclude its immediate deliberations regarding the form of the restructuring. It would certainly be unreasonable in terms of any expectation of completing all the principal terms of any proposed reorganization transaction with a selected bidder. More generally, under either restructuring scenario currently contemplated, more time will be required for the applicant to complete any transaction that the applicant resolves upon.

[11] Second, in extending the stay extension to November 30, 2016, the Court is not renouncing its authority to impose an earlier deadline if required by the restructuring process. In this sense, the issue of the stay extension and the supervisory role of the Court in respect of the restructuring process engage separate issues.

[12] Third, it is also important for a successful going-concern restructuring to support the applicant’s continued operations on a “business-as-usual” basis to the extent possible to further the prospects of a going-concern restructuring. In this regard, the imposition of short-term milestones, beyond which the circumstances of the applicant remain subject to a determination of the Court, would be counter-productive. It could easily raise unwarranted concerns on the part of third parties dealing with the applicant in the SISP and require the diversion of the applicant’s limited resources away from maintaining and growing the business of the applicant as an independent entity.

[13] Fourth, on this extension motion, the financial position of the applicant, as reported upon by the Monitor in its Twenty-Eighth Report, indicates that the applicant has experienced results in line with the Independent Business Plan approved by the Court pursuant to its order dated October 9, 2015 through May 31, 2016 and has experienced better results since then. The forecast cash flows of the applicant for the stay extension period reflect a generally stable cash balance throughout the period despite the anticipated seasonal increase in inventory in the autumn of 2016. Accordingly, there does not appear to be any material prejudice to the security position of any of the creditors who assert secured claims in this proceeding.

[14] Lastly, the monthly reporting and information flow from the Monitor, as well as the case conferences in this proceeding, provide the key stakeholders with on-going information regarding the status of the SISP as well as the financial state of the applicant. Accordingly, the key stakeholders, including but not limited to USS, are in a position to respond as they see fit to

developments in respect of the applicant's restructuring process, notwithstanding the absence of any court-imposed deadline to return to court for a formal stay extension motion.

[15] Accordingly, the applicant's motion to extend the stay of proceedings to November 30, 2016 under section 11.02 of the CCAA is granted.

Approval of the Second Extension Agreement

[16] The revised terms of the DIP facility, as set out in the Second Extension Agreement, are principally a reduced availability to \$30 million, a reduced extension fee (because the fee is calculated on the reduced availability), an extension to December 31, 2016 and a milestone requirement that an agreement for the restructuring of the assets or business of the applicant be signed by November 1, 2016.

[17] The motion for approval of the Second Extension Agreement is supported, or not opposed, by all of the key stakeholders. While the applicant has not drawn on the DIP Loan to date and its cash flows for the stay extension period do not contemplate the need for any draws during such period, the existence of the DIP Loan is important in several respects. The following considerations form the basis of the Court's approval of the Second Extension Agreement.

[18] First, the DIP loan, as amended to date including the Second Extension Agreement, (the "DIP Loan") will provide an important cash buffer to meet any unforeseen working capital needs resulting, in particular, from market price volatility or the need for increased seasonal inventory stockpiling during the remainder of 2016. Second, the DIP Loan provides for stability and confidence to the bidders participating in the SISP, in particular, in respect of the continuity of the business as it is currently operated, which it is hoped will be restructured on a going-concern basis in that process. The revised terms of the DIP Loan are also consistent with the SISP currently underway. Third, the DIP Loan provides comfort regarding the continuity of the applicant's operations to the end of 2016 to the applicant's employees, customers and suppliers. Their current and continuing relationships with the applicant are critical to a successful restructuring on a going-concern basis. Fourth, the revised terms of the DIP Loan, as set out in the Second Extension Agreement, have been approved by the board of directors of the applicant. Fifth, the Monitor has advised that it considers the reduction in the availability under the DIP Loan to be appropriate and reasonable in the circumstances. Lastly, there is no evidence of any material prejudice to any creditor of the applicant if the Second Extension Agreement is approved and implemented. As mentioned, the forecast cash flows of the applicant for the stay extension period do not currently contemplate a draw under the DIP Loan during that period. While the existing charge in favour of the DIP Loan will continue, there is no change to the priority of such charge and there will be a reduction in the amount secured.

