Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA 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

BRIEF OF AUTHORITIES OF THE MOVING PARTY, THE CHILDREN'S PLACE (CANADA), LP

(Motion Returnable October 16, 2018)

October 5, 2018

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4. *Canadian Airlines Corp., Re*, [2000] A.J. No. 1692.
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Tab 1

Most Negative Treatment: Check subsequent history and related treatments.

2012 BCCA 367
British Columbia Court of Appeal

Yu v. Jordan

2012 CarswellBC 2760, 2012 BCCA 367, [2012] B.C.J. No. 1863, [2013] 1 W.W.R. 103, [2013] W.D.F.L. 124, [2013] W.D.F.L. 132, [2013] W.D.F.L. 138, [2013] W.D.F.L. 239, [2013] W.D.F.L. 64, 220 A.C.W.S. (3d) 369, 24 R.F.L. (7th) 154, 327 B.C.A.C. 170, 354 D.L.R. (4th) 8, 36 B.C.L.R. (5th) 248, 556 W.A.C. 170

Yanhua Yu also known as Yan Hua Yu, Respondent (Claimant) and Terance Allen Jordan, Appellant (Respondent)

Newbury, Hall, D. Smith JJ.A.

Heard: August 13, 2012
Judgment: September 11, 2012
Docket: Vancouver CA039713

Proceedings: affirming *Yu v. Jordan* (2012), 2012 CarswellBC 167, 2012 BCSC 92 (B.C. S.C.)

Counsel: M.R. Ellis, Q.C., for Appellant
M. Perry, J. England, for Respondent

Subject: Family

Related Abridgment Classifications

Family law
IX Custody and access
IX.5 Variation of custody order
IX.5.a Factors to be considered
IX.5.a.iii Material change in circumstances
Family law
IX Custody and access
IX.5 Variation of custody order
IX.5.b Practice and procedure
IX.5.b.iii Miscellaneous

Headnote

Family law --- Custody and access — Variation of custody order — Practice and procedure — Miscellaneous
Parties married in 2001, and separated in 2004 — Parties had one child, J, born in July 2002 — In 2004, consent order was made awarding parties joint custody and shared parenting, but was silent as to which legislation governed its provisions — Mother brought successful application for primary residence of J — Father appealed — Appeal dismissed — Pleadings, wording, and circumstances in which consent order was made weighed in favour of it having been made under Divorce Act — In absence of order for divorce at time of consent order, custody provisions could not have been final orders under Act — Consequently, mother had no legal burden to establish material change of circumstances.
Family law --- Custody and access — Variation of custody order — Factors to be considered — Material change in circumstances
Parties married in 2001, and separated in 2004 — Parties had one child, J, born in July 2002 — In 2004, consent order was made awarding parties joint custody and shared parenting — In 2008, mother brought unsuccessful application for primary residence of J — Mother later agreed to J living primarily with father while she did not have car — When mother obtained vehicle in 2009, father refused to go back to shared parenting arrangement — Mother brought successful

application for primary residence of J — Father appealed — Appeal dismissed — It was father's refusal to return to week on/week off parenting of J as contemplated by parties at time of consent order that trial judge found to be material change of circumstances — There was no error in that determination — Father's change in travel commitments was also material in that J's needs, while in father's care, were now being met by nanny and driver rather than by mother.

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Cases considered by *D. Smith J.A.*:

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Javid v. Kurytnik (2006), 2006 CarswellBC 3042, 2006 BCCA 565 (B.C. C.A.) — referred to

Javid v. Kurytnik (2007), 2007 CarswellBC 1467, 2007 CarswellBC 1468, (sub nom. *S.M.J. v. L.M.K.)* 374 N.R. 389 (note), 257 B.C.A.C. 12 (note), 432 W.A.C. 12 (note) (S.C.C.) — referred to

Pfann v. Pfann (2008), 2008 CarswellBC 747, 2008 BCSC 452 (B.C. S.C.) — considered

S. (D.B.) v. G. (S.R.) (2006), 61 Alta. L.R. (4th) 1, 31 R.F.L. (6th) 1, 391 A.R. 297, 377 W.A.C. 297, 2006 SCC 37, 2006 CarswellAlta 976, 2006 CarswellAlta 977, 351 N.R. 201, [2006] 10 W.W.R. 379, 270 D.L.R. (4th) 297, [2006] 2 S.C.R. 231 (S.C.C.) — referred to

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Statutes considered:

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Generally — referred to

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s. 16(8) — considered

s. 17 — considered

s. 17(5) — considered

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s. 24 — considered

s. 24(1) — considered

APPEAL by father from judgment reported at *Yu v. Jordan* (2012), 2012 CarswellBC 167, 2012 BCSC 92 (B.C. S.C.), granting mother's application for order that child reside primarily with her.

D. Smith J.A.:

Overview

1 This appeal demonstrates the potential unintended consequences of failing to specify in a court order which legislation governs corollary relief provisions for the custody and support of a child of the marriage, in a divorce proceeding where both the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and the *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*] are pleaded. It also illustrates how the meaning of a court order is determined: it is not determined by the parties' stated intention as to its meaning after the order is made, but by objective indicia that may be found in the pleadings of the action, the wording of the order and in the circumstances in which the order was made. In the absence of such objective indicia, the doctrine of paramountcy will apply such that the order will be founded in the federal legislation.

2 In this case, the appellant father, Terance Jordan, appeals the January 23, 2012 order of Mr. Justice Melnick granting the respondent mother, Yan Yu, primary residence of the child of the marriage, "J.J.", born July 12, 2002 (the "Order"). The Order "varied" a December 17, 2004 consent order that awarded the parties joint custody and joint guardianship of "the child of the marriage" and ordered them to "both parent the child of the marriage ... as equally as possible" and to "agree on parenting schedules from time to time" (the "Consent Order").

3 The provisions of the Consent Order incorporated the December 16, 2004 Minutes of Settlement from the parties' divorce action in which corollary relief, including custody of and support for the child, was pleaded under the *Divorce Act* and the *FRA*. The Consent Order, however, was silent as to which legislation governed its provisions, and the order for divorce was not obtained until November 2, 2006, after the father filed a counterclaim in the divorce action seeking a divorce order *simpliciter*.

4 Both parties were represented by counsel at the time of the Consent Order. The father, however, acted on his own behalf when he applied for the order for divorce.

5 The issue of whether the custody and support provisions of the Consent Order were made pursuant under the *Divorce Act* or the *FRA* is not merely an interesting academic exercise, but one with some practical consequences to litigants who may have to revisit those provisions in a subsequent proceeding. In this case, if the impugned provisions of the Consent Order were made under the *FRA* (which the father now contends) they are final orders and the mother had the legal burden of demonstrating a material change of circumstances to support a variation of those provisions. If, however, they were made pursuant to the *Divorce Act*, they are interim orders (as the order for divorce had not yet been granted) and the mother would have had no legal burden to establish a material change of circumstances in order to change the provisions.

6 The Order was the second attempt by the mother to "vary" the custody and support provisions of the Consent Order. Her first application for primary residence of J.J. was brought on April 4, 2008, and was made pursuant to s. 17(5) of the *Divorce Act*. The application was dismissed based on the chambers judge's finding that the mother had failed to demonstrate a material change of circumstances since the Consent Order. The mother's second application was filed on June 6, 2011; a similar application was made on August 15, 2011 (collectively I will refer to the two applications as the "June 6, 2011 application" or the "second application"). The second application was remitted to the trial list where it was heard over the course of a 5-day trial before Melnick J. The legal authority relied on for the second application included both the *Divorce Act* and the *FRA*.

7 In his reasons for judgment indexed at 2012 BCSC 92 (B.C. S.C.), Melnick J. first addressed "[the] threshold question ... whether there has been a material change in circumstances since the last order of this Court respecting the custody of the child" (para. 1). The last order was the April 4, 2008 order dismissing the first variation application.

He applied the test in s. 17(5) of the *Divorce Act* ("a change in the 'condition, means, needs or other circumstances of the child'") as it was described in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.) at paras. 10-13, and concluded that the evidence established a material change of circumstances.

8 He then considered the statutory factors in s. 16(8) of the *Divorce Act* and s. 24(1) of the *FRA* to determine what custodial arrangement at this time would meet the best interests of the child. Based on his assessment of the evidence (and lack of evidence), and his findings of credibility with respect to each of the parties, he concluded that the best interests of the child would be met by an order of primary residence with the mother commencing August 1, 2012, with liberal and generous access to the father. He specified the father's access to include (in general terms) an equal sharing of the school holidays (Christmas, Spring Break and summer), every second weekend, and every third week in September, November, January, March and May, "unless the parties otherwise agree". These provisions of the Order were not appealed by the father. The mother was also granted liberty to register the child in a school convenient to her residence in Burnaby or North Vancouver.

9 It is common ground that absent a material error of fact, law or principle (that is, a serious misapprehension of the evidence, a failure to apply the correct legal test, or a failure to consider a relevant factor in the application of the correct legal test, resulting in a final award that is "clearly wrong"), this Court has no jurisdiction to interfere with the exercise of the trial judge's discretion in determining what custodial arrangements are in the best interests of a child: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014 (S.C.C.) at paras. 14-15.

10 The father does not challenge the trial judge's exercise of discretion in deciding that the best interests of the child was to reside primarily with the mother (except in regard to a finding of fact relating to the permanency of the living arrangements of the child's Chinese grandmother with the mother in Canada and, as a result, the extent to which she could exert a positive influence on the child by teaching her about her Mandarin heritage if the child were living with the mother). Rather, the father's central submission is that the trial judge erred in principle in finding that a material change in circumstances had occurred since the April 2, 2008 order, and that therefore he had no jurisdiction to revisit the issue of what custodial arrangement would be in the best interests of the child.

11 As an extension of this submission, the father contends that the trial judge erred in law by failing to accept the mother's factual statements in her June 6, 2011 Notice of Application to vary the Consent Order (the second variation application) as pleadings from which "adverse facts" to the mother should have been found. He says the pleadings, which list the changes to the parties' initial custodial arrangement under the Consent Order, acknowledge the consensual basis to the changes and are therefore the equivalent of "formal" or "judicial admissions". He submits the custodial arrangement, as it has changed from time to time, should have been the starting point for his determination of the threshold issue of whether the mother had established a material change in circumstances. In other words, he says the mother's factual statements as to the adjusted parenting arrangements of the child from 2008 until the June 6, 2011 application, reflect changes agreed upon by the parties as contemplated by the words of the Consent Order "to agree on parenting schedules from time to time", and therefore the trial judge erred by failing to consider whether a material change of circumstances had occurred from those adjusted parenting arrangements.

12 Last, the father submits the trial judge misapprehended the evidence in regard to the living arrangements of the child's Chinese grandmother in Canada, and therefore overemphasized the extent of her positive influence in teaching the child about her Mandarin heritage, including its language and culture, which finding factored into his determination of what parenting arrangement was in the best interests of the child.

13 For the reasons that follow, I am of the view that the custody and support provisions of the Consent Order were made pursuant to the *Divorce Act*. In the absence of an order for divorce at the time the Consent Order, the custody and support provisions could not have been final orders under the *Divorce Act* but only interim orders. In my view the impugned provisions of the Consent Order were not final orders under the *FRA* and therefore were not subject to the test of a material change in circumstances before they could be varied. Consequently, the mother had no legal burden to establish a material change of circumstances in order to change the Consent Order.

14 I am also cognizant, however, that the application before Melnick J. was presented by counsel for both parties as a variation application of the Consent Order pursuant to s. 17(5) of the *Divorce Act* (as was the previous application that resulted in the April 4, 2008 dismissal order). Based on this joint representation to the trial judge as to nature of the application, the judge accepted the parties' submissions that the mother had the legal burden of establishing a material change of circumstances since the April 2, 2008 order, before the Consent Order could be "Revisited". In these circumstances, I am also satisfied that the trial judge did not err in finding a material change of circumstances since the April 4, 2008 order, and that no material error (in fact or in law), or error of principle has been demonstrated that would render his finding — that the best interests of the child at this time would be met by any order that J.J. reside primarily with her mother — was clearly wrong.

Background

15 The father and mother, ages 69 and 36 respectively at the date of trial, met in China in 1999, where they were married on February 16, 2001. In early 2002 the mother immigrated to Canada with the father, where their daughter was born. The parties separated in December 2004 and on December 6, 2004 the mother commenced the within divorce proceedings. Minutes of Settlement were entered into on December 16, 2004, and on December 17, 2004, the Consent Order was granted. On May 10, 2006, the father filed a counterclaim in the action in which he sought an order for divorce only, with no corollary relief. On November 2, 2006, the order for divorce was granted.

16 After the parties' separation, the family residence in West Vancouver was sold. Thereafter, the father purchased a house in West Vancouver and the mother purchased a townhouse in North Vancouver.

17 The father is a racehorse trainer. During the marriage he worked full-time and was the owner of a horse-training business that, for a number of years, operated out of both Vancouver and Toronto. However, as the horse-racing business declined in Vancouver, the centre of its operation increasingly settled on Toronto. In the year immediately preceding the trial, the father had worked full-time during the racing season (April to October) out of Toronto. His business now operates exclusively in that community. For the purpose of child support, the trial judge found the father's annual income to be $102,000.

18 The mother is an independent insurance broker and investment advisor. At the date of trial, she worked part-time and was enrolled in the Masters of Business Administration program at Simon Fraser University ("SFU") in Burnaby. Since September 2010 she has resided on campus while she attends university and has rented out her North Vancouver townhouse. The trial judge found her annual income to be approximately $23,500 (based on both employment income and rental income).

19 Until February 2007 the parties shared a week on/week off parenting arrangement. During that period, J.J. started school in West Vancouver.

20 In February 2007, the mother was injured in a motor vehicle accident. As a result of the accident her driver's license was suspended for six months. She also found that she was unable to physically care for the child because of her injuries. She therefore asked the father if the child could transfer to a school near her North Vancouver residence. He refused. As a consequence, the week on/week off arrangement was changed so that the child resided with the father during the weekdays and with the mother on weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m. (the "adjusted arrangement"). This adjusted arrangement permitted J.J. to complete the school year at the school she was then attending.

21 By September 2007 Ms. Yu felt physically able to resume her equal sharing of the care of the child and asked Mr. Jordan to return to their previous week on/week off arrangement. Again he refused. His refusal precipitated the mother's April 4, 2008 application.

