COURT FILE NUMBER	2501-06120
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	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 SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., SUNTERRA ENTERPRISES INC.
APPLICANT	PVC MANAGEMENT II, LLC d/b/a PIPESTONE MANAGEMENT

Clerk's Stamp

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Book of Authorities to Submissions of the Applicant, PVC Management II, LLC d/b/a Pipestone Management

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ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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LIST OF AUTHORITIES

TAB	DESCRIPTION
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
2.	*1057863 B.C. Ltd. (Re)*, 2024 BCSC 1111
3.	*Enron Canada Corp. v. Campbell's Industrial Supply Ltd.*, 2000 ABCA 16
4.	*Canwest Global Communications Corp.*, 2011 ONSC 2215
5.	*Bul River Mineral Corporation (Re),* 2014 BCSC 1732

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to August 11, 2025

Last amended on December 12, 2024

À jour au 11 août 2025

Dernière modification le 12 décembre 2024

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to August 11, 2025. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of August 11, 2025 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 11 août 2025. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 11 août 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

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

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

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

General power of court

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

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

Pouvoir général du tribunal

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

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

Relief reasonably necessary

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

2019, c. 29, s. 136.

Rights of suppliers

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

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

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

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

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

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

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

Stays, etc. — other than initial application

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

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

Redressements normalement nécessaires

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

2019, ch. 29, art. 136.

Droits des fournisseurs

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

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

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

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

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

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

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

Suspension : demandes autres qu'initiales

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

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

(b) 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.

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

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

Preuve

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

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

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

Restriction

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

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

Restriction

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

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

Stays — directors

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

Suspension — administrateurs

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

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2005, c. 47, s. 128.

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la personne — autre que la compagnie visée par l'ordonnance — qui a des obligations au titre de lettres de crédit ou de garanties se rapportant à la compagnie.

2005, ch. 47, art. 128.

11.05 [Abrogé, 2007, ch. 29, art. 105]

Membre de l'Association canadienne des paiements

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

2005, ch. 47, art. 128; 2007, ch. 36, art. 64.

11.07 [Abrogé, 2012, ch. 31, art. 420]

Restrictions : exercice de certaines attributions

11.08 L'ordonnance prévue à l'article 11.02 ne peut avoir d'effet sur :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

c) l'exercice par le procureur général du Canada des pouvoirs qui lui sont conférés par la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 128.

Suspension des procédures : Sa Majesté

11.09 (1) L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou

premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

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

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

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

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

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

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

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

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

When order ceases to be in effect

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

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Cessation d'effet

(2) Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

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

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

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

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

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

Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette

sum, and of any related interest, penalties or other amounts, and the sum

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

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

Operation of similar legislation

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

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

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

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

loi ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Effet

(3) L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu

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

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

2005, c. 47, s. 128; 2009, c. 33, s. 28.

auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

Meaning of *regulatory body*

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

Définition de *organisme administratif*

11.1 (1) Au présent article, ***organisme administratif*** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Regulatory bodies — order under section 11.02

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

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

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

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

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

Exception

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

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

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

Declaration — enforcement of a payment

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

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

Déclaration : organisme agissant à titre de créancier

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

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

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

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

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Financement temporaire

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

Priority — secured creditors

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

Priorité — créanciers garantis

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

Priority — other orders

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

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

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

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

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

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

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

Facteurs à prendre en considération

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

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

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

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

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

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

Additional factor — initial application

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

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

Facteur additionnel : demande initiale

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

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

Assignment of agreements

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

Cessions

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

Exceptions

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

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Exceptions

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

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Facteurs à prendre en considération

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

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

11.31 [Abrogé, 2005, ch. 47, art. 128]

Fournisseurs essentiels

11.4 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priorité

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

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Révocation des administrateurs

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Security or charge relating to director's indemnification

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

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priority

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

Priorité

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

Restriction — indemnification insurance

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

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Negligence, misconduct or fault

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

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

Négligence, inconduite ou faute

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

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

Court may order security or charge to cover certain costs

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

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

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

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priority

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

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

Priorité

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

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

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

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

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

1997, c. 12, s. 124.