[19] Accordingly, the Second Extension Agreement is hereby authorized and approved.

Wilton-Siegel J.

Date: July 29, 2016

Tab 34

2016 BCSC 107
British Columbia Supreme Court

Walter Energy Canada Holdings, Inc., Re

2016 CarswellBC 158, 2016 BCSC 107, [2016] B.C.W.L.D. 844,
23 C.C.P.B. (2nd) 201, 263 A.C.W.S. (3d) 300, 33 C.B.R. (6th) 60

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

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

In the Matter of a Plan of Compromise or Arrangement of Walter Energy
Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Fitzpatrick J.

Heard: January 5, 2016

Judgment: January 5, 2016

Written reasons: January 26, 2016

Docket: Vancouver S1510120

Counsel: Marc Wasserman, Mary I.A. Buttery, Tijana Gavric, Joshua Hurwitz, for Petitioners
John Sandrelli, Tevia Jeffries, for United Mine Workers of America 1974 Pension Plan and Trust
Matthew Nied, for Steering Committee of First Lien Creditors of Walter Energy, Inc.
Aaron Welch, for Her Majesty the Queen in Right of the Province of British Columbia
Kathryn Esaw, for Morgan Stanley Senior Funding, Inc.
Peter Reardon, Wael Rostom, Caitlin Fell, for KPMG Inc., Monitor
Neva Beckie, for Canada Revenue Agency
Stephanie Drake, for United States Steel Workers, Local 1-424

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

APPLICATION by insolvent corporations for extension of stay of proceedings and other relief to lead to potential restructuring.

Fitzpatrick J.:

Introduction and Background

1 On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

2 The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

3 The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions

relating to the partnerships: *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]); *Forest & Marine Financial Corp., Re*, 2009 BCCA 319 (B.C. C.A.) at para. 21.

4 The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of \$16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

5 From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

6 The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately \$22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of \$11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

7 This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US\$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

8 As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

9 The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

10 For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

11 The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

12 Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

13 The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US\$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "*ERISA*".

14 The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

15 It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

16 Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

17 At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

18 The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

19 It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

20 Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]). At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

- (i) the fairness, transparency and integrity of the proposed process;
- (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

21 Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc.*, Re, 2012 ONSC 2840 (Ont. S.C.J. [Commercial List]) at paras. 17-19.

22 In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable,

particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

23 The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

24 No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

25 The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

26 The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

27 In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

28 A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

29 The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

30 Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

31 In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

32 The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

33 In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *8440522 Canada Inc., Re, 2013 ONSC 6167* (Ont. S.C.J. [Commercial List]) at para. 17). No question arises as to his extensive qualifications to fulfil this role.

34 The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

35 The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd., 2007 SKQB 121* (Sask. Q.B.) at para. 19.

36 The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

37 PJT is to receive a monthly work fee of US\$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

38 At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US\$75,000. In addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to \$1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

39 To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of \$10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

40 The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

41 In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.) at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

42 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

- (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.

43 I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

44 The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

45 Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

46 The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

47 Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

48 In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of \$10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

Key Employee Retention Plan ("KERP")

49 The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

50 The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

51 I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) at para. 53; *Sahlin v. Nature Trust of British Columbia Inc.*, 2010 BCCA 516 (B.C. C.A. [In Chambers]) at para. 6. A sealing order was granted on January 5, 2016.

52 The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

53 The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

54 The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

The combination of the salary increase and proposed retention bonus ... were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

55 I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

56 The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

57 As noted by the court in *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

58 Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]); and *U.S. Steel Canada* at paras. 28-33.