22 In the April 4, 2008 application, the mother sought primary residence of the child. In an affidavit sworn February 19, 2008 in opposition to the application, the father deposed that the initial custodial agreement between the parties at

the time of the Consent Order (the week on/week off) had "generally been followed" and that he could "do all of [his] travelling for the purposes of employment during the week that the plaintiff has [the child]". Madam Justice Russell dismissed the application on the basis that the mother had failed to demonstrate a material change of circumstances since the Consent Order, as required by s. 17(5) of the *Divorce Act*. In oral reasons for judgment, (*Yu v. Jordan* (4 April 2008), Vancouver E043907), shefound that "the arrangement between the parties is that there is a 50/50 basis for custody" (para. 11) and that "[t]he status quo must continue for the time being" (para. 4).

23 For a short period after the April 4, 2008 order the parties returned to the week on/week off arrangement. However, it did not prevail because of further changes to each of the parties' lives. As a result, they reinstated the adjusted arrangement whereby the child resided with her father during the week and with her mother on weekends.

24 In May 2008, the mother decided to cease operating her car because of the increase in her insurance premiums due to her accident. With her inability to deliver and pick up the child from school, she was compelled to leave the child again with the father during the week. She remained without vehicle insurance until December 2009.

25 In September 2008, Ms. Yu enrolled in an Adult Continuing Education course. She attended that program for the next two years and in September 2010 commenced the Masters of Business Administration program at SFU. At that time she moved into student housing on campus and rented out her North Vancouver townhouse.

26 Following the April 2008 hearing, Mr. Jordan came out of semi-retirement and began travelling to Toronto on a regular basis for the horse racing season. In order to accommodate that change in his availability, he hired a full-time nanny to assume the care of the child while he was away. The nanny also travelled with him and the child to Toronto during his monthly summer access in July. The father also hired a Mr. Dreworth to pick up and drop off the child from school when he was not at home.

27 During this period (2008-2012) the child continued to spend weekends with the mother. The trial judge found that J.J. is an outgoing child who had acquired friends at both parents' homes.

28 Because of the father's extensive travel commitments, the mother asked the father in 2011 for primary residence of the child. When he refused, she filed the June 6, 2011 application.

29 The immediate issue about which school the child would attend in September 2011 was resolved by order of a master on September 8, 2011, when the child was ordered returned to the father's care for the weekdays and was to attend the West Vancouver school. The order also extended the mother's weekend access to include Monday mornings and directed the father to deliver the child to the mother when he was out of town.

30 The mother found it difficult to transport the child from her Burnaby residence to school in West Vancouver on Monday mornings in a timely manner. For a short time the father made the return trip. However, on October 24, 2011, at the father's request, the September 8, 2011 order was varied to provide for the child to be returned to the father by 7:00 p.m. on Sunday.

31 J.J. completed grade 3 at the West Vancouver school on June 28, 2011.

The Trial Judge's Reasons

32 Before Melnick J., the father submitted that the adjusted arrangement (weekdays with him and weekends with the mother) had been agreed to by the mother and that J.J.'s primary residence had been with him since the start of that arrangement or at least since 2008. In his submission, there had been no material change in circumstances from the adjusted arrangement, which pre-dated the April 4, 2008 order, and that arrangement should continue.

33 The mother submitted that the father had imposed the adjusted arrangement on her in September 2007 when he refused to return to the week on/week off arrangement and that he had interpreted the effect of the April 4, 2008 order to permit him to continue with the adjusted arrangement rather than return to the week on/week off arrangement. She

contended that a material change had occurred since the 2008 order by reason of the change in the father's working arrangements that required him to travel to Toronto on a regular basis and by his refusal to return to their initial arrangement.

The finding of a material change in circumstances

34 Mr. Justice Melnick focussed on the change in circumstances since 2008. As to the factual issue of whether the adjusted arrangement had been agreed to or imposed by the father, he found:

> [6] For a very short time after the April 2008 order, the parties did in fact parent the child in a manner that could be said to be consistent with the equal parenting they had consented to before Justice Cole. But that soon changed.
>
> [7] Ms. Yu lost the use of her vehicle in May 2008. At the time she resided in North Vancouver while Mr. Jordan continued to live in West Vancouver where the parties had resided during cohabitation. The child attended school in West Vancouver. Mr. Jordan was then, and continues to be, quite insistent that the child do so as he regards the school as a very good one. Apparently it is. At that time, due to her effective inability to commute in a timely way between the two communities with the child, Ms. Yu requested of Mr. Jordan that he assist with driving or agree to the child attending a school near her townhouse in North Vancouver. He refused.
>
> [8] Ms. Yu then agreed to the child living primarily with Mr. Jordan while she did not have a car so as to facilitate the child attending school. She regained the use of her vehicle in December 2009. She then requested that Mr. Jordan agree to her having the primary care of the child; that the child attend a school in North Vancouver; or that they resume the week on/week off parenting schedule envisioned by the orders of Mr. Justice Cole [the Consent Order] and Madam Justice Russell [the April 4, 2008 order]. Mr. Jordan refused.

35 Applying the test in *Gordon v. Goertz* at paras. 10-13, he found that a material change of circumstances had occurred since the April 4, 2008 order, in two respects: (i) the father had unilaterally changed the assumed "50/50" or "equally as possible" parenting arrangement, and (ii) the father had resumed working in Toronto and hired a nanny to care for the child in his absence. Neither circumstance, he found, had been in the contemplation of the parties when the Consent Order was made:

> [9] Mr. Jordan is a horse trainer. His work is primarily in the Toronto area. Thus he frequently commutes to Toronto during horse racing season. He now tries to confine the time he is away to weekends when Ms. Yu has access to the child. But the child is sometimes left in the care of the nanny he has hired on a full-time basis. Regularly working in Toronto was not what Mr. Jordan usually did at the time either of the earlier orders respecting custody were made. In that respect, there has been a change in circumstances although Mr. Jordan downplays its materiality by indicating that he manages to fit his work into the present parenting schedule.
>
> [10] It is the present parenting schedule which I find is materially different from that envisioned by the earlier orders - in which it was envisioned that the parties would parent the child as equally as possible. That is not happening now and it is not happening, I find, because Mr. Jordan does not wish it to happen. This is a change that was not envisioned by the parties when the order of Mr. Justice Cole was made. That order incorporated the consent of the parties to the equal parenting regime. Nor was it contemplated at the time of the order of Madam Justice Russell. Mr. Jordan's affidavit makes that plain. Ms. Yu then wanted a change but Mr. Jordan did not. Madam Justice Russell left the basic custodial arrangements of equal care in place.
>
> [Emphasis added.]

The finding of the best interests of the child

36 After concluding that the threshold issue of a material change of circumstances had been met, the trial judge embarked on an inquiry of what arrangement would be in the best interests of the child. In that regard he considered the statutory tests under s. 16(8) of the *Divorce Act*, and s. 24 of the *FRA*.

37 Section 16(8) of the *Divorce Act* provides:

> 16(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

38 Section 24 of the *FRA* mandates several factors to be considered:

> 24(1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:
>
> (a) the health and emotional well being of the child including any special needs for care and treatment;
>
> (b) if appropriate, the view of the child;
>
> (c) the love, affection and similar ties that exist between the child and other persons;
>
> (d) education and training for the child;
>
> (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately;

39 In addressing these factors, the trial judge found that "[b]oth parties very much love the child and do whatever is practicable to provide for her wellbeing as each conceives that concept" (para. 17). He noted, however, that Mr. Jordan had not called the nanny or the driver to testify on his behalf, although both individuals were involved in the child's day-to-day life during the week (para. 18). The mother, in comparison, called two friends to testify on her behalf, both of whom he found spoke of her in very positive terms "as being an exemplary mother who, to their knowledge, has never spoken in front of the child in a negative way concerning Mr. Jordan". In comparison he found that the father had "done so on a number of occasions with words that would have diminished her [the mother's] status to the child". (Para. 19.) The judge also found that the father had impeded the child's access to her mother while in his care, by taking the cell phone and IPad Ms. Yu had purchased for J.J. in order to facilitate communications when she was with her father. Although the trial judge agreed that the mother's communications with the father could be "annoyingly argumentative" he also found the father to be "argumentative" as well as "inflexible" (para. 20).

40 As examples of that inflexibility, the trial judge referred to the father's child care arrangements when he was in Toronto and his attitude toward the mother's requests to co-parent the child:

> [21] Notwithstanding the existing orders that call for parenting to be as equal as possible, I am satisfied that Mr. Jordan has, on a number of occasions, been in Toronto for work when the child could have been in the care of Ms. Yu but, instead, was left in the charge of the nanny and Mr. Dreworth. Further, I find that Mr. Jordan tailored his evidence to give me the impression that his work responsibilities in Toronto cause him to be absent from home less than he probably is.
>
> . . .
>
> [24] Then too, over the time Mr. Jordan has provided, by his insistence, the primary residence of the child, his demonstrated attitude toward Ms. Yu has probably resulted in a measure of alienation of the child from her mother: her father is disparaging of his mother so she has become less comfortable in being with her mother when the three

of them are together. Perhaps, fortunately, that is rare, as I have no doubt from the evidence of Ms. Laliberte and Ms. Yousuf that when the child is with her mother apart from Mr. Jordan they have a good relationship.

41 At the same time, the trial judge was also critical of the mother's conduct. He found her to be unhelpful or uncooperative in failing to pick up and return the child to the father in a timely manner, and in delivering the child to school on Monday mornings.

42 As to the parties' ongoing relationship, he found:

> [22] ... Unfortunately, the enmity each has for the other has affected the extent to which each cooperates with the other, the loser being the child on a number of occasions. A lack of trust in the other's motives has coloured the conduct of each party toward the other.

43 In regard to the child's education, he found:

> [25] Both parties have demonstrated a concern to ensure that the child gets a good education. Given her higher level of education, Ms. Yu may be better placed to assist with school assignments, but Mr. Jordan gave me the impression that he is a person who will do whatever is required to see that the child gets any help she needs.

44 As to which parent would better facilitate access to and a positive relationship with the other parent, he found:

> [32] Ms. Yu will more probably create a positive relationship between Mr. Jordan and the child than he will between Ms. Yu and the child. Ms. Yu is more generous in her attitude to Mr. Jordan than he is to her. She will better foster communication between the child and Mr. Jordan than he would.

45 Lastly, he found that if the child lived with the mother she would be exposed to the positive influence of her Chinese grandmother:

> [16] Ms. Yu's mother has now retired and has moved from China to Burnaby. Her mother does not speak English so she communicates with Ms. Yu and the child in Mandarin. The child has learned some Mandarin from her grandmother but, given the infrequent use she makes of it, she is not making significant advances in learning the language. Mr. Jordan withdrew the child from Mandarin school as she was not treated well by the teacher due to the slowness of her progress. Mr. Jordan says Ms. Yu did not use her weekend access visits to help with the child's Mandarin homework. Mr. Jordan does not speak Mandarin. The present *de facto* custodial arrangements have resulted in a diminished opportunity for the child to explore and develop the Chinese half of her heritage.

46 Based on these findings (of which only the last one is in dispute), the trial judge concluded that "[o]n balance, then, although each parent has demonstrated the capacity to provide good parenting, if not effective communication with each other, the best interests of the child will be served by her now residing principally with Ms. Yu". (Para. 35.) He reasoned:

> [29] The child is doing well academically. From the evidence adduced by both parties, I conclude that she is a bright, busy, pleasant girl who has no health issues of concern. She has friends she relates to in each parent's environment. But, as Ms. Robin, counsel for Mr. Jordan submitted, what she now requires is stability, a sense of security knowing what her living arrangements will be.
>
> [30] The inability of both parties to communicate with the other in a respectful, positive manner concerning the child makes an "as equally as possible" parenting arrangement unworkable. In fact, that arrangement, although ordered by the court, has essentially not been in place since 2008. Mr. Jordan has seen to that. Undoubtedly, he views the child residing principally with him as being in the child's best interest. She has, in fact, done well while in his care. But so has she done well when in the much less frequent care of Ms. Yu.
>
> [31] The child should be in the joint custody and guardianship of both parents but she should reside principally with Ms. Yu. I conclude that Ms. Yu will better facilitate access of Mr. Jordan to the child than he has of Ms. Yu to

her. Further, the child should have her own mother, not a nanny, responsible for her care. Ms. Yu has the time and the demonstrated ability to provide that care. That is not meant as a criticism of the care the child now receives from Mr. Jordan, Alita and Mr. Dreworth. But all I know of the latter two individuals from the evidence is that Mr. Dreworth helps Mr. Jordan with driving the child. The nanny, Alita, recently considered moving to another position but was convinced to stay on. Her presence in the child's life is a good one, but not necessarily a permanent one as would be the case with Ms. Yu, the child's own mother.

. . .

[33] Living most of the time with Ms. Yu will allow the child to be exposed to and to develop an appreciation of the Mandarin part of her heritage. She will have more time to spend with her grandmother, for example.

[34] There is the advantage, as well, of Ms. Yu being more readily available to the child, now nine, to discuss problems, share confidences and provide information to her about life and life skills.

Preliminary Issue: Divorce Act or Family Relations Act?

47 It is common ground that an order for corollary relief in a divorce action that pleads both the *Divorce Act* and the *FRA* cannot be a final order for corollary relief under the *Divorce Act* absent the granting of an order for divorce. Such an order will remain an interim order under the *Divorce Act* until the divorce order is granted. Final corollary relief under the *Divorce Act* can be granted only upon the granting of an order for divorce: *S. (D.B.) v. G. (S.R.)*, [2006] 2 S.C.R. 231 (S.C.C.) at paras. 91-92.

48 Difficulties may arise in subsequent proceedings where an order is silent as to which legislation governs its provisions. For example, in *Boznik v. Boznik* (1993), 76 B.C.L.R. (2d) 202 (B.C. S.C.), Madam Justice Huddart held that an interim order for spousal and child support, which the parties intended to be a final support order, was not extinguished by a subsequent order for divorce that was silent in regard to final corollary relief under the *Divorce Act.* In that case, the payor father had sought to vary the interim order pursuant to s. 17 of the *Divorce Act.* Huddart J. held that there was no jurisdiction under s. 17 of the *Divorce Act* to vary the interim support order but the interim order would remain in effect until a final order for support under the *Divorce Act* was made. (At 207.)