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

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

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

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

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

1997, ch. 12, art. 124.

Court to appoint monitor

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

Nomination du contrôleur

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

Restrictions on who may be monitor

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

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

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

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

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

(b) if the trustee is

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

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

Court may replace monitor

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

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

No personal liability in respect of matters before appointment

11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

Personnes qui ne peuvent agir à titre de contrôleur

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

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

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

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

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

b) qui est :

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

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

Remplacement du contrôleur

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

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

Immunité

11.8 (1) Par dérogation au droit fédéral et provincial, le contrôleur qui, en cette qualité, continue l'exploitation de l'entreprise de la compagnie débitrice ou lui succède comme employeur est dégagé de toute responsabilité personnelle découlant de quelque obligation de la compagnie, notamment à titre d'employeur successeur, si celle-ci, à la fois :

a) l'oblige envers des employés ou anciens employés de la compagnie, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

b) existait avant sa nomination ou est calculée par référence à une période la précédant.

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Liability in respect of environmental matters

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the monitor's appointment; or

(b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Reports, etc., still required

(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days

Obligation exclue des frais

(2) L'obligation visée au paragraphe (1) ne fait pas partie des frais d'administration.

Responsabilité de l'employeur successeur

(2.1) Le paragraphe (1) ne dégage aucun employeur successeur, autre que le contrôleur, de sa responsabilité.

Responsabilité en matière d'environnement

(3) Par dérogation au droit fédéral et provincial, le contrôleur est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu, avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée.

Rapports

(4) Le paragraphe (3) n'a pas pour effet de soustraire le contrôleur à l'obligation de faire rapport ou de communiquer des renseignements prévus par le droit applicable en l'espèce.

Immunité — ordonnances

(5) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (3), le contrôleur est, ès qualité, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par des procédures intentées au titre de la présente loi, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout intérêt dans l'immeuble en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(c) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au contrôleur de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout intérêt dans le bien immeuble en cause ou y avait renoncé, ou s'en était dessaisi.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Suspension

(6) En vue de permettre au contrôleur d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Frais

(7) Si le contrôleur a abandonné tout intérêt dans le bien immeuble en cause ou y a renoncé, les réclamations pour les frais de réparation du fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Priorité des réclamations

(8) Dans le cas où des procédures ont été intentées au titre de la présente loi contre une compagnie débitrice, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre elle pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un de ses biens immeubles est garantie par une sûreté sur le bien immeuble en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge ou réclamation visant le bien.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental

Précision

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1057863 B.C. Ltd. (Re),* 2024 BCSC 1111

Date: 20240625
Docket: S206189
Registry: Vancouver

Between:

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

- and -

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57

- and -

In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC

Petitioners

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	H. L. Williams A. Bowron
Counsel for Province of Nova Scotia:	S. Foreman, K.C. D. Brown
Counsel for Paper Excellence Canada Holdings Corporation:	P.J. Reardon
Counsel for the Monitor, Ernst & Young Inc.:	E. Pillon
Counsel Pacific Harbor North American Resources Ltd.:	B. Brammall
Counsel for Pictou Landing First Nation:	B. Hebert
Counsel for Unifor Local 440:	R. Pink, K.C.

Place and Date of Hearing:	Vancouver, B.C. May 31, 2024
Place and Date of Ruling with Written Reasons to Follow:	Vancouver, B.C. May 31, 2024
Place and Date of Written Reasons:	Vancouver, B.C. June 25, 2024

Introduction

[1] This hearing was convened in this restructuring proceeding to obtain approval of a significant milestone—a settlement between the major stakeholders—in what has been a long, complex and difficult proceeding.

[2] The petitioners seek an order approving a comprehensive settlement agreement and also, a claims process order. No party or stakeholder opposed the relief.

[3] In June 2020, these proceedings began when the petitioners sought creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. At the time, the petitioners' business was the operation of a pulp mill (then in hibernation) and related timberland operations in Pictou County, Nova Scotia.