59 I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

60 In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the *SISP*.

61 What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

Cash Collateralization / Intercompany Charge

62 Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent,

Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

63 On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately \$22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

64 The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

65 Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

66 No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

67 In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

Stay Extension

68 In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

69 Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

70 As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

71 Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

72 The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code*, R.S.B.C. 1996, c. 224 (the "Code"). The Board ordered Wolverine LP to pay \$771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;

b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and

c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

73 The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corp., Re*, 2015 BCSC 1961 (B.C. S.C.). There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

[26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:

a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;

b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and 505396 *B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;

c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;

d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;

e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and

f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

74 I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the \$771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

75 In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

76 In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

77 Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

Application granted.

Tab 35

2013 SCC 6
Supreme Court of Canada

Indalex Ltd., Re

2013 CarswellOnt 733, 2013 CarswellOnt 734, 2013 SCC 6, [2013] 1 S.C.R. 271, [2013] W.D.F.L. 1591, [2013] W.D.F.L. 1592, [2013] S.C.J. No. 6, 20 P.P.S.A.C. (3d) 1, 223 A.C.W.S. (3d) 1049, 2 C.C.P.B. (2nd) 1, 301 O.A.C. 1, 354 D.L.R. (4th) 581, 439 N.R. 235, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, J.E. 2013-185, D.T.E. 2013T-97

Sun Indalex Finance, LLC (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierek, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

United Steelworkers (Appellant) and Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services (Respondents) and Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association (Interveners)

McLachlin C.J.C., LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver JJ.

Heard: June 5, 2012
Judgment: February 1, 2013
Docket: 34308

Proceedings: reversing *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.); reversing *Indalex Ltd., Re* (2010), 79 C.C.P.B. 301, 2010 ONSC 1114, 2010 CarswellOnt 893 (Ont. S.C.J. [Commercial List]); and reversing in part *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.); additional reasons to *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.)

Counsel: Benjamin Zarnett, Frederick L. Myers, Brian F. Empey, Peter Kolla, for Appellant, Sun Indalex Finance, LLC
Harvey G. Chaiton, George Benchetrit, for Appellant, George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors

David R. Byers, Ashley John Taylor, Nicholas Peter McHaffie, for Appellant, FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited

Darrell L. Brown, for Appellant / Respondent, United Steelworkers

Andrew J. Hatnay, Demetrios Yiokaris, for Respondents, Keith Carruthers, et al.

Hugh O'Reilly, Amanda Darrach, for Respondent, Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership)

Mark Bailey, Leonard Marsello, William MacLarkey, for Respondent / Intervener, Superintendent of Financial Services

Robert I. Thornton, D.J. Miller, for Intervener, Insolvency Institute of Canada

Steven Barrett, Ethan Poskanzer, for Intervener, Canadian Labour Congress

Kenneth T. Rosenberg, Andrew K. Lokan, Massimo Starnino, for Intervener, Canadian Federation of Pensioners

Éric Vallières, Alexandre Forest, Yoine Goldstein, for Intervener, Canadian Association of Insolvency and Restructuring Professionals

Mahmud Jamal, Jeremy Dacks, Tony Devir, for Intervener, Canadian Bankers Association

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Employment; Civil Practice and Procedure; Constitutional; International

APPEAL by company, monitor, secured creditor, and trustee in bankruptcy from judgment reported at *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.), ordering distribution from reserve fund to pay amount of pension plan deficiencies; APPEAL by union from judgment reported at *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.), issuing costs endorsement.

POURVOI formé par une société, un contrôleur, un créancier garanti et un syndic de faillite à l'encontre d'une décision publiée à *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.), ayant ordonné de combler le déficit des régimes par prélèvement sur le fonds de réserve; POURVOI formé par un syndicat à l'encontre d'un jugement publié à *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.), ayant adjugé les dépens.