49 This reasoning was followed in *Chicoine v. Chicoine* [2007 CarswellBC 1168 (B.C. S.C.)] and *Pfann v. Pfann*, 2008 BCSC 452 (B.C. S.C.), and applied by this Court in *Armstrong v. Armstrong*, 2012 BCCA 166 (B.C. C.A.) at para. 43.

50 It is also common ground that a material change of circumstances is a threshold requirement to the variation of a final order for custody or support made pursuant to the *Divorce Act* or the *FRA*: see *Javid v. Kurytnik*, 2006 BCCA 565 (B.C. C.A.) at para. 5, leave to appeal refused [2007] S.C.C.A. No. 80 (S.C.C.); and *Boychuck v. Singleton*, 2008 BCCA 355 (B.C. C.A.).

51 In this case, Minutes of Settlement in an action that pleaded both the *Divorce Act* and the *FRA* were merged into the Consent Order, which was silent as to the legislative provision under which the custody and support provisions of the order were made. The issue of which legislation governs in these circumstances was addressed in *Gomes v. Gomes (Keene)* (1985), 47 R.F.L. (2d) 83 (B.C. S.C.) where Mr. Justice Hutchisonheld (at p. 95) that in proceedings where both the *Divorce Act* and the *FRA* are pleaded, "[t]he court may award maintenance under either Act, but if there is no indication in an order as to which Act was invoked it may be assumed that the federal Act was because Parliament is the paramount legislature." He reiterated this interpretation in *Spiers v. Spiers* (1995), 15 B.C.L.R. (3d) 148 (B.C. S.C. [In Chambers]), where he applied the doctrine of paramountcy to find that a custody provision in an order granted in a divorce action that pleaded both the *Divorce Act* and the *FRA*, but was silent on which Act governed, will be assumed to have been made pursuant to the *Divorce Act* (paras. 13-14). In my view this analysis is correct and is equally applicable to subsequent proceedings that follow an order for divorce that is either silent as to corollary relief or provides corollary relief but is silent as to which of the pleaded Acts governs its provisions.

52 The father submits this Court should infer that the parties must have intended the custody and support provisions of the Consent Order to be final orders under the *FRA* based on the parties' incorporation of Minutes of Settlement (which resolved all of the issues raised in the divorce action except for the divorce order) into the Consent Order, and their subsequent treatment of the mother's applications to change the Consent Order as variation applications of a final order. However, even if the parties' intentions governed the interpretation of an order (a proposition with which I do not agree), the parties in this case expressly treated the two applications following the Consent Order as variation applications under the *Divorce Act* and the orders dismissing those applications therefore could only have been made pursuant to the *Divorce Act*.

53 In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

54 Here, both the *Divorce Act* and the *FRA* were pleaded. However, the language of the Consent Order refers to J.J. as "the child of the marriage". This language is taken from the *Divorce Act*, which refers to a child as a "child of the marriage" (for the purposes of corollary relief under the *Act*) and defines a "child of the marriage" as "a child of two spouses or former spouses who, at the material time, (a) is under the age of majority and who has not withdrawn from their charge, or (b) is age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life" (s. 2(1)). The definition of "child" in the *FRA* is different. It refers to a "child" only and defines a "child" (for the purposes of custody, guardianship, access and support orders under that Act) as "a person who is under the age of 19 years" (s. 1(1)) and says the term "includes a child not yet born on the death of the child's father or mother but subsequently born alive" (s. 21).

55 The circumstances in which the Consent Order was made pre-dated the granting of the order for divorce and the subsequent order for divorce *simpliciter* was silent as to any final orders for corollary relief. The objective indicia (the pleadings, the wording of the order, and the circumstances in which the order was made) in my view weigh in favour of the Consent Order having been made under the *Divorce Act* and therefore its custody and support provisions being interim orders. In the absence of the Consent Order specifying which legislative scheme governs its provisions, I would also apply the doctrine of paramountcy to find that the impugned provisions were made under the *Divorce Act*.

56 While one or both of the parties may have intended the custody and support provisions of the Consent Order to be final orders under the *Divorce Act*, the necessary steps to achieve that disposition were not taken. That omission cannot in my view be corrected in hindsight by changing the legislative scheme under which the order was made. For a court to permit a party bound by a court order to subsequently provide a revised interpretation of the order in order to rectify what may have inadvertently been omitted at the time the order was made, could result in uncertainty, confusion and potential unfairness to the other party(ies) to the order. It could also undermine the objective of finality in a court order.

57 In my view, the Consent Order cannot be interpreted in retrospect in a manner to reflect what the parties may have intended it to be, but failed to finalize at the time the Consent Order was made. The only objectively reasonable interpretation of the Consent Order is that its custody and support provisions were corollary relief provisions under the *Divorce Act*, albeit interim orders as the order for divorce had not yet been granted. In the result, the mother was not required to establish a material change of circumstances in applying for a variation of the Consent Order.

58 I propose, however, also to address the father's grounds of appeal that allege errors in the trial judge's application of s. 17(5) of the *Divorce Act* in view of the manner in which the parties argued their respective positions before the trial judge. I shall further address the father's submission that the Order should be set aside based on a misapprehension of the evidence concerning the living arrangements of the child's grandmother.

Did the Trial Judge Err in Finding a Material Change of Circumstances?

59 The trial judge found a material change circumstances from the April 4, 2008 order based on: (i) the father's refusal to co-parent the child based on the week on/week off arrangement agreed to by the parties when they entered into the Consent Order; and (ii) the father's work commitments in Toronto which required him to delegate the care of the child to a nanny and driver for at least six months of the year, when the mother was available and had requested to care for the child. This change, he also found, had not been in the contemplation of the parties at the time of the Consent Order.

60 The father submits that the Consent Order did not expressly mandate a week on/week off parenting arrangement and contemplated changes to the parties' initial arrangement by permitting them to "agree on parenting schedules from time to time". He says that in accordance with that provision, the Consent Order was varied from time to time by agreement and therefore the trial judge erred in finding the changes in the parenting arrangement after the Consent Order was made, and in particular since the April 4, 2008 order, were material changes of circumstances. In support of his position, the father submits that the mother's factual summary of the changes to the Consent Order in her June 6, 2011 Notice of Application, amounted to admissions that she had consented to the changes and that the trial judge erred in failing to consider those admissions in determining the issue of whether she had established a material change of circumstances. I do not agree.

61 The central difference between the parties' positions on this issue is their respective characterization of the changes to the Consent Order, particularly between 2008 and 2012. The father says they were by agreement; the mother says they were imposed. The trial judge resolved that issue in favour of the mother by finding that adjusted arrangement (weekdays with the father and weekends with the mother) was "materially different from that envisioned by the earlier orders — in which it was envisioned that the parties would parent the child as equally as possible". (Para. 10.)

62 The earlier orders included the Consent Order and the April 4, 2008 order of Russell J. Before her, the father deposed that the week on/week off arrangement had "generally been followed". In fact, it had not been followed since February 2007. It would seem from her reasons that Russell J. understood that it was that initial week on/week off arrangement which the mother was attempting to change. While the mother acknowledged that between February and September 2007 she had been temporarily unable to care for the child because of the motor vehicle accident and therefore acceded to the adjusted arrangement, the trial judge found that after September 2007 her efforts to return to the week on/week off arrangement were consistently rejected by the father. There was no agreement to the adjusted arrangement after that date. It was the father's refusal to return to the week on/week off parenting of the child as contemplated by the parties at the time of the Consent Order that the trial judge found to be a material change of circumstances. I find no error in that determination.

63 The father does not dispute the trial judge's finding that his increased travel to Toronto during the horse-racing season also was not in the contemplation of the parties at the time of the Consent Order. He submits, however, that this change in the parenting arrangements was not a material change of circumstances as that concept was described in *Gordon v. Goertz*:

> [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings tool place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
>
> [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or ability of the parents to meet

the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

64 Again, I am unable to agree with this submission. In my view this change was clearly material in that the child's needs, while in the father's care, were now being met by a nanny and a driver rather than by the mother. I agree with the trial judge's finding this amounted to a material change that affected the needs of the child and that the father's refusal to permit the mother to co-parent the child in these circumstances was clearly not within the contemplation of the parties when the Consent Order was made.

Did the Trial Judge Misapprehend the Evidence Regarding the Living Arrangements of the Child's Chinese Grandmother and Therefore the Extent of her Ability to Teach the Child about her Mandarin Heritage?

65 The father takes issue with the judge's finding that "[t]he present *de facto* custodial arrangements have resulted in a diminished opportunity for the child to explore and develop the Chinese half of her heritage". (Para. 16.) To the extent that the judge relied on this finding to determine what was in the child's best interests, the father submits that he erred.

66 I agree with the father that the evidence is unclear as to the permanent status of the grandmother's visit to Canada in September 2011. After her arrival, the mother applied to have both her parents emigrate from China to Canada. However, at the date of trial, the stage of that application was unknown. At best it could be said that the mother anticipated her parents' application would be approved and her mother's stay in Canada would be permanent.

67 Regardless of whether the evidence clearly established that the child's grandmother would be permanently residing in Canada in the future, it remains the case that the judge's numerous other findings of fact in support of his decision that the best interests of the child would be met by granting the mother primary residence are not challenged by the father and overwhelmingly support the Order. I find no basis on this ground of appeal to set aside the Order.

68 In the result, I would dismiss the appeal.

Newbury J.A.:

I Agree:

Hall J.A.:

I Agree:

Appeal dismissed.

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Tab 2

2015 BCSC 1199
British Columbia Supreme Court

Credit Suisse AG v. Great Basin Gold Ltd.

2015 CarswellBC 1953, 2015 BCSC 1199, [2015] B.C.W.L.D. 5426, 256 A.C.W.S. (3d) 590, 27 C.B.R. (6th) 32

Credit Suisse AG, Petitioner and Great Basin Gold Ltd., Respondent

Fitzpatrick J.

Heard: June 9, 2015
Judgment: July 10, 2015
Docket: Vancouver S134749

Counsel: S. Dvorak, R. Jacobs, J. Dietrich for Linden Advisors LP, Crystalline Management Inc. and Wolverine Asset Management, LLC
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J.K. McEwan, Q.C., J. Hughes for Ferdinard Dippenaar, Lourens van Vuuren, Willem Beckmann, Philip N. Bentley, Bheki Khumalo and Dana Roets
P. Rubin for Credit Suisse AG

Subject: Insolvency
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
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous
Respondent GB was granted creditor protection under Companies' Creditors Arrangement Act CCAA — Initial order imposed stay of proceedings against or in respect of GB or affecting business and property of GB — Initial order provided stay of proceedings as against directors and officers of GB in respect of pre-filing matters — Order terminating CCAA proceedings was granted and termination order specifically provided that stays of proceedings in initial order were terminated and set aside — Applicant creditors commenced action against GB's directors and officers — Receivership order was granted and imposed stay of proceedings against or in respect of GB and property — Creditors brought application for clarification concerning proper interpretation of receivership order — Receivership order did not stay action against directors and officers — Initial order contained broader stay protection for GB than stay in receivership order — Even with broader stay protection, Initial Order contained separate stay of proceedings against directors and officers that supported interpretation that broader stay did not provide protection to officers and directors — Receivership order included more limited stay protection — Plain reading of pleadings in action supported view that allegation was that directors and officers were personally liable for actions or omissions by each of them — While many of factual circumstances upon which those allegations were made involved GB, that did not mean that action was "in respect of" GB — There was no connection or relationship between relief sought in action and GB and property as defined in receivership order.
Table of Authorities
Cases considered by *Fitzpatrick J.*:

CanadianOxy Chemicals Ltd. v. Canada (Attorney General) (1999), 1999 CarswellBC 776, 29 C.E.L.R. (N.S.) 1, 133 C.C.C. (3d) 426, 171 D.L.R. (4th) 733, 23 C.R. (5th) 259, 122 B.C.A.C. 1, 200 W.A.C. 1, [1999] 1 S.C.R. 743, 1999 CarswellBC 777 (S.C.C.) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4806, 76 C.C.P.B. 307, 57 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]) — considered

Puratone Corp., Re (2013), 2013 MBQB 171, 2013 CarswellMan 360, (sub nom. *Puratone, Re)* 295 Man. R. (2d) 55 (Man. Q.B.) — considered

Sarvanis v. Canada (2002), 2002 SCC 28, 2002 CarswellNat 537, 2002 CarswellNat 538, 210 D.L.R. (4th) 263, 284 N.R. 263, 2002 C.E.B. & P.G.R. 8412 (headnote only), [2002] 1 S.C.R. 921, 2002 CSC 28 (S.C.C.) — considered

Sutherland v. Reeves (2014), 2014 BCCA 222, 2014 CarswellBC 1661, 61 B.C.L.R. (5th) 308, 357 B.C.A.C. 46, 611 W.A.C. 46 (B.C. C.A.) — distinguished

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — followed

Yu v. Jordan (2012), 2012 BCCA 367, 2012 CarswellBC 2760, 36 B.C.L.R. (5th) 248, [2013] 1 W.W.R. 103, 327 B.C.A.C. 170, 556 W.A.C. 170, 354 D.L.R. (4th) 8, 24 R.F.L. (7th) 154 (B.C. C.A.) — followed

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

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

s. 243(1) — considered

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

s. 105 — referred to

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

Generally — referred to

s. 11.03(1) [en. 2005, c. 47, s. 128] — considered

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

App. B, s. 2(2)(b) — referred to

APPLICATION by creditors for clarification of stay provisions of receivership order.

***Fitzpatrick J.*:**

Introduction

1 This application concerns the scope of a stay of proceedings ordered by the court arising from the granting of a receivership order as against the respondent, Great Basin Gold Ltd. ("Great Basin").

2 The issue is whether the proper interpretation of the stay provision is such that it includes a stay of proceedings in favour of the former directors and officers of Great Basin.

3 Linden Advisors LP, Crystalline Management Inc. and Wolverine Asset Management, LLC (collectively, the "Applicant Creditors"), had previously commenced an action against Great Basin's directors and officers and the issue of the stay has been recently raised. The Applicant Creditors now seek clarification concerning the proper interpretation of the receivership order, namely, whether the stay prevents them from continuing with their action, save with leave of the court.