[4] The proceedings were very contentious between the petitioners, its shareholders, its major secured creditor, and the Province of Nova Scotia (the "Province"), who is also a major secured creditor. Major issues arose between the parties concerning the petitioners' intention to restart the pulp mill and/or obtain financial compensation from the Province for legislation that had mandated its closure. This conflict had led to litigation and judicial reviews in Nova Scotia and allegations against the Province as to their conduct in the face of these restructuring proceedings.

[5] In May 2022, I granted an order directing a mandatory mediation process between the parties, against the wishes of the Province: *1057863 B.C. Ltd. (Re)*, 2022 BCSC 759 [*Mediation Order Reasons*]. I appointed the Honourable Thomas Cromwell, C.C., as the Mediator.

[6] Despite the rocky start to the mediation process, including the Province seeking to appeal the mediation order, the mediation continued for the next two years to address the multiple complex issues between the various parties. The parties have been assisted in the process to a large degree by not only Mr. Cromwell, but also the Monitor and its counsel.

[7] The proposed settlement represents a significant and very positive turn of events that will bring certainty to the parties as to the path forward in these restructuring proceedings.

[8] For the reasons discussed below, I approved the settlement and granted the claims process order, with reasons to follow. These are those reasons.

The Settlement Agreement

[9] The settlement agreement is a global resolution of all claims between the petitioners and its shareholders, the interim lenders and the Province, including the litigation arising from the Province's legislation that directly affected the pulp mill and the petitioners' ability to operate the pulp mill.

[10] The provisions of the settlement agreement are complex, but can be generally described as including either a "New Mill Scenario" or a "No Mill Scenario". Specifically:

a) The "New Mill Scenario": the first step is to obtain a feasibility study for the development of a new mill in Liverpool, Nova Scotia (the "New Mill"). That study is to be obtained within nine months of today and the parties have set out the specifics of what will determine whether the New Mill will be financially viable in terms of a rate of return. If a positive result arises, the petitioners will seek third-party financing. If that financing is obtained, the petitioners will pay $15 million to the Province and fund amounts required to wind-up the existing pension plans and deficiencies; and

b) The "No Mill Scenario": if the plans for the New Mill do not materialize, the petitioners will liquidate the timberlands. The parties have agreed upon a waterfall of payments from those sale proceeds, including payment of the interim financing, amounts to wind-up the pension plans, payment of $30 million to the Province plus $15 million to

> maintain the existing pulp mill and implement a closure plan. The petitioners may seek to sell the existing mill.

[11] In either scenario, the parties have agreed to dismiss or withdraw the various litigation claims, including challenges to the Province's legislation, a judicial review of certain environmental decisions, the appeal from the mediation order and allegations in these *CCAA* proceeding against the Province.

[12] Given what is described as the Mediator's "instrumental" assistance in the past, the parties intend to continue to retain Mr. Cromwell in the event that any issues arise in the implementation of the steps contemplated by the settlement agreement.

[13] This Court may approve the settlement agreement under its broad statutory jurisdiction under s. 11 of the *CCAA*, which refers to a court making such orders as are necessary to achieve the remedial objectives of the *CCAA*.

[14] Settlement agreements have frequently been approved in *CCAA* proceedings where a settlement avoids complex and costly legal contests and which contribute to advancing the restructuring on a timely and efficient basis: *Walter Energy Canada Holdings, Inc. (Re),* 2017 BCSC 1968 [*Walter Energy*] at paras. 35–36; *Great Basin Gold Ltd. (Re),* 2012 BCSC 1773 at para. 16; *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078 [*Sino-Forest*] at para. 44.

[15] Factors that are considered in deciding whether to approve a settlement under the *CCAA* include: whether the settlement is fair and reasonable; whether the settlement provides substantial benefits to stakeholders; and whether the settlement is consistent with the purpose and spirit of the *CCAA*: *Sino-Forest* at para. 49; *Walter Energy* at para. 33.