Deschamps J.:

1 Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

2 To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("*Indalex*"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

I. Facts

3 Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

4 In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

5 At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

6 Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at \$1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at \$3.0 million on a wind-up basis as of January 1, 2008.

7 From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies could draw from joint credit facilities and would guarantee each other's liabilities.

8 Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

9 The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US\$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

10 The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed \$5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

11 On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US\$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed

that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

12 On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

13 Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US\$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US\$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

14 The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

15 The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

16 The sale to SAPA closed on July 31, 2009. The Monitor collected \$30.9 million in proceeds. It distributed US \$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained \$6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US\$27 million to the DIP lenders. The payment of US\$17 million left a US\$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US\$10 million.

17 Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

18 In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the *PBA* and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

19 On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

20 On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])). The Plan Members appealed the dismissal of their motions.

21 The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)).

22 The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

23 The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.)).

24 The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

25 The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?
2. If so, does the deemed trust supersede the DIP charge?
3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?
4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Windup Deficiencies?

26 The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

57. . . .

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

27 The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

28 The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

29 The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

30 It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

31 It is readily apparent that the wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

75. (1) Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

32 Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

33 The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the \$1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to \$1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

34 Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

35 In *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.), Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*.

[Emphasis added; pp. 312-13.]

36 Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of

the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

37 The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

38 The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

39 The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23a, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

40 Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

41 Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

42 The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

43 Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting

wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

44 Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

45 In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

46 The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

47 The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. Does the Deemed Trust Supersede the DIP Charge?

48 The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

49 The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme,

which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

50 The Appellants' first argument would expand the holding of *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

52 The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.), at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

53 The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

54 There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

55 With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

56 A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

57 None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

58 In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List])):

- (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
- (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
- (c) there is no other alternative available to the Applicants for a going concern solution;
- (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
- (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
- (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
- (g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the *CCAA* filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order ...; and
- (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

59 Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve

their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906 [2009 CarswellOnt 4263 (Ont. S.C.J.)], at paras. 7 and 8).

60 In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. Did Indalex Have Fiduciary Obligations to the Plan Members?

61 The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

62 The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

63 However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

64 Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests

of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

66 When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

67 In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

68 In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

69 Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

70 As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the CCAA court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The CCAA judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. Would an Equitable Remedy Be Appropriate in the Circumstances?

76 The definition of "secured creditor" in s. 2 of the CCAA includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

77 Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.), but did

not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US\$10 million shortfall.

78 This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

79 Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

80 It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

81 There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007*, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.

The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

82 In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

83 In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

84 I would therefore allow the main appeals without costs in this Court, set aside the orders made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

Cromwell J.:

I. Introduction

85 When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

86 Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

87 The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?

B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?

C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?

D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("*USW*")?

88 My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that

the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. Overview

89 These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

90 Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

91 In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

92 Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly \$2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly \$2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

93 Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

94 Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

95 The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US\$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions *accrued to the date of the wind up but not yet due* under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

96 The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

97 The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. Indalex's CCAA Proceedings

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

98 As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the CCAA. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the CCAA court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

99 On April 8, 2009, in what I will refer to as the DIP order, the CCAA judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;
- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);
- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;
- He granted the DIP lenders a so-called super priority:

THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trust, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

- He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than \$5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

100 In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

101 The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) *The DIP Extension Order (Joint A.R., vol. I, at p. 156)*

102 On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately \$5 million more from the DIP lenders, thus raising the allowed total to US\$29.5 million.

103 Counsel for the former executives received the motion material the night before. Counsel for USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 [2009 CarswellOnt 4263 (Ont. S.C.J.)], at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) *The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]))*

104 On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders.

[Emphasis added; para. 9.]