Background Facts

The Insolvency Proceedings

4 On September 19, 2012, Great Basin applied for and was granted creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Despite the filing having taken place in Vancouver, British Columbia, Great Basin's gold-mining operations, through its subsidiaries, were principally located elsewhere. Various properties were held around the world, but the principal assets were gold mines in Nevada and South Africa.

5 On the filing date, I granted an initial order, as is typically granted in *CCAA* proceedings (the "Initial Order"). I remained seized of the *CCAA* proceedings and would issue all of the court orders in those proceedings and in the later receivership proceedings as discussed in these reasons.

6 The Initial Order imposed a stay of proceedings against or in respect of Great Basin or affecting the "Business" and "Property" of Great Basin:

> 15. Until and including October 19, 2012 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 [Great Basin] or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of [Great Basin] and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of [Great Basin] or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

7 "Property" was defined in the Initial Order as "current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof". Great Basin was ordered to continue to carry on its business in the ordinary course (defined as the "Business").

8 In addition, the Initial Order provided for a stay of proceedings as against the directors and officers of Great Basin in respect of pre-filing matters:

> 22. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of [Great Basin] with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of [Great Basin] 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 a such obligations, until a compromise or arrangement in respect of [Great Basin], if one is filed, is sanctioned by this Court or is refused by the creditors of [Great Basin] or this Court. 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 [Great Basin] 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.

9 By June 28, 2013, the *CCAA* proceedings had run their course with sales of the major gold-mining assets having been concluded or substantially underway. On that date, this Court granted an order terminating the *CCAA* proceedings at the request of Great Basin and with the support of its largest secured creditor, the petitioner Credit Suisse AG (the "Termination Order"). The Termination Order specifically provided that the stays of proceedings as set out above in paragraphs 15 and 22 of the Initial Order were terminated and set aside.

10 Concurrent with the termination of the *CCAA* proceedings, on June 28, 2013, Credit Suisse AG applied to the Court and was granted an order (the "Receivership Order"), appointing a receiver over the "Property" of Great Basin, who was defined as the "Debtor".

11 The definition of "Property" in the Receivership Order was different than that found in the Initial Order. The term was defined as "all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof." This definition of "Property" was consistent with the wording of the model receivership order published on the Court's website, and also consistent with the language

found in s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which is the statutory authority for the appointment of the receiver.

12 The central issue on this application arises from the terms of the Receivership Order which imposed a stay of proceedings against or "in respect of" Great Basin and the Property, as defined:

> 12. No Proceedings against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of Proceeding except for service of the initiating documentation on the Debtor and the Receiver.

13 Under the Receivership Order, FTI Consulting Canada Inc. was appointed receiver and manager (the "Receiver").

14 The evidence at the June 28, 2013 hearing - at which time the Termination Order and the Receivership Order were granted - referred to the following relevant circumstances:

> a) the stay of proceedings under the Initial Order was set to expire on June 30, 2013;
>
> b) no extension of the *CCAA* proceedings was being sought by Great Basin as there was no prospect for a restructuring of Great Basin and there was no on-going business being conducted by Great Basin. As such, there was no need to continue the *CCAA* proceedings and incur the cost of doing so;
>
> c) the remaining directors and officers of Great Basin were set to resign on the earlier of June 30, 2013 or the date on which the *CCAA* proceedings were terminated. This was tied to the expiry of the then-existing insurance policy in place for the directors and officers of Great Basin; and
>
> d) it was considered necessary that a receiver be appointed to complete the remaining matters that were outstanding in the *CCAA* proceedings. Those matters included causing Great Basin's subsidiaries in other jurisdictions to finalize the sales of the principal gold-mining assets through insolvency proceedings in those jurisdictions. Specifically:
>
> > i. in May 2013, the Hollister gold mine in Nevada had been sold through insolvency proceedings commenced under chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. and it was anticipated that certain administrative matters needed to be finalized to conclude those proceedings; and
> >
> > ii. the sales process of the Burnstone mine in South Africa was underway at the time pursuant to business rescue proceedings commenced in South Africa. Those sale proceedings had not been completed, and it was contemplated that a sale would require later transactions to be completed by Great Basin and certain Cayman Islands subsidiaries.

15 Paragraph 23 of the Initial Order provided that Great Basin indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers on account of legal defence costs after the commencement of the *CCAA* proceedings. As security for this obligation, the directors and officers were granted a "Directors' Charge" as against Great Basin's "Property" (as defined in the Initial Order) limited to $500,000. The Director's Charge was granted priority behind the "Administration Charge" but ahead of the "DIP Lenders' Charge" for the interim financing.

16 Pursuant to paragraph 22 of the Termination Order, the Directors' Charge continued to attach to the "Property" as defined in the Initial Order. The priorities of the various court-ordered charges were further addressed in the Receivership Order, but the Directors' Charge remained second in priority only behind the Administration Charge.

Action Brought by the Applicant Creditors

17 On August 14, 2014, the Applicant Creditors commenced an action in this Court against the former directors and officers of Great Basin (the "Action"). In essence, the Applicant Creditors allege that various public disclosures, including financial statements, prospectuses and press releases made by Great Basin contained misrepresentations and omissions. The Applicant Creditors allege that the directors and officers breached their common-law, statutory and fiduciary duties and obligations owed to certain stakeholders of Great Basin, including the Applicant Creditors. They seek damages in the amount of $40 million plus interest.

18 As counsel for the directors and officers point out, there is some emphasis in the Action on the disclosure in a November 2009 prospectus issued by Great Basin for certain unsecured convertible debentures in which the Applicant Creditors invested. There are also allegations concerning the public disclosure made before and after that offering.

19 In addition, on January 9, 2015, Credit Suisse AG commenced a claim against some directors and officers of Great Basin in the Second Judicial District Court of the State of Nevada. Similar to the action commenced by the Applicant Creditors, Credit Suisse AG alleges that the officers and directors misrepresented certain matters relating to Great Basin, which Credit Suisse AG relied upon in granting significant loans to Great Basin, both prior to and after the *CCAA* proceedings began. Credit Suisse AG also alleges that the officers and directors "recklessly mismanaged" Great Basin's subsidiaries.

20 In May 2015, counsel for the officers and directors advised counsel for the Applicant Creditors of their position that the Applicant Creditors had filed the Action in violation of the stay of proceedings granted per paragraph 12 of the Receivership Order. Among other things, the directors and officers asserted that, given the allegations about public disclosures made by Great Basin, and the indemnities that Great Basin gave to each of the officers and directors, the stay applied. Counsel for the officers and directors therefore took the position that the Receivership Order stayed the Action unless and until written consent was obtained from the Receiver or leave was obtained from this Court.

21 Initially, there was some issue about why the matter of the stay was only being raised some time following the commencement of the Action in August 2014. However, counsel for the officers and directors advised that the Receivership Order had only recently come to their attention in May 2015, which explanation I accept. In my view, nothing arises from any delay in bringing forward the issue as the matter can be addressed on its merits.

22 Certain of the defendants in the Action, being officers and directors appointed prior to the *CCAA* proceedings, intend to file response material denying any wrongdoing. Specifically, they contend that the acts that are the subject of the Action are "the acts of [Great Basin] and not the acts of the [officers and directors]". In addition, they propose to file a counterclaim alleging that the Action is in breach of the trust indenture by which the Applicant Creditors invested in Great Basin. That trust indenture provided that there would be no recourse against certain persons, including directors and officers.

23 Other defendants in the Action, being directors and officers appointed after the *CCAA* proceedings began, also intend to file response material. They also contend that the representations and conduct that are the subject of the Action were "representations made by or conduct of [Great Basin], not these Defendants personally". They also propose to file a counterclaim alleging that the Action is in breach of the trust indenture by which the Applicant Creditors invested in Great Basin.

The Issue

24 The Applicant Creditors dispute the interpretation of paragraph 12 of the Receivership Order advanced by the directors and officers that they require leave of the court in order to proceed with the Action. Nevertheless, in order to clarify the matter, the Applicant Creditors now bring this application for a declaration that the stay of proceedings does not operate to stay the Action and that no leave is required.

25 The Receiver has indicated that it takes no position in respect of this application so, obviously, no consent to bring the Action is forthcoming to obviate the issue.

Discussion

26 The parties agree that the Receivership Order is to be interpreted in accordance with the approach as set out in *Yu v. Jordan*, 2012 BCCA 367 (B.C. C.A.):

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

27 All of the aspects leading to and including the granting of the Receivership Order - the pleadings, relevant circumstances and language of the order itself - are considerably interrelated in this case. In my view, all aspects support the conclusion that the Receivership Order did not stay the Action against the directors and officers.

(i) Pleadings

28 The pleadings that are relevant here include the backdrop of the *CCAA* proceedings, the terms of the Initial Order and, later still, the Receivership Order and the Termination Order.

29 In the *CCAA* context, imposing a stay of proceedings is generally seen as a critical component of the relief sought by the debtor company in preserving the *status quo* while a company attempts to restructure. The need for a stay of proceedings against creditors of the debtor company seems evident enough; however, it is also well-recognized that a stay of proceedings against third parties could, in some cases and, indeed, often does, equally assist in achieving the objectives of the *CCAA*.

30 In addition, the need to cast a large net in terms of protecting the debtor's ownership and management of its assets pending reorganization is generally seen as justifying the typical broad definition of "Property", as is found in the Initial Order.

31 Early cases tended to rely on inherent jurisdiction as the jurisdictional basis for a stay as against third parties. In that regard, the comments of Tysoe J. (as he then was) in *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 at 268 (S.C.) are instructive in that such a stay must be important to the reorganization process and the court must weigh the relative prejudice arising from the stay:

> Hence, it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar* Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.
>
> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

[Emphasis added.]

32 Stays of proceedings in favour of former or current directors and officers of a debtor company in *CCAA* proceedings were and are common. Such a stay is seen as consistent in achieving the policy objective of furthering the debtor company's restructuring efforts. A stay of proceedings in favour of officers and directors affords some protection to those individuals, in that it acts as an inducement to remain involved in the restructuring, which is benefited by the directors' and officers' knowledge and expertise. Other benefits include avoiding the allocation of time and resources to defend such proceedings at the expense of and detriment to the restructuring itself.

33 In 2005, the *CCAA* was amended to provide the court with express statutory authority to stay proceedings against directors and officers with respect to pre-filing matters:

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

34 It can be seen that the provision in the Initial Order staying actions against the directors and officers (paragraph 22) substantially tracks the language of s. 11.03(1).

35 The rationale of the court in *Re Woodward's* continues to be applied in *CCAA* proceedings and, in particular, to the consideration as to whether stays in favour of officers and directors will be continued or lifted.

36 In *Nortel Networks Corp., Re* (2009), 57 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]), at 239 , Morawetz J. upheld a stay of proceedings in favour of certain directors and employees of Nortel:

> 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: *Woodwards Limited (Re)* (1993) 17 C.B.R. (3d) 236 (B.C.S.C.).)

37 Importantly, the court in *Re Nortel* emphasized that the stay was intended only as a postponement of the claims being brought or continued: *Nortel* at 239. The postponement aspect is consistent with s. 11.03(1) of the *CCAA* and paragraph 22 of the Initial Order, which contemplate the continuation of the stay until such time as a compromise or arrangement is either accepted or refused by the creditors and the court.

38 As Dewar J. stated in *Puratone Corp., Re*, 2013 MBQB 171 (Man. Q.B.), whether the stay will be lifted or continued is to be considered in the context of the nature and timing of the *CCAA* process before the court: para. 15. In that case, the court noted that the *CCAA* proceedings did not result in a restructuring but, rather, a liquidation of the assets with proceeds to be distributed. As such, the court, in considering relative prejudice, found that the balance of convenience favoured lifting the stay to allow the action against Puratone and the directors and officers to proceed "sooner rather than later": para. 38.

39 It is in this context that the Termination Order and Receivership Order must be considered. In a situation similar to that in *Re Puratone*, by June 2013, much of the policy objectives underlying the stay in favour of Great Basin's directors and officers in the Initial Order had been spent. The receivership presented a sea change of sorts in the sense that a pure liquidation of the remaining assets was the focus and, importantly, the remaining liquidation efforts were to be handled

by the Receiver and not by the directors and officers of Great Basin. In that regard, the focus of the Receivership Order was to protect the activities of the Receiver and the assets under its administration. The stay of proceedings found in paragraph 12 of the Receivership Order accomplished that, in part, along with the stay of proceedings in paragraph 13, and the specific stay as against the Receiver in paragraph 11.

40 It is not unheard of that *CCAA* proceedings simply segue into receivership proceedings with little regard to or change in the relief granted in court orders in terms of the effect of those orders on third parties. However, a receivership is a fundamentally different type of proceeding and the objectives to be achieved in each type of proceeding must be considered in terms of how third parties are to be affected. That is not to say that a stay of proceedings against third parties will never be appropriate in a receivership; rather, the court must be cognizant, as was stated in *Re Woodward's*, that the stay power should be used cautiously, and there must be some cogent reason underlying the interference with the rights of those third parties in either a *CCAA* or receivership proceeding.

41 That brings me more specifically to the Termination Order which must be considered alongside the Receivership Order. What can be gleaned from both these orders, when considered in the context of the Initial Order, is that counsel did what was expected of them, in that they carefully considered what relief was appropriate going forward, with or without amendment, and what relief should be terminated. This was the substance of the hearing on June 28, 2013 when the two orders were granted.

42 It is significant that paragraph 15 of the Initial Order contained a broader stay protection for Great Basin than the stay in the Receivership Order since it provided for a stay "against or in respect of [Great Basin] or the Monitor, or affecting *the Business* or the Property" [emphasis added]. Even with this broader stay protection, the Initial Order contained a separate stay of proceedings against directors and officers at paragraph 22, which supports the interpretation that the broader stay did not provide this protection to the officers and directors.

43 In contrast, the Receivership Order included more limited stay protection for Great Basin's Property, which need only have been acquired for or used in relation to its business. It did not, as did the Initial Order, refer to the stay of proceeding in relation to any action that might affect Great Basin's "Business". This is understandable since it was expected that Great Basin would continue its "Business" in the *CCAA* proceedings: Initial Order at para. 4. This is also consistent with the evidence at the June 28, 2013 hearing that Great Basin had ceased to conduct any business by the time of the receivership.