[16] In assessing whether the proposed settlement is fair and reasonable, the court can consider the settlement's balancing of the interests of all parties, equitable treatment of the parties, including the creditors who are not signatories to the

agreement, and its benefit to the petitioners and its stakeholders generally: *Nortel Networks Corporation (Re),* 2010 ONSC 1708 at para. 73.

[17] I accept the parties' joint submissions, supported by the Monitor, that approval of the settlement agreement is appropriate in the circumstances. In particular:

a) The settlement agreement provides a significant benefit to the petitioners and their stakeholders. It facilitates a global resolution of all of the claims amongst the parties which will avoid significant cost and effort to resolve those claims;

b) This result will bring certainty to what has been, in the past, a difficult and complex restructuring that, to a large degree, was hampered by uncertainty;

c) The settlement agreement also provides the petitioners with the time and resources necessary to start working towards a solution for the benefit of all creditors. There is no alternative to the settlement agreement that provides a better outcome for the petitioners' stakeholders in the short or medium term;

d) The settlement agreement also represents a significant step forward to permit the petitioners to implement either one of the two scenarios. This includes:

i. The agreement allows for the opportunity for development of the New Mill based on objectively determined criteria to assess its financial viability in a location that all parties have identified as preferable. If the New Mill meets these criteria, there is the possibility of the petitioners restarting business in Nova Scotia, which would include use of the timberlands. This would allow for further contribution to the Nova Scotia economy and employment of thousands of Nova Scotia residents;

ii. Alternatively, the No Mill Scenario allows the petitioners to resolve their outstanding financial matters through an organized liquidation and a transparent and clearly stated waterfall of payments; and

e) The settlement agreement provides certainty and clarity on a number of high-stakes issues for a variety of stakeholders, including those not directly involved in the settlement. In either scenario, there is a framework for the repayment of the outstanding pension obligations and ensuring that the petitioners' environmental obligations on the Mill Site are addressed in a responsible manner. In addition, the Pictou Landing First Nation ("PLFN") will be treated as an unaffected creditor in any future plan of arrangement that may be brought by the petitioners in the *CCAA* proceeding.

[18] I recognize the substantial efforts that have brought the parties to the proposed settlement agreement. The mediation process has been lengthy and the outcome—the settlement—is the result of a significant good faith efforts of the parties. As stated above, the Monitor has had a significant role in advancing the mediation over that time and I accept the Monitor's support and recommendations on this application.

[19] I conclude that the settlement agreement should be approved. It is fair and reasonable. Of course, the parties' agreement is indicative of their view of that fact. However, the benefits and fairness to the other stakeholders who are not parties is also evident from its terms. Finally, the settlement agreement is consistent with the remedial purposes and objectives of the *CCAA*: *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 at para. 70.

Interim Financing

[20] The settlement agreement also involved various amendments to the interim financing that has been in place for some years now, as approved by the Court.

[21] The negotiated amendments include: (i) extending the maturity date to March 31, 2025; (ii) removing the “Milestones” (which principally related to a restart of the existing mill); (iii) clarifying the principal amount available does not include interest (which ensures sufficient liquidity during the requested stay extension); and (iv) increasing the interest rate to 13% per annum, applicable to the entirety of the principal amount of the Interim Financing Facility. Any draws under the Interim Financing Facility will be in the amounts required, in consultation with the Monitor.

[22] These amendments will ensure that the petitioners have sufficient funding during the proposed stay extension period. This funding will allow the petitioners to maintain their assets while the feasibility study is being completed.

[23] In the New Mill Scenario, the Interim Financing Facility will remain in place. The petitioners will either repay the Interim Financing Facility with the financing of the New Mill or negotiate another solution with the interim lenders. In the No Mill Scenario, the Interim Financing Facility will be repaid from the proceeds from the sale of the timberlands given its senior priority.

[24] In addition, the parties have agreed to an amendment of the Subordinated Interim Financing to extend the maturity date to March 31, 2025.

[25] With the DIP Amendments (comprised of Third Amended and Restated DIP Financing Term Sheet and the Subordinated Amending Agreement), the petitioners have also confirmed that they will have sufficient liquidity to meet their obligations during the stay extension.