(5) *The Sale Approval Order (Joint A.R., vol. I, at p. 166)*

105 On July 20, 2009, Indalex brought two motions before Campbell J.

106 The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

107 The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) *The Sale and Distribution of Funds*

108 SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US\$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) *The Order Under Appeal*

109 On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the windup deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

110 Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) *The Decision of the Ontario Court of Appeal*

111 The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

112 Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

113 Gillese J.A. found that the super priority provided for in the DIP order did not trump the deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramouncy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Ted Leroy Trucking Ltd., Re, 2010 SCC 60, [2010] 3 S.C.R. 379* (S.C.C.), did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

114 In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

115 She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into

voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

116 Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?

(1) Introduction

117 The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

118 The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

119 The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the windup".

120 Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

121 I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

122 Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

123 A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a)

and includes "an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind-up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind-up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73 and 74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

124 For convenience, the provision as it then stood is set out here.

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

125 While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

126 The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA Regulations*").

127 Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, [etc.] ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": *The Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial

calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

128 If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

129 To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be \$1,655,200. Indalex made special wind-up payments of \$709,013 in 2007 and \$875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was \$1,795,600 — i.e. higher than it had been two years before, notwithstanding that payments of roughly \$1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of \$601,000 in April 2009: C.A. reasons, at para. 32.

(3) The Deemed Trust Provisions

130 The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

131 There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

132 The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

133 When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations, s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

134 I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up ... an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan *an amount of money equal to employer contributions accrued to the date of the wind up but not yet due* under the plan or regulations."

135 When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) *The Interpretative Approach*

136 The issue we confront is one of statutory interpretation and the well-settled approach is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26. Taking this approach it is clear to me that the sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) **Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"**

137 The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "are due ... and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up but [are] not yet due". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

138 In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

139 In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

140 Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.). However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

141 In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D.A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.).

142 In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook — Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

143 The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated by him to be equal to sinking fund payments [on the bonds and debentures] which shall have accrued but shall not be due at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

Where ... a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment: p. 316.

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to "due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

144 Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.)).

145 I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

146 Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

147 I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

148 Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

(2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,

.....

(c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

149 To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "accrued to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued to the date of the wind up" (s. 57(4)).

(b) The Scheme of the Act

150 As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

151 I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "due and not paid". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they

are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "*not yet due*".

152 The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

153 It is striking how closely the text of s. 75(1)(a) — which does not relate to the wind-up deficiency — tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that ... are due ... and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the windup deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

154 I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) Legislative History and Evolution

155 Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at para. 43.

156 Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

157 The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the lien and the deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency*.

158 My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due ... to all amounts due and accrued upon wind up" (para.

42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the windup deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) *The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113*

159 So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113, s. 6*. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23a(1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23a(3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) *The Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80*

160 Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80*; see Kaplan at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

161 It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency ..., up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

162 It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

(iii) *The Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2*

163 The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

164 The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

165 The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are "in addition to the amounts that the employer is liable to pay under subsection 21(2)"* (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

166 The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due*).

167 This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

168 A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.

In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions....

Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214. [Emphasis added.]

(*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

169 Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) Pension Benefits Act, 1987, S.O. 1987, c. 35

170 Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983 version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

171 The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued *to the date of the wind up* but not yet due".

172 The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have *accrued to and including* the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

173 To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) The Purpose of the Legislation

174 Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), at paras. 13-14.

175 In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

176 First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

179 For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

B. Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?

(1) Introduction

180 The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

181 The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

182 In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that

the plan beneficiaries had the opportunity to have representation in the CCAA proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

183 This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

(2) *What Fiduciary Duties did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?*

(a) Legal Principles

184 The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1 (Ont. C.A.), at para. 55.

185 However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at para. 31. As La Forest J. put it in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.):

The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship ... [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.... It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.

[Emphasis added; pp. 646-47.]

186 The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 (S.C.C.), at para. 141; *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at paras. 36-37; *B. (K.L.) v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 (S.C.C.), at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *3464920 Canada Inc. v. Strother*, 2007 SCC 24, [2007] 2 S.C.R. 177 (S.C.C.), at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

(b) The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer

187 In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the PBA. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

188 Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management

Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan." Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

189 The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

22. (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

(2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

.....