44 Finally, it cannot be ignored that there was neither an application for nor an order for a separate stay of proceedings against the directors and officers in the Receivership Order as there was in the Initial Order. To the opposite effect, that provision was specifically terminated by the Termination Order. I agree with the Applicant Creditors that this change must be given some meaning. The directors and officers assert that they were not represented by counsel at the June 28, 2013 hearing. However, it must be inferred that they were well-aware of the protections afforded to them by reason of the *CCAA* proceedings (including the specific stay and the granting of the Directors' Charge), and that they either were or could have been, with some due diligence, aware of how matters were to be transitioned to the receivership.

45 At the very least, their knowledge of the expiry of the director and officer insurance policy, coupled with their resignations at the same time, would have highlighted to them that changes were afoot in terms of their participation in the proceedings and the protections that they had enjoyed to that time.

(ii) Language of the Receivership Order

46 It is clear enough that the Receivership Order does not include any express language imposing a stay of proceedings in favour of Great Basin's directors and officers. This is in contrast to paragraph 22 of the Initial Order.

47 Counsel for the directors and officers rely on the wording of paragraph 12 of the Receivership Order in arguing that there is a stay of proceedings "in respect of" both Great Basin and the Property, as defined. They contend that this wording is broad enough to include the Action now commenced by the Applicant Creditors.

48 In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at 751, Major J. discussed the Court's earlier consideration of the phrase "in respect of":

> [A plain] reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen* [1983] 1 S.C.R. 29, at p. 39:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

49 The extent of the scope of that phrase was, however, tempered by the later comments of the Court in *Sarvanis v. Canada*, 2002 SCC 28 (S.C.C.):

> [22] It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.

Further, the Court in *Sarvanis* discussed that the phrase "in respect of" must be considered by "looking to the context in which the words are found": see paras. 23-26.

50 What then is the connection between the terms of the Receivership Order, being Great Basin and its Property, and the Action?

51 Firstly, the directors and officers argue that the Action is "in respect of" Great Basin because the allegations concern the corporate actions of Great Basin, specifically as to the issuance of the 2009 prospectus by which the misrepresentations were said, at least in part, to have been made. As I have outlined above, the substance of the defences raised in the Action is that the directors and officers were acting in the course of their duties in those capacities and that, therefore, any misrepresentations are the misrepresentations of Great Basin and not of the directors and officers personally.

52 Specifically, the officers and directors contend that the officer and director defendants in the Action could easily be replaced by simply naming Great Basin as a defendant given the causes of action advanced. While that may be true, one might wonder about the utility of doing so since the Applicant Creditors obviously have a more direct cause of action against Great Basin given the creditor/debtor relationship that currently exists.

53 The reality is that Great Basin is not named as a defendant in the Action even though it could have been.

54 Further, I appreciate that the officers and directors have substantive defences to the Action. Those defences include that the directors and officers were only acting in the course of their duties and that they acted in a manner consistent with what the law requires. Negligence claims will be met with the contention that the business judgment rule applies; allegations of breach of fiduciary and statutory duties will be met with the contention that their duties are owed to Great Basin, not to the Applicant Creditors as creditors, or that the claims are statute-barred.

55 Even so, a plain reading of the pleadings in the Action supports the view that the allegation is that the directors and officers are *personally* liable for the actions or omissions by each of them. Accordingly, while many of the factual circumstances upon which those allegations are made involve Great Basin, that does not mean that the Action is "in respect of" Great Basin.

56 As the Applicant Creditors contend, if the language "in respect of" a corporate debtor is to be interpreted so broadly to encompass such claims against its directors and officers arising from their actions in that capacity, then a separate stay of proceedings against directors and officers (as was granted in the Initial Order) would never be required.

57 The argument of the directors and officers is also not assisted by the circumstances of the trust indenture issued by Great Basin that provided that there would be no recourse or personal liability against others, including directors and officers. Again, that document may form an important plank of the directors' and officers' defence against personal liability, but the fact that Great Basin issued that trust indenture does not mean that there is an inextricable connection between Great Basin and the Action.

58 Secondly, the directors and officers argue that their claim is "in respect of" Great Basin's Property, as defined in the Receivership Order. I would observe at the outset that the definition of Property in the Receivership Order is considerably narrower than that found in the Initial Order. As I will discuss below, that is an important factor in many aspects, including in interpreting the scope of the stay of proceedings imposed in both the *CCAA* and receivership proceedings.

59 The directors and officers also argue that this claim is "in respect of" Great Basin's Property arising from the circumstances of the indemnity agreement that Great Basin executed in favour of the directors and officers. However, if the Applicant Creditors are successful in the Action, they will recover judgment against the directors and officers personally, not against Great Basin to the extent that it may recover from its Property. At best, the indemnity agreement forms an independent contractual basis upon which the directors and officers might seek recovery from Great Basin. I agree that a third-party action by the directors and officers against Great Basin would obviously engage the stay of proceedings found in the Receivership Order. It seems clear enough why no such claim has been advanced, given that the directors and officers would in any event be unlikely to recover any judgment obtained given the substantial losses of even the secured creditors.

60 The directors and officers argue that the Action is "in respect of" Great Basin's Property since the Directors' Charge was continued over the Property by the terms of the Termination Order and the Receivership Order. This represents a more substantial connection between the Action and Great Basin's Property than the above arguments, but is answered by the same points raised in relation to the indemnity. Again, this is an independent claim that might be advanced by the directors and officers against Great Basin and the Property. The fact that the directors and officers might in the future advance claims against the Property secured by the Directors' Charge, does not change the characterization of the claims of the Applicant Creditors which are not against Great Basin's Property.

61 In these circumstances, I cannot discern any connection or relationship between the relief sought in the Action and Great Basin and the Property, as defined in the Receivership Order. A plain reading of the Receivership Order evidences that the stay of proceedings was intended to maintain order in the realization proceedings that were then to be conducted by the Receiver in liquidating the assets of Great Basin. No issues are raised in the Action that directly affect the process by which that liquidation is to be accomplished by the Receiver.

(iii) Applicable Circumstances

62 Much of what I have discussed above includes the particular circumstances that were in existence leading up to the June 2013 hearing when the relief sought was granted in the Receivership Order.

63 To summarize, the *CCAA* proceedings had ceased to serve any purpose in that no restructuring was on the horizon. The only activities being conducted at the end were the sales of the gold-mining assets, and it was argued before the court that the proper person to conduct those later activities was a receiver. In that vein, the directors and officers were set to depart the scene in that their services were no longer required.

64 Indeed, upon the court order appointing the Receiver, the powers of the directors and officers ceased: see *Business Corporations Act*, S.B.C. 2002, c. 57, s. 105.

65 In that sense, the rationale behind continuing the stay of proceedings in favour of the directors and officers evaporated. There remained no useful purpose in continuing the stay in their favour. The matter of prejudice was not particularly argued before the court on June 28, 2013. However, in the main, the court would have intuitively recognized

that a third party having a claim against the directors and officers would be prejudiced by the continuation of the stay and no corresponding prejudice was asserted by the directors and officers in terms of discontinuing the stay.

66 To put it another way, no evidence was presented upon which the court could have exercised its discretion in terms of continuing the extraordinary remedy of preventing actions being brought against Great Basin's directors and officers in the changed circumstances at play in June 2013.

67 The directors and officers place considerable reliance on the reasoning and results found in *Sutherland v. Reeves*, 2014 BCCA 222 (B.C. C.A.). The court in that case had appointed a receiver, not to liquidate assets to pay debt, but to wind down the business and affairs of Tangerine, a limited partnership. Mr. Sutherland and Mr. Reeves, the main participants in the limited partnership, had substantial disputes concerning Tangerine's affairs. A stay of proceedings was imposed "in respect of" Tangerine and its property (as defined). Later still, Mr. Sutherland filed an action against Mr. Reeves alleging fraud in relation to the cancellation of shares in the general partner company and termination of a management services agreement. The Court of Appeal found that the interpretation of the stay of proceedings found in the receivership order should have prevented the filing of the later action.

68 While the analysis of the Court of Appeal is of some assistance on this application, I consider that the unique circumstances found in *Sutherland* do not support a similar result here in that they provided an entirely different context in which to interpret a very different receivership order.

69 Firstly, the definition of "Property" in the receivership order in *Sutherland* was stated by the court to be "undeniably broad" in that it referred to the "business, affairs, undertaking and assets" of Tangerine, which appears to have been operating as a business: para. 35. This expansive definition was clearly intended to encompass the entire business activities of Tangerine which had become dysfunctional by reason of the relationship of Mr. Sutherland and Mr. Reeves. The broader terms of "business" and "affairs" at issue in *Sutherland* are not found in the Receivership Order, consistent with the lack of business activity of Great Basin and the intention to simply liquidate assets to pay debt.

70 Secondly, it was evident that, although Mr. Sutherland had not named Tangerine as a defendant in his later action, his allegations were, in substance, about the infighting that had led to the receivership order in the first instance. Further, the relief sought included that relating to the shareholdings in Tangerine. The court found that Mr. Sutherland's action inherently involved the affairs and business of Tangerine, or was "in respect of" Tangerine: para. 36.

71 Thirdly, the Court also found that Mr. Sutherland was obviously trying to do indirectly what he had been prevented from doing directly. His later action was the same as had been previously pled even before the receivership order and, as such, the order was characterized to capture such allegations: para. 37.

72 What can be inferred from the decision in *Sutherland* is that the court was attempting to bring order to a complex corporate situation which was chaotic and hamstrung by fighting between the parties. Mr. Sutherland was attempting to thwart that objective and his action had the potential to negatively affect the efforts of the receiver in dealing with the assets and business. In that sense, the objective behind the receivership order was more akin to the situation addressed by the Initial Order. Here, by the time of the Receivership Order, order had been achieved and the overall objective was to empower the Receiver, not the directors and officers, to continue the liquidation process.

73 What does resonate from the decision in *Sutherland*, but by way of distinction, is the court's conclusion that Mr. Sutherland's later action threatened to disturb the receivership process: para. 48. In contrast, there was no evidence at the time of the hearing on June 28, 2013 that the stay of proceedings in favour of the officers and directors was needed to protect the receivership process.

74 On a final note, the court in *Sutherland* noted that Mr. Sutherland was only being prevented from bringing his action until the end of the receivership process: para. 50. By that time, the salutary effect of the stay would have been achieved and there would have been no longer any need to prejudice Mr. Sutherland by its terms.

75 Similarly, here, the salutary effect of the stay in favour of Great Basin's directors and officers ended upon the granting of the Receivership Order.

Conclusion

76 I declare that the stay of proceedings in paragraph 12 of the Receivership Order does not apply to the Action for the above reasons. The Applicant Creditors are awarded their costs of the application as against the directors and officers on Scale B.

Application granted.

Tab 3

2009 CarswellOnt 7882
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7882, [2009] O.J. No. 5379, 183 A.C.W.S. (3d) 634, 61 C.B.R. (5th) 200

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.

Heard: December 8, 2009
Judgment: December 15, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Alex Cobb, Shawn Irving for CMI Entities
Alan Mark, Alan Merskey for Special Committee of the Board of Directors of Canwest
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
K. McElcheran, G. Gray for GS Parties
Hugh O'Reilly, Amanda Darrach for Canwest Retirees and the Canadian Media Guild
Hilary Clarke for Senior Secured Lenders to LP Entities
Steve Weisz for CIT Business Credit Canada Inc.

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

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.ii Contractual rights
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.f Lifting of stay

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares

had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Substance and subject matter of moving parties' motion were encompassed by stay — Substance of moving parties' motion was "proceeding" that was subject to stay under initial order which prohibited commencement of all proceedings against or in respect of insolvent entities or affecting business or property of insolvent entities — Relief sought would involve exercise of any right or remedy affecting business or property of insolvent entities which was stayed under initial order.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares from 441 Inc. to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Stay of proceedings not lifted — Balance of convenience, assessment of relative prejudice and relevant merits favoured position of insolvent entities — There was good arguable case that shareholders agreement, which would inform reasonable expectations of parties, permitted transfer and dissolution of 441 Inc. — Moving parties were in no worse position than any other stakeholder who was precluded from relying on rights that arose upon insolvency default — If stay were lifted, prejudice to insolvent entities would be great and proceedings contemplated by moving parties would be extraordinarily disruptive — Litigating subject matter of motion would undermine objective of protecting insolvent entities while they attempted to restructure — It was premature to address issue of whether insolvent entities could disclaim agreement — Issues surrounding any attempt at disclaimer should be canvassed on basis mandated in s. 32 of Act — Discretion to lift stay on basis of lack of good faith not exercised.

Table of Authorities

Cases considered by *Pepall J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 8 — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 32 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 106 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 25.11(b) — referred to

R. 25.11(c) — referred to

MOTION by moving party to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement; MOTION by insolvent entities for order that motion by moving party was stayed; CROSS-MOTION by moving party for leave to proceed with its motion.

***Pepall J.*:**

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.l and GS VI AA One Parallel Holding S.ar.l (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;

(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings

in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them 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 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, 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 CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 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 CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

> (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;

(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;

(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;

(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and

(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Canadian Airlines Corp., Re*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The

GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

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

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Stelco Inc., Re*[3] and the key element of the CCAA process: *Canadian Airlines Corp., Re*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Lehndorff General Partner Ltd., Re*[5] , the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

"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....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."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy" [11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* [12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company. [13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re* [14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or

(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.

- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.

• Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

• Article 6.13 prohibits the liquidation or dissolution of another company [15] without the prior written consent of one of the GS Parties [16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd., Re* [17] :

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place." [18]

44 Similarly, in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* [19] , one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts.

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the

involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> > (a) whether the monitor approved the proposed disclaimer or resiliation;
> >
> > (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
> >
> > (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Insolvent entities' motion granted; motion and cross-motion of moving party dismissed.

Footnotes

1 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

2 (B.C. C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

5 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

9 R.S.O. 1990, c.C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para.37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

Tab 4

2000 CarswellAlta 622
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 622, [2000] A.W.L.D. 666, [2000] A.J. No. 1692, 19 C.B.R. (4th) 1

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs and Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., Defendants

Paperny J.