[26] This Court has jurisdiction to consider and approve the proposed amendments to the interim financings pursuant to s. 11.2 of the *CCAA,* taking into account various non-exhaustive factors set out in s. 11.2(4).

[27] I conclude that the proposed amendments are necessary and appropriate in terms of advancing this restructuring:

a) the amendments will allow the petitioners to preserve value in the existing mill and the timberlands, the petitioners' only current source of revenue and most valuable assets;

b) the amendments will also enhance the prospects of a viable restructuring by allowing the petitioners breathing room to determine whether the New Mill is feasible or whether to proceed with the orderly liquidation contemplated in the settlement agreement;

c) the terms of the amendments are consistent with how the petitioners' affairs will be managed in the *CCAA* proceedings, in terms of their projected cash flow needs to maintain *status quo* operations to complete the feasibility study;

d) the 3% increase to the interest rate is proportional to the change in the economic conditions since the Interim Financing Facility was originally negotiated; and

e) the Province, the petitioners' primary secured creditor, does not oppose approval of the amendments and no other stakeholder or creditor will be materially prejudiced by reason of the amendments.

The Claims Process

[28] The proposed Claims Process is designed to provide clarity and certainty in this *CCAA* proceeding by revealing the types of claims that may be asserted against the petitioners as part of their restructuring efforts.

[29] The petitioners, in consultation with the Monitor, are of the view that conducting a claims process at this time to confirm the nature, quantum and priority of claims will help to ensure orderly execution of any plan of arrangement the petitioners put forward after the feasibility study in the New Mill Scenario, or a distribution in the No Mill Scenario. They both anticipate that this will dovetail with the timing of the feasibility study and use that time efficiently.

[30] The Claims Process is structured on what I would generally describe as the usual terms. Claims that will be addressed include: Pre-Filing Claims, Restructuring Claims and Directors/Officers Claims. A number of claims will be excluded from the Claims Process, including of course those that cannot be addressed under the *CCAA*. Excluded claims will also cover any claims arising on or after the filing date (other than the Restructuring Claims and Directors/Officers Claims), the Province's claims relating to the environmental remediation of the existing mill and any claims raised in PLFN's litigation.

[31] The proposed Claims Process is primarily a negative claims process.

[32] The Claims Bar Date will be August 30, 2024 or, for the Restructuring Claims, such later date as is specified if there is a notice of disclaimer or resiliation.

[33] The Monitor is to run the Claims Process and adjudicate any claims, in consultation with the petitioners. The petitioners, with oversight of the Monitor, will have an opportunity to resolve any proof of claim or disputed claim during the course of the Claims Process. Any claim that is referred to the Court for adjudication in accordance with the Claims Process is to be adjudicated on a *de novo* basis.

[34] The jurisdiction of the Court to approve a claim process is found in s. 11 of the *CCAA*: *Soccer Express Trading Corp. (Re)*, 2020 BCSC 749 at para. 106.

[35] Claim processes are frequently granted in *CCAA* proceedings. They bring some certainty to the proceedings. Claim processes are a commonly recognized element of such proceedings and are an important step in achieving the remedial objectives in a *CCAA* restructuring: *Bul River Mineral Corp. (Re),* 2014 BCSC 1732 at paras 29–32; *Quest University Canada (Re)*, 2020 BCSC 1845 [*Quest University*] at paras. 20–21.

[36] I agree with the petitioners that the Claims Process is fair and reasonable to the affected stakeholders. The Claims Process was designed in consultation with the Monitor and the Monitor supports the proposed Claims Process. I agree that commencing the Claims Process at this time will, among other benefits, allow the

Monitor to efficiently and effectively assess any potential claims, which will permit the determination of the nature, quantum, and priority of potential claims.

[37] Also, the negative aspect of the Claims Process is fair to stakeholders, as it will minimize unnecessary costs by eliminating the need for creditors who receive a notice to fill out proof of claim forms and gather supporting evidence. This aspect of the Claims Process is acceptable as these proceedings have been underway and they have been well publicized: *Quest University* at para. 26; *Toys "R" Us (Canada) Ltd. (Re)*, 2018 ONSC 609 at para. 14. The negative Claims Process will also ensure that known claims are not lost due to a failure to file by the Claims Bar Date.