(4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

190 Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: ss. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

191 Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

192 The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

193 Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

194 This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(a); *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide

what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) Breaches of Fiduciary Duty

195 Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

(i) Conflict of Interest

196 The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

197 The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

198 This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

199 Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal — those inherent in the employer's exercise of business judgment — cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

200 How, then, should we identify conflicts of interest in this context?

201 In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.), Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at § 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

202 In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the CCAA Proceedings to Reduce Pension Obligations and Notice of Them

203 The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

204 I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

205 First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57 (dissenting):

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

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

206 Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

207 The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA* as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter,

may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

208 This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

209 This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47 (B.C. S.C.), a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater Inc., Re*, 2009 QCCS 6459 (C.S. Que.). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

210 Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

211 I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

212 I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

213 To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one ... does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

214 The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

215 I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

216 Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

217 Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

218 Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (Ont. S.C.J. [Commercial List]). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

219 I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

220 At the same time Indalex applied for the sale approval order, it also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's

fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

221 It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

222 To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) *Was Imposing a Constructive Trust Appropriate in This Case?*

223 The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

224 The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85 (S.C.C.), cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

225 As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

226 I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

227 I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

228 As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for breach of fiduciary duty. The four conditions are these:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

229 My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, at para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

230 The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 995;

... for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

231 While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters'*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy.... [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

232 The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the *CCAA* proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

233 Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is

fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

234 Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result. Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

235 The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

236 There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust — i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff — had been established.

237 I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

238 There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

239 Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach — the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process — had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a \$6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

240 A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

241 I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?

242 Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?

(1) Introduction

243 The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

244 With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to costs on a partial indemnity basis fixed at \$40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, [2011 ONCA 578, 81 C.B.R. \(5th\) 165](#) (Ont. C.A.), at para. 7.

245 Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of \$269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

246 USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition

advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) *Standard of Review*

247 In *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

(3) *Analysis*

248 I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

249 The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

250 The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

251 The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

252 I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The factors set out in *Nolan* and other cases cited therein are best understood as highly relevant considerations guiding the exercise of judicial discretion with respect to costs.

253 The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

254 The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

255 The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation — the vast majority I would add — would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

256 The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

257 In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

258 I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. Disposition

259 I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

260 With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

261 I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of \$269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

262 I would dismiss the USW costs appeal, but without costs.

LeBel J. (dissenting):

I. Introduction

263 The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

264 I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

265 Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("*DIP*") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

266 But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, [I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal \(2011 ONCA 265, 104 O.R. \(3d\) 641\)](#).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

267 Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely, this relationship works or can be twisted, perverted or abused, as was the situation in this case.

268 The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

269 Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout

the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

270 It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

271 Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

272 The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

273 Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:

In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction — but that is for another day. [(2009), 79 C.C.P.B. 101 (Ont. S.C.J.), at para. 10, *per* Morawetz J.]

Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [Factum, at paras. 54-55]

274 I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in CCAA Proceedings

275 The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

276 I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

277 In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.). The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203 and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the

defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

278 In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

279 The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

280 For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

Order accordingly.

Ordonnance en conséquence.

Appendix

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

6. The said Act is amended by adding thereto the following sections:

23a. — (1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

(2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21. . . .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

.....

23. — (1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

.....

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(a) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(b) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

.....

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(a) the value of the assets of the plan; and

(b) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23. — (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

.....

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32. — (1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58. — (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

.....

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

.....

59. — (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

.....

75. — (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

.....

76. — (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Pension Benefits Act, R.S.O. 1990, c. P.8

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

(3) [Accrued contributions] An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) [Wind up] Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

.....

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

.....

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.
2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).
3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

- (1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,
- (a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
 - (b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,
 - (i) the normal retirement date under the pension plan, or
 - (ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or
 - (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.
- (2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.
- (3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.
- (4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.
- (5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.
- (6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.
- (7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.
- (7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.
- (8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

.....

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

Ontario

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

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