Judgment: May 4, 2000
Docket: Calgary 0001-05071, 0001-05044

Counsel: *G. Morawetz*, *A.J. McConnell* and *R.N. Billington*, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Canadian Airlines.
S. Dunphy, for Air Canada and 853350 Alberta Ltd.
R. Anderson, Q.C., for Loyalty Group.
H. Gorman, for ABN AMRO Bank N.V.
P. McCarthy, for Monitor - Price Waterhouse Cooper.
D. Haigh, Q.C., and *D. Nishimura*, for Unsecured noteholders - Resurgence Asset Management.
C.J. Shaw, for Airline Pilots Association International.
G. Wells, for NavCanada.
D. Hardy, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.iii Prejudice to creditors
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and had voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — In

determining whether stay should be lifted, court had to balance interests of all parties who stood to be affected — This would include general public, which would be affected by collapse of airline — Evidence indicated that liquidation would be inevitable were noteholders to realize on collateral — Objective of stay was not to maintain literal status quo but to maintain situation that was not prejudicial to creditors while allowing airline "breathing room" — It was premature to conclude that plan would be rejected or that proposal acceptable to noteholders could not be reached — Evidence indicated that airline was moving to effect compromises swiftly and in good faith — Appointment of receiver to manage collateral would negate effect of stay and thwart purposes of Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — Proposal that airline make interim payments for use of security was not viable — Suggestion that other airline financially supporting plan should pay out airline's debts to noteholders was without legal foundation — Existence of solvent entity financially supporting plan with view to obtaining economic benefit for itself did not create obligation on that entity to pay airline's creditors — Noteholders could not require sale of assets or shares of airline's subsidiary — Subsidiary was not debtor company but was itself property of airline — Marketing of subsidiary's assets would constitute "proceeding in respect of petitioners' property" within meaning of s. 11 of Act — Even if marketing of subsidiary's assets did not so qualify, court has inherent jurisdiction to grant stays in relation to proceedings against third parties where exercise of jurisdiction is important to reorganization process — In deciding whether to exercise inherent jurisdiction, court weighs interests of insolvent corporation against interests of parties who would be affected by stay — Threshold of prejudice required to persuade court not to exercise inherent jurisdiction to grant stay is lower than threshold required to persuade court not to exercise discretion under s. 11 of Act — Noteholders failed to meet either threshold — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Table of Authorities

Cases considered by *Paperny J.*:

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

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.) — considered

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147 (Ont. Gen. Div.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Meridian Development Inc. v. Toronto Dominion Bank, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — referred to

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142 (B.C. C.A.) — considered

Philip's Manufacturing Ltd., Re (1992), 15 C.B.R. (3d) 57 (note), 143 N.R. 286 (note), 70 B.C.L.R. (2d) xxxiii (note), 15 B.C.A.C. 240 (note), 27 W.A.C. 240 (note), 6 B.L.R. (2d) 149 (note) (S.C.C.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257 (B.C. S.C.) — considered

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 — considered

s. 11 — considered

s. 11(4) — considered

APPLICATION by holders of senior secured notes in corporation for order lifting stay of proceedings against them in *Companies' Creditors Arrangement Act* proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

***Paperny J.* (orally):**

1 Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

> 1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
>
> 2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection

and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or

2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged

this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

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

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

1. When the plan is likely to fail;

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal

with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian

Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

Tab 5

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
Related Abridgment Classifications
Real property
V Landlord and tenant
V.6 Nature and elements of lease
V.6.h Particular types of leases
Headnote
Landlord and Tenant --- Nature and elements of lease — Particular types of leases
Order under Companies' Creditors Arrangement Act (CCAA) prevented tenants at shopping centres in which E Co. was anchor tenant from terminating leases during E Co.'s restructuring period — D never served with notice of application — D's motion to vary order to allow it to exercise its rights under co-tenancy clauses in its leases dismissed — If court were to grant order it would have to grant same relief to other tenants in similar positions which would seriously jeopardize E Co.'s restructuring plans — Section 11 of CCAA and inherent jurisdiction of court sufficiently wide to permit making of orders against third parties who were not creditors where their actions would potentially prejudice success of plan — None of E Co.'s stores had yet closed such that D had not in fact suffered any prejudice and benefits of maintaining stay far outweighed the prejudice to D — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.
The court made an order under the *Companies Creditors Arrangement Act* (the "CCAA") to permit E Co. to present a plan of compromise and arrangement to its creditors. The order contained a clause preventing tenants at retail shopping centres in which E Co. was an anchor tenant from terminating their leases during the restructuring period. D was never served with notice of the application. D operated retail stores in regional shopping centres in which E Co. operated one of the anchor stores. The D leases contained co-tenancy clauses which permitted D to terminate or alter the lease terms

if E Co. ceased to operate in a shopping centre. The reasons given by the landlords for maintaining the stay included that no plan was yet filed, and it was unclear at the time how the claims would be addressed, that the exercise of the moving parties' rights would have a negative impact on the ability of E Co. to restructure, that if E Co. were prevented from concluding a successful restructuring with its landlords economic harm would be far reaching, and that the exodus of tenants could result in mall closures, causing a significant ripple effect throughout local economies and cause further job loss. D brought a motion to vary the order to allow D to exercise its rights under the co-tenancy clauses in its leases.

Held: The motion was dismissed.

If the court were to grant the order it would have to grant the same relief to other tenants in similar positions. If this were to happen, there was evidence that E Co.'s restructuring plan would be seriously jeopardized. If tenants were allowed to reduce rents or terminate leases under the clauses, the claims of landlords against E Co. would be greately increased, and would have a serious impact on a restructuring plan. The court had jurisdiction to make the order. Section 11 of the CCAA, and the inherent jurisdiction of the court, were sufficiently wide to permit the making of orders against third parties who were not creditors where their actions would potentially prejudice the success of a plan. Furthermore, the prejudice to the moving parties did not outweigh the benefits of maintaining the stay. The reasons given by the landlords for maintaining the stay were accurate. Furthermore, no stores had yet been closed such that D had not in fact suffered any prejudice. As such the benefits of maintaining a stay far outweighed the prejudice to D.

Table of Authorities

Cases considered by *Houlden J.A.*:

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 63 Alta. L.R. (2d) 361, 92 A.R. 81, 72 C.B.R. (N.S.) 1 (Alta. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

s. 11 [am. 1992, c. 27, s. 90(1)(f); 1996, c. 6, s. 167(1)(d)] — referred to

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 Petroleums 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 6

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

Priszm 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 billon. 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 *Priszm 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]); *Priszm 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 CCCA 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.

Tab 7

2016 ONSC 1821
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2016 CarswellOnt 4361, 2016 ONSC 1821, 264 A.C.W.S. (3d) 842

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: March 14, 2016
Judgment: March 14, 2016
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Tracy Sandler, Rob Curson, for Applicants
Alan B. Dryer, for Gap
Jonathan Bell, Rick Orzy, for RioCan
A. Kauffmen, for Ivanhoe Cambridge & Oxford
Alan Mark, Jesse Mighton, for Monitor
Catherine Francis, for Primaris
Linda Galessiere, for various Landlords
Jay Swartz, for Target Corporation
Dylan Chochla, for Sobeys Capital Incorporated
Vern DaRe, for Doral Holdings
David S. Ward, for WMI - Holding Comapany as GP, for Winners Merchants International ("TIX")
Michael Arovtina, for Bental Kennedy/Tamarak
Jeff Carhart, for Ginsey Industries and Other Suppliers
Kathryn Esaw, for EPL

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
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
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

***Morawetz R.S.J.*:**

1 The parties have made considerable progress in these proceedings.

2 The Applicants have resolved a number of issues with the various landlord groups and are preparing an Amended and Restated Plan of Compromise.

3 The motion record sets out various dates for future events, including a creditors' meeting and a potential sanction hearing.

4 I am satisfied that the parties are working in good faith and with due diligence such that the requested extension of the Stay Period to April 15, 2016 is both reasonable and appropriate. This relief is granted.

5 TJX brought a motion requesting certain relief relating to the Co-Tenancy Stay. The parties have reached agreement on wording that permits the lifting of the Co-Tenancy Stay on terms that are acceptable to the court and are memorialized in paragraph 3 of the draft order presented.

6 Issues relating to the effect of the Co-Tenancy Stay during the period when the Co-Tenancy Stay was in force are adjourned and will be addressed at a hearing commencing on April 26, 2016 at 8:30 a.m. The terms of the adjournment are set out on the typed attachment.

7 Finally, the Notice of Objection Bar Date is amended to extend the Notice of Objection Bar Date to 28 days following April 15, 2016 or such later date as the court may order.

8 An order has been signed to reflect the foregoing.

Appendix

The terms of the adjournment are as follows:

a. Such portion of the motion relating to the Waiting Period issue will be heard before Justice Morawetz during the week of April 18 on a date convenient to counsel and Justice Morawetz;

b. The following timetable for the delivery of materials will apply:

i. 14 days before the motion, the landlords will deliver any responding evidence that they intend to rely on.

ii. 7 days before the hearing, TJX will deliver any reply evidence that it intends to rely on;

iii. 5 days before the hearing, TJX will deliver its factum; and

iv. 3 days before the hearing, the landlords will deliver their responding factums.

Tab 8

2013 ONCA 550
Ontario Court of Appeal

Dilollo, Re

2013 CarswellOnt 13607, 2013 ONCA 550, 117 O.R. (3d) 81, 235 A.C.W.S. (3d) 310, 310 O.A.C. 282, 368 D.L.R. (4th) 1, 6 C.B.R. (6th) 112

In the Matter of the Bankruptcy of Cosimo Dilollo

msi Spergel Inc., as Trustee of the Estate of Cosimo Dilollo, a Bankrupt, Applicant (Appellant) and I.F. Propco Holdings (Ontario) 36 Ltd., Respondent (Respondent in Appeal)

K. Feldman, R. Sharpe, G.R. Strathy JJ.A.

Heard: June 3, 2013
Judgment: October 2, 2013
Docket: C56626

Proceedings: affirming *Dilollo, Re* (2013), 2013 ONSC 578, 2013 CarswellOnt 781, 97 C.B.R. (5th) 182 (Ont. S.C.J. [Commercial List])

Counsel: Mervyn D. Abramowitz, Philip Cho, for Appellant
Harvey Chaiton, Douglas A. Bourassa, for Respondent

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.j Miscellaneous
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.d Effect of appeal

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Miscellaneous

Creditor obtained default judgment against bankrupt for $22,031,787.67, and later brought bankruptcy application against bankrupt — Creditor and bankrupt agreed to compromise creditor's judgment for $1.2 million, and bankrupt paid $1,136,500, which creditor accepted in satisfaction of settlement — Creditor's bankruptcy application remained outstanding, and bankruptcy order was eventually made — Bankrupt filed appeal from bankruptcy order, which appeal was dismissed — Trustee brought motion under s. 95 of Bankruptcy and Insolvency Act (BIA) for declaration that $1.1365 million paid by bankrupt to creditor under settlement constituted preference and sought order that creditor repay that amount to trustee — Creditor brought motion for order that trustee's claim was time-barred by Limitations Act, 2002 (LA), or certain alternative relief, and motion judge found that trustee's motion was time-barred — Trustee appealed — Appeal dismissed — Under s. 195 of BIA, bankruptcy order is stayed upon filing of appeal — At issue was whether that stay suspended limitation period applicable to motion by trustee to set aside preferential payment by bankrupt under s. 95 of BIA — Section 20 of LA provides that LA does not affect extension, suspension or other variation of limitation period or other time limit by or under another Act — While "extension, suspension or other

variation" contained in BIA would be capable of suspending operation of limitation period in LA, s. 195 of BIA did not have that effect.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Effect of appeal

Creditor obtained default judgment against bankrupt for $22,031,787.67, and later brought bankruptcy application against bankrupt — Creditor and bankrupt agreed to compromise creditor's judgment for $1.2 million, and bankrupt paid $1,136,500, which creditor accepted in satisfaction of settlement — Creditor's bankruptcy application remained outstanding, and bankruptcy order was eventually made — Bankrupt filed appeal from bankruptcy order, which appeal was dismissed — Trustee brought motion under s. 95 of Bankruptcy and Insolvency Act (BIA) for declaration that $1.1365 million paid by bankrupt to creditor under settlement constituted preference and sought order that creditor repay that amount to trustee — Creditor brought motion for order that trustee's claim was time-barred by Limitations Act, 2002 (LA), or certain alternative relief, and motion judge found that trustee's motion was time-barred — Trustee appealed — Appeal dismissed — Under s. 195 of BIA, bankruptcy order is stayed upon filing of appeal — At issue was whether that stay suspended limitation period applicable to motion by trustee to set aside preferential payment by bankrupt under s. 95 of BIA — Section 20 of LA provides that LA does not affect extension, suspension or other variation of limitation period or other time limit by or under another Act — While "extension, suspension or other variation" contained in BIA would be capable of suspending operation of limitation period in LA, s. 195 of BIA did not have that effect.

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Canada (Attorney General) v. Fekete (1999), 242 A.R. 196, 1999 CarswellAlta 297, 10 C.B.R. (4th) 102, 1999 ABQB 262 (Alta. Master) — referred to

Cohen, Re (1948), 29 C.B.R. 163, [1948] O.W.N. 781, [1948] 4 D.L.R. 808, 1948 CarswellOnt 109 (Ont. C.A.) — referred to

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Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd. (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.)* 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — considered

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Gingras v. General Motors Products of Canada Ltd. (1974), 13 N.R. 361, 1974 CarswellQue 59, 1974 CarswellQue 59F, [1976] 1 S.C.R. 426, 57 D.L.R. (3d) 705 (S.C.C.) — considered

Goorbarry v. Bank of Nova Scotia (2011), 2011 ONCA 793, 2011 CarswellOnt 15062, 286 O.A.C. 282, 109 O.R. (3d) 92, 345 D.L.R. (4th) 624 (Ont. C.A.) — referred to

Guillemette v. Doucet (2007), 88 O.R. (3d) 90, 230 O.A.C. 202, 2007 ONCA 743, 2007 CarswellOnt 7034, (sub nom. *Doucet v. Guillemette)* 287 D.L.R. (4th) 522, 48 C.P.C. (6th) 17 (Ont. C.A.) — considered

Joseph v. Paramount Canada's Wonderland (2008), 2008 CarswellOnt 3495, 2008 ONCA 469, 90 O.R. (3d) 401, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 241 O.A.C. 29 (Ont. C.A.) — considered

July v. Neal (1986), 1986 CarswellOnt 446, 57 O.R. (2d) 129, 32 D.L.R. (4th) 463, 17 O.A.C. 390, 19 C.C.L.I. 230, 12 C.P.C. (2d) 303, [1986] I.L.R. 1-2126, 44 M.V.R. 1 (Ont. C.A.) — followed

Lakehead Newsprint (1990) Ltd. v. 893499 Ontario Ltd. (2001), 2001 CarswellOnt 34, 23 C.B.R. (4th) 170 (Ont. S.C.J.) — referred to

Lakehead Newsprint (1990) Ltd. v. 893499 Ontario Ltd. (2001), 28 C.B.R. (4th) 53, 2001 CarswellOnt 3388, 155 O.A.C. 328 (Ont. C.A.) — referred to
Letang v. Cooper (1964), [1965] 1 Q.B. 232, [1964] 2 All E.R. 929, [1964] Lloyd's Rep. 339 (Eng. C.A.) — followed
Mawji, Re (2011), 94 C.B.R. (5th) 77, 2011 CarswellOnt 15684, 2011 ONSC 4259 (Ont. S.C.J.) — referred to
Mawji, Re (2012), 94 C.B.R. (5th) 135, 2012 CarswellOnt 2576, 2012 ONCA 152 (Ont. C.A.) — referred to
Sally Creek Environs Corp., Re (2013), 2013 CarswellOnt 6123, 2013 ONCA 329 (Ont. C.A.) — considered
Westby Ex p. Lancaster Banking Corp., Re (1878), 10 Ch. D. 776 (Eng. Ch. Div.) — considered
Wilson's Truck Lines Ltd. v. Pilot Insurance Co. (1996), 1996 CarswellOnt 4282, 38 C.C.L.I. (2d) 159, [1997] I.L.R. I-3402, 31 O.R. (3d) 127, 22 M.V.R. (3d) 216, 140 D.L.R. (4th) 530, 24 M.V.R. (3d) 216, 94 O.A.C. 321 (Ont. C.A.) — referred to
Wilson's Truck Lines Ltd. v. Pilot Insurance Co. (1997), 33 O.R. (3d) 37, 24 M.V.R. (3d) 216n, 98 O.A.C. 329, 147 D.L.R. (4th) 242, [1997] I.L.R. I-3447, 1997 CarswellOnt 886 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 69 — considered

s. 69.1 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.2 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(1.1) [en. 2005, c. 47, s. 62(1)] — considered

s. 69.3(2) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.5 [en. 1992, c. 27, s. 36(1)] — considered

s. 95 — considered

s. 95(1)(a) — considered

s. 178(1) — considered

s. 178(2) — considered

s. 195 — considered

s. 215 — considered

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 28 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

s. 4 — considered

s. 19 — considered

s. 19(1) — considered

s. 20 — considered

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 63.01 — considered

APPEAL by trustee from judgment reported at *Dilollo, Re* (2013), 2013 ONSC 578, 2013 CarswellOnt 781, 97 C.B.R. (5th) 182 (Ont. S.C.J. [Commercial List]), in which motion judge found that certain motion by trustee was time-barred.

***G.R. Strathy J.A.*:**

1 Under s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"), a bankruptcy order is stayed upon the filing of an appeal. This appeal raises the issue of whether that stay suspends the limitation period applicable to a motion by a trustee to set aside a preferential payment by a bankrupt under s. 95 of the *BIA*.

2 The motion judge found that the limitation period was not suspended by the stay and dismissed the preference motion as time-barred. For the reasons that follow, although I do not agree entirely with the motion judge's analysis, I agree with his conclusion and would dismiss the trustee's appeal.

A. The Facts

3 On July 6, 2006, the respondent, I.F. Propco Holdings (Ontario) 36 Ltd. ("Propco"), obtained a default judgment against the bankrupt, Cosimo Dilollo ("Dilollo"), for $22,031,787.67.

4 On December 15, 2006, Propco brought a bankruptcy application against Dilollo. Ultimately, Propco and Dilollo agreed to compromise Propco's judgment for $1.2 million. They agreed that if this sum was paid, both parties would consent to the dismissal of Propco's bankruptcy application and would exchange releases.

5 Between August and December, 2007, Dilollo paid $1,136,500, which, although less than the agreed amount, Propco accepted in satisfaction of the settlement. As matters transpired, the bankruptcy application was not dismissed and releases were not exchanged. By early 2008, Propco's bankruptcy application remained outstanding and by order dated May 22, 2008, three other creditors were added as applicants to it.

6 On June 5, 2009, the bankruptcy application was heard by Morawetz J. Dilollo admitted at the hearing that he had settled Propco's claim for "something around" $1.185 million. A bankruptcy order was made on January 11, 2010 [2010 CarswellOnt 104 (Ont. S.C.J. [Commercial List])], and a trustee was appointed. In his endorsement granting the application, Morawetz referred to the settlement of the debt between Propco and Dilollo for $1.185 million.

7 On January 20, 2010, Dilollo filed an appeal from the bankruptcy order. This court dismissed that appeal on September 27, 2010.

8 At the first meeting of creditors on May 31, 2011, the appellant, msi Spergel Inc. (the "Trustee"), was appointed in place of the original trustee.

9 On August 24, 2012, the Trustee brought a motion under s. 95 of the *BIA* for a declaration that the $1.1365 million paid by Dilollo to Propco under the settlement constituted a preference and sought an order that Propco repay that amount to the Trustee.

10 Propco, for its part, brought a motion for an order that the Trustee's claim was time-barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "*Limitations Act*"). Alternatively, it sought an order that if the Trustee's claim was not time-barred, it was entitled to file a proof of claim in Dilollo's estate for the full amount of its $22,031,787.67 judgment. Propco said that if the preferential payment was set aside, the settlement agreement under which the payment had been made should also be set aside, with the result that the full amount of its claim was outstanding and provable in the bankruptcy. The difference was important, because if Propco could file a claim for the full amount of the judgment, it would account for about 90% of the value of proven claims.

B. Statutory Provisions

11 The Trustee brought its motion to set aside the payment to Propco as a preference under s. 95(1)(a) of the *BIA*:

> (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> > (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

12 There is no limitation period in the *BIA* applicable to the time within which the trustee is required to bring a motion to set aside a preference. In *Edwards, Re*, 2011 ONCA 497, 336 D.L.R. (4th) 719 (Ont. C.A.), at para. 4, this court applied the proposition that "general limitation periods in provincial statutes apply to bankruptcy proceedings," referring to *Gingras v. General Motors Products of Canada Ltd.* (1974), [1976] 1 S.C.R. 426 (S.C.C.) and *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), [1978] 1 S.C.R. 230 (S.C.C.).

13 Both parties, therefore, agreed that the general two-year limitation period in s. 4 of the *Limitations Act* applied to the motion to set aside the preference. That section provides:

> Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

14 The Trustee acknowledged that it was aware of the potential preference claim on January 11, 2010, the date of release of the reasons of Morawetz J. granting the bankruptcy order. It also conceded that the limitation period began on the date of the bankruptcy order, but argued that Dilollo's appeal to this court suspended the running of the limitation period pending the disposition of the appeal. It relied in this regard on the combined operation of s. 20 of the *Limitations Act* and s. 195 of the *BIA*.

15 Section 19 of the *Limitations Act* has the effect of invalidating any limitation period not specifically referred to in the Schedule to that Act, unless it was in effect on January 1, 2004, and incorporates by reference a statutory provision listed in the Schedule. It states:

> (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,
>
> > (a) the provision establishing it is listed in the Schedule to this Act; or
> >
> > (b) the provision establishing it,
> >
> > > (i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act.

16 However, section 20 of the *Limitations Act* provides:

> This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

17 The Trustee argued that s. 195 of the *BIA* operated as a "suspension" of the limitation period pending the appeal to this court. That section provides:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

18 Returning to the time periods at issue here, the key dates are as follows:

January 11, 2010	Bankruptcy order
January 20, 2010	Appeal filed by Dilollo
September 27, 2010	Appeal dismissed by Court of Appeal
January 11, 2012	Two-year limitation period expired
August 24, 2012	Preference motion commenced

19 If the stay of proceedings pursuant to s. 195 of the *BIA* during the appeal of the bankruptcy order had the effect of suspending the limitation period for the preference motion, the limitation period would have expired on September 18, 2012, and the Trustee's preference motion would have been brought in time. If the stay did not suspend the limitation period, it would have expired two years after the date of the bankruptcy order — that is, on January 11, 2012 — and the preference motion, which was brought about 30 months after the bankruptcy order, would have been time-barred.

C. The Motion Judge's Reasons

20 There were two issues before the motion judge. The first was whether the limitation period for the Trustee's preference motion was "suspended" by the stay of proceedings in s. 195 of the *BIA* during the pendency of the appeal from the bankruptcy order.

21 The second issue was whether, if the motion was not time-barred, and if the Trustee was ultimately successful in voiding the preferential payment under s. 95 of the *BIA*, Propco was entitled to file a claim for the full amount of its judgment (in excess of $22 million), or was confined to claiming the settlement amount of $1,136,500.

22 The motion judge found that before s. 20 can apply to extend, suspend or vary a limitation period, there must be a limitation period in another statute and that other statue must provide for the extension, suspension or other variation of *that limitation period*. Since there was no limitation period in s. 195 of the *BIA*, and that provision did not purport to suspend or extend a limitation period in the *BIA*, the ordinary limitation period applied. He expressed this conclusion as follows, at para. 16:

> To engage section 20 of the *Limitations Act, 2002* requires that some other statute provides for a limitation period and also provides for the "extension, suspension or other variation of a limitation period or other time limit by or under another Act". Section 195 of the *BIA* does not contain any limitation period or provide for the "extension, suspension or other variation" of a limitation period. Since *BIA* s. 195 does not purport to extend, suspend or vary a limitation period contained in the *BIA*, section 20 of the *Limitations Act, 2002* does not apply. Since no other

> suspension provision contained in the *Limitations Act, 2002* would apply in the circumstances of this case, the basic two year limitation period set out in section 4 governs. The parties agreed that time started to run on the day the Bankruptcy Order was made, so the basic two-year limitation period expired on January 11, 2012, well before the Trustee initiated the Preference Motion. That motion, therefore, is statute-barred. [Citations omitted.]

23 The motion judge also concluded that the stay pending appeal under s. 195 of the *BIA* was not functionally equivalent to a limitation period, and it was open to the Trustee to move to lift the stay if so advised. He stated, at para. 17 of his reasons:

> That a stay pending appeal might prevent a person from taking some step does not alter that conclusion. A stay of proceedings pending the hearing of an appeal is not the functional equivalent of a limitation period. Limitation periods set deadlines by which a person must initiate legal process in respect of a cause of action. Stays pending appeal are engaged following the initial disposition of the legal process in which the cause of action was asserted. Limitation periods and stays pending appeal conceptually are quite different creatures. If a stay might operate to prejudice a person's legal rights, recourse generally is available to seek a lifting of the stay from the court. Section 195 of the *BIA* specifically provides that "the Court of Appeal or a judge thereof may vary or cancel the stay ... for such other reason as the Court of Appeal or judge thereof may deem proper". In the present case it was always open to the Trustee to seek a lifting of the stay from the Court of Appeal if the Trustee thought that its ability to initiate a preference motion might be prejudiced by the appeal. As matters transpired, the Trustee was left with ample time following the dismissal of the appeal to commence its Preference Motion.

24 In the result, he found that the Trustee's motion was time-barred. Although not necessary to do so in the circumstances, the motion judge went on to consider whether, if the claim under s. 95(1)(a) of the *BIA* was not statute-barred, and if the payment under the settlement was found void as a preference, Propco was entitled to claim for the full amount of its judgment or was restricted to the compromised amount. He concluded that the Trustee could file a claim for the full amount of the judgment.

D. The Parties' Submissions

25 The Trustee's position, both before the motion judge and in this court, was that pursuant to s. 195 of the *BIA*, the appeal of the bankruptcy order resulted in an automatic stay of proceedings and suspended the limitation period applicable to the s. 95 preference motion. In that case, the preference motion would not be statute-barred until two years less nine days [1] after the appeal of the bankruptcy order was dismissed by this court on September 27, 2010. Under this theory, the preference motion was brought about a month before the expiry of the two-year limitation period.

26 The Trustee submits that the motion judge failed to follow "established jurisprudence" concerning the effect of a stay under the *BIA* on the running of limitation periods. It refers to case law under s. 69 of the *BIA* which holds that the limitation period ceases to run for creditors' claims against the bankrupt while the bankruptcy is in effect.

27 The Trustee also submits that the motion judge erred in holding that the absence of a limitation period in the *BIA* for bringing a preference motion meant that s. 20 of the *Limitations Act* was inapplicable. In this regard, the Trustee argues that the motion judge failed to properly consider and apply this court's decision in *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401 (Ont. C.A.).

28 Propco submits that the motion judge was correct in finding that s. 195 of the *BIA* does not extend, suspend or vary the basic two-year limitation period, because it does not contain a limitation period or provide for the "extension, suspension or other variation" of a limitation period. It relies on this court's decision in *Guillemette v. Doucet*, 2007 ONCA 743, 88 O.R. (3d) 90 (Ont. C.A.), which it submits makes it clear that s. 20 of the *Limitations Act* only applies where the other statute contains *both* a limitation period *and* a provision extending, suspending or varying that limitation period. Propco also relies on *Joseph* for the proposition that a common law extension of the limitation period is not available under s. 20.

29 Finally, Propco distinguishes the authorities under s. 69 of the *BIA* relied upon by the Trustee, none of which involved s. 20 of the *Limitations Act* and which, it says, are based on English authority inapplicable to Ontario's comprehensive limitations regime.

E. Analysis

30 The appropriate starting point for the analysis of the issues is the language of the statutory provision relied upon by the Trustee to suspend the limitation period. Section 195 of the *BIA* states that "all proceedings under an order or judgment appealed from shall be stayed" until the disposition of the appeal. It provides, however, that this court or a judge of this court may vary or cancel the stay if the appeal is not being prosecuted diligently, "or for such other reason as the Court of Appeal or a judge thereof may deem proper."

31 The section contains no limitation period and makes no express reference to the extension, suspension or variation of any limitation period. For this reason, the motion judge found that s. 20 of the *Limitations Act* was inapplicable and the basic two-year limitation period applied.

32 I agree within this conclusion, but do not agree with the portion of the motion judge's reasons dealing with the interpretation of s. 20 of the *Limitations Act*. In my view, read together, this court's decisions in *Guillemette* and *Joseph* establish that s. 20 speaks to two situations: (a) where a statute contains a limitation period or time limit to which the *Limitations Act* does not apply and a provision for the extension, suspension or variation of that period or time limit; and (b) where a statute simply contains a provision for the extension, suspension or variation of a limitation period or other time limit imposed "by or under" another statute.

33 In *Joseph*, Feldman J.A. adopted this interpretation, but found that the "special circumstances" doctrine was a creature of the common law, and could not be considered an extension *under* the *Courts of Justice Act*, R.S.O. 1990, c. C.43. It is apparent from her reasons that, had she found it to be a statutory extension, she would have applied it to the limitation period under the *Limitations Act*.

34 While there is language in *Guillemette* that could be taken to suggest, as Propco argues and as the motion judge held, that the operation of s. 20 is limited to statutes that contain their own limitation periods, that was not, in fact, the result in *Guillemette*. In that case, the limitation period in the *Solicitors Act*, R.S.O. 1990, c. S.15, was found to be of no effect by virtue of s. 19 of the *Limitations Act*, because it was not listed in Schedule A of the statute, but its "suspension" provision nevertheless applied to extend the limitation period in the *Limitations Act*.

35 Section 28 of the *Class Proceedings Act 1992*, S.O. 1992, c. 6, is a well-recognized example of such a statutory extension. It suspends the operation of the applicable limitation period in favour of class members when a class proceeding is commenced. There is no limitation period in the statute itself that is suspended, but the statute operates to suspend another statutory limitation period applicable to the cause of action: see, for example, *Coulson v. Citigroup Global Markets Canada Inc.*, 2012 ONCA 108, 16 C.P.C. (7th) 1 (Ont. C.A.).

36 I therefore agree with the Trustee's submission that an "extension, suspension or other variation" contained in the *BIA* would be capable of suspending the operation of the limitation period in the *Limitations Act*. The question is whether s. 195 of the *BIA* has that effect. I agree with the motion judge's conclusion that it does not.

37 The Trustee acknowledges that there is no direct authority that a stay under s. 195 of the *BIA* suspends the limitation period. It submits, however, that there is a long line of authority holding that the statutory stay of creditors' claims under s. 69 of the *BIA* has the effect of suspending the limitation period. It submits that the principles contained in the case law under s. 69 apply equally to s. 195.

38 Section 69 of the *BIA* and several sections that follow — s. 69.1 (Division I proposals), s. 69.2 (consumer proposals) and s. 69.3 (bankruptcies) — provide for a stay of proceedings against an insolvent person or debtor, as the case may

be, after the filing of a notice of intention, after filing a proposal, or after a bankruptcy order. The wording of s. 69.3(1), dealing with bankruptcies, is typical:

> Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

39 Subsection (1.1) provides that the stay ceases to apply on the day the trustee is discharged. Subsection (2) deals with the claims of secured creditors, who are permitted to realize their security unless the court orders otherwise. Section 69.4 provides that a creditor may apply to the court to have the stay lifted, and s. 69.5 permits the collection of withholdings or deductions under provincial tax laws.

40 These provisions promote the objects of the *BIA* by providing an orderly and fair distribution of the property of the bankruptcy amongst creditors and by preventing proceedings by a creditor that would give that creditor an advantage over others: see *Cohen, Re*, [1948] 4 D.L.R. 808 (Ont. C.A.), at para. 12.

41 These provisions stipulate that on the happening of the particular act, "no creditor has any *remedy* against the debtor or the debtor's property" (emphasis added).

42 Although the heading of these provisions refers to a "stay of proceedings", they accomplish this result by preventing the exercise of the creditor's remedy — the cause of action.

43 This court has, on a number of occasions, adopted the definition of "cause of action" propounded by Morden J.A. in *July v. Neal* (1986), 57 O.R. (2d) 129 (Ont. C.A.), at p. 137, adopting the words of Lord Diplock in *Letang v. Cooper* (1964), [1965] 1 Q.B. 232 (Eng. C.A.), at pp. 242-3: "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." For other examples see: *Wilson's Truck Lines Ltd. v. Pilot Insurance Co.* (1996), 31 O.R. (3d) 127 (Ont. C.A.), supp. reasons, (1997), 33 O.R. (3d) 37 (Ont. C.A.); *Goorbarry v. Bank of Nova Scotia*, 2011 ONCA 793, 109 O.R. (3d) 92 (Ont. C.A.).

44 By providing that the creditor has no "remedy" against the bankrupt, s. 69 prevents the exercise of the creditor's cause of action while the bankruptcy is in effect. This is entirely consistent with the purpose of the *BIA* of providing for the orderly and fair distribution of a bankrupt's property and preventing any creditors from gaining an advantage. The section does not suspend the limitation period. It prohibits any action on a claim that is provable in the bankruptcy. In most cases, the limitation period becomes irrelevant because, by s. 178(2) of the *BIA*, on discharge the bankrupt is released of all claims provable in the bankruptcy other than those set out in s. 178(1).

45 The Trustee relies, however, on a line of cases under s. 69, which are summarized by the following quote from L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law in Canada*, 4th ed. rev., vol. 3, loose-leaf (Toronto: Carswell, 2013), at p. 5-99:

> When a bankruptcy occurs, the *Statute of Limitations* ceases to run against claims ... The creditor's ability to take proceedings against the debtor is stayed by the *Act*, and the stay of proceedings suspends the operation of the limitation period.... The suspension ends when the trustee is discharged (s. 69.3(1)), and the *Statute of Limitations* commences to run again at that time. [Citations omitted.]

Cases that follow this principle include: *Lakehead Newsprint (1990) Ltd. v. 893499 Ontario Ltd.* (2001), 23 C.B.R. (4th) 170 (Ont. S.C.J.), varied, (2001), 155 O.A.C. 328 (Ont. C.A.); *Canada (Attorney General) v. Fekete*, 1999 ABQB 262, 242 A.R. 196 (Alta. Master); *Barry-Kays, Re*, 2010 ONSC 3535, 69 C.B.R. (5th) 243 (Ont. S.C.J.); *Mawji, Re*, 2011 ONSC 4259, 94 C.B.R. (5th) 77 (Ont. S.C.J.), affirmed 2012 ONCA 152, 94 C.B.R. (5th) 135 (Ont. C.A.); *Fimax Investments Group Ltd. v. Grossman*, 2012 ONSC 2436 (Ont. Master).

46 The common root of these authorities runs deep — an 1887 decision of the English Chancery Division, *Crosley, Re* (1887), 35 Ch. D. 266 (Eng. Ch. Div.). In that case, Crosley, a broker, was adjudged bankrupt in February 1874. It was discovered that he had misappropriated securities that he had held for a customer, Captain Ayscough. Ayscough made a claim in the bankruptcy and received a small dividend. The administration of the bankrupt estate was completed in 1880 and an order was made annulling Crosley's bankruptcy.

47 Crosley died in 1885 and in May 1896 an order was made for the administration of his estate. Captain Ayscough made a claim for the balance of what he was owed, on the basis that the debt was incurred by Crosley's fraud and therefore survived the bankruptcy.

48 It was argued, however, that the claim was barred by the six-year statute of limitations. Lord Justice Cotton said this, at p. 270:

> Then it is said that the claim is barred by the Statute of Limitations. But the fraud was not discovered till after the adjudication in bankruptcy. While the bankruptcy was in force no action could be brought, so the statute could not begin to run till the annulling of the bankruptcy, and within six years from that time an order for administration was made. The Statute of Limitations is therefore no defence, and the appeal must be dismissed.

49 Lindley J. agreed, at p. 271, stating:

> The short answer to the argument founded on the Statute of Limitations is that the statute did not begin to run till the bankruptcy had been annulled.

50 While the respondent argues that the court referred to no authority in support of the proposition that the statute of limitations did not run during the bankruptcy, the proposition was not new. In *Westby Ex p. Lancaster Banking Corp., Re* (1878), 10 Ch. D. 776 (Eng. Ch. Div.), at p. 784, the bankruptcy commenced in 1870. After the estate had been realized, and the trustees determined that nothing more could be brought in, the bankruptcy was deemed to be closed. The bankrupt failed to pay his creditors the requisite ten shillings on the pound, which would have entitled him to a discharge, and he never obtained a discharge. Subsequently, in 1878, the bankrupt inherited a large amount of money. A creditor, whose debt had appeared on the statement of affairs, but who had not proven his debt before the close of the bankruptcy, sent a proof of claim to the Receiver, who had taken over as trustee.

51 It was held that the creditor was entitled to apply for leave to enforce his debt as a judgment debt against the debtor's property. In answer to the argument that the creditor's claim was time-barred, Sir James Bacon, the Chief Judge in Bankruptcy, abruptly dismissed the assertion, at p. 272:

> The argument founded on the *Statute of Limitations* as an answer to this claim is not tenable for a moment. *The Statute of Limitations has nothing to do with the bankruptcy laws.* When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the *Statute of Limitations* has no application at all to such a case, or to the principles by which it is governed. [Emphasis added.]

52 In my view, this proposition remains valid. Section 69 of the *BIA* is not, as such, a provision that extends, suspends or varies a limitation period. It takes away creditors' civil remedies and requires them to submit their claims through the bankruptcy process. The bar on commencing or continuing proceedings serves this end and preserves the integrity of the bankruptcy process. In most cases, the limitation period is of no further significance because creditors' claims are dealt with in the bankruptcy. In the rare case, where the bankrupt is not discharged or the claim survives bankruptcy, the limitation period may resume running. It also continues to run against a creditor who seeks to recover a debt in proceedings unconnected to the bankruptcy: see Houlden, Morawetz and Sarra at 5-99, referring to *In re Benzon. Bower v. Chetwynd* [1914] 2 Ch. 68.

53 The stay under s. 195 of the *BIA* serves a very different purpose. It simply provides that on the appeal of any order or judgment made in the course of a bankruptcy, the status quo will be preserved, unless the court orders otherwise. This is not dissimilar to the automatic stay of a judgment for the payment of money, under rule 63.01 of the *Rules of Civil Procedure*. Its purpose is to ensure that no steps are taken that cannot be unwound if the appeal succeeds.

54 The Trustee also argued that the motion judge failed to appreciate that a trustee is incapable of acting where the very order from which it derives its authority is under appeal. It submits that during the stay under s. 195 a trustee is unable to hold a first meeting of creditors, hold a meeting with the inspectors, investigate potential claims and obtain legal opinions about such claims. This, said the Trustee, would put a trustee and creditors at risk, because the limitation period could slip away before the trustee had an opportunity to investigate potential claims or to take action. It argued that a trustee must have a full two years after its appointment to be able to investigate the situation and make decisions, with the advice of the creditors and the inspectors, before deciding whether to commence proceedings.

55 The motion judge addressed this issue at para. 17 of his reasons, referred to above at para. 23, where he noted that it was open to the Trustee to apply to lift the stay if it interfered with its ability to initiate the preference motion. As the motion judge also noted, the Trustee had ample time to commence the preference motion.

56 Accordingly, I regard s. 69 of the *BIA*, and the line of cases under it, to be entirely distinguishable from s. 195 and from the case before this court. Both provisions are also distinguishable from s. 20 of the *Limitations Act*, which is concerned with provisions in other acts for the extension, suspension or other variation of limitation periods contained in those other acts.

57 To conclude, this is not a case in which a statute other than the *Limitations Act* contains either a limitation period or an express extension, suspension or other variation of the limitation period. The Trustee relies, in effect, on an implicit or implied statutory extension of the limitation period. This court considered a somewhat similar argument in *Sally Creek Environs Corp., Re*, 2013 ONCA 329 (Ont. C.A.). In that case, certain creditors of the bankrupt brought a motion for leave pursuant to s. 215 of the *BIA* to commence an action for negligence against the Office of the Superintendent of Bankruptcy and two of its employees. They alleged that the OSB was negligent in supervising the trustee in bankruptcy, with the result that the dividend paid to creditors was less than it would otherwise have been.

58 In a taxation hearing, the Registrar in Bankruptcy made findings of serious misconduct on the part of the trustee. It was acknowledged that the limitation period for an action against the OSB began to run when the Registrar's decision was released on June 23, 2008, because the creditors were aware on that date of the material facts with respect to their cause of action.

59 In response to the motion for leave, the OSB argued that the motion was time-barred because it had been brought more than two years after the Registrar's decision. The creditors responded, however, that the Registrar's decision had been appealed, first to the Superior Court of Justice and then to this court. They argued that the appeal had the effect of "suspending" the limitation period. The motion judge found that all material facts were known by June 23, 2008 and the running of the limitation period was unaffected by the appeals.

60 This court affirmed the decision of the motion judge. It noted, at para. 11, that the appellants had provided no authority for the proposition that the limitation period, having begun to run, was tolled by an appeal or as a result of the outcome of the appeal.

61 The decision of this court in *Sally Creek*, like *Guillemette* and *Joseph*, is consistent with the purpose of the *Limitations Act* of promoting certainty and clarity in the law of limitation periods. That purpose is not accomplished by extending, suspending or varying a limitation period unless expressly authorized by statute. In my view, this is not such a case.

F. Conclusion

62 For these reasons, I would dismiss the appeal. As a result, the payment to Propco could not be impeached and it is unnecessary to consider the second issue before the motion judge.

63 In default of agreement as to costs, I would direct the parties to file brief written submissions, no more than three pages in length, exclusive of the costs outline. I would order that Propco's submissions be delivered within 20 days and the Trustee's submissions within 20 days thereafter.

K. Feldman J.A.:

I agree.

R. Sharpe J.A.:

I agree.

Appeal dismissed.

Footnotes

1 Nine days being the time between the bankruptcy order and the filing of the appeal.

Court File No. CV-17-11846-00CL

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., 9370-2751 QUÉBEC INC., 191020 CANADA 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.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF THE CHILDREN'S PLACE (CANADA), LP (Motion Returnable October 16, 2018)

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