[38] Finally, the Claims Process follows the usual steps and procedures.

[39] I conclude that the terms of the proposed Claims Process are fair and reasonable and that the implementation of the Claims Process is appropriate and prudent as this time.

The Stay Extension

[40] The petitioners seek an extension of the stay of proceedings to March 31, 2025.

[41] The petitioners cite the need to preserve the *status quo* while implementing the settlement agreement. The proposed extension is said to be appropriate to provide them with time to complete the feasibility study in order to determine whether the New Mill is financially viable. They anticipate that this time will be sufficient to advance the next steps under the settlement agreement to the point that they can then decide upon a course of action based on the results of the feasibility study and the outcome of the Claims Process.

[42] The proposed stay extension period is supported by the petitioners' cash flow projections which evidence sufficient liquidity to continue operations and complete the next steps contemplated by the settlement agreement.

[43] This Court has the discretion to grant a stay extension for a period that it considers necessary on any terms that this Court may impose: s. 11.02(2) of the *CCAA*. I must be satisfied that the stay extension is appropriate and that the petitioners have acted and continue to act in good faith and with due diligence: s. 11.02(3), *CCAA*.

[44] The Monitor states that, in its view, the stay extension period is reasonable in the circumstances and that the requirements of s. 11.02(3) have been met.

[45] I am satisfied that the stay period should be extended to March 31, 2025. In a significant way, this stay extension is an integral part of allowing the parties to achieve the benefits of the settlement agreement.

Limited Partnership Relief

[46] Pursuant to s. 2 of the *CCAA*, only "companies" are eligible to receive the protection afforded by the *CCAA*.

[47] However, courts frequently exercise their jurisdiction under s. 11.02(2) of the *CCAA* to extend the protections of the *CCAA* to partnerships where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the partnerships were not included: *Lehndorff General Partners Ltd. (Re)*, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (O.N.C.J.); *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222 at paras. 33–34; *Cinram International Inc. (Re)*, 2012 ONSC 3767, Schedule “B” at para. 64; *Miniso International Hong Kong Limited v. Migu Investments Inc.,* 2019 BCSC 1234 at paras. 58–62.

[48] In this proceeding, I extended the benefit of the initial stay of proceeding in favour of the limited partnerships that are part of the Northern Pulp group: *1057863 B.C. Ltd (Re),* 2020 BCSC 1057 at para. 5. In addition, the mediation process was also directed toward these entities: *Mediation Order Reasons* at para. 124.

[49] I am satisfied that it is appropriate to continue to include the limited partnerships in the relief granted.

[50] I am also satisfied that it is appropriate to include the limited partnership in the Claims Process because the limited partnerships are an integral part of the Northern Pulp group and this will provide further clarity regarding any claims to be presented and/or accepted. The petitioners refer to many examples where such entities have been included in claim processes: *Re Nordstrom Canada Retail Inc.* (30 May 2023), Toronto CV-23-00695619-00CL (O.N.S.C.) (Claims Procedure Order); *Re Old MM GP Inc.* (8 March 2024), Toronto CV-23-00710259-00CL (O.N.S.C.) (Claims Procedure Order); and *Joseph Richard Hospitality Group Ltd. (Re)* (27 July 2023), Vancouver S235026 (B.C.S.C.) (Order Made After Application (Claims Process Order)).

The Wind Farms

[51] The petitioners also raise an issue that has not been previously addressed by the Court. In years past, the petitioners had identified that a portion of the timberlands had the potential to accommodate wind farms as a source of revenue.

[52] Prior to the *CCAA* proceedings, the petitioners granted an option to lease land for the purpose of a wind farm. In April 2023, this option was extended. In December 2023, the option was exercised and, on April 25, 2024, the petitioners entered into a lease with Higgins Mountain Wind Farm Limited Partnership. The next steps involve the development of the lands for the project.

[53] In addition, in September 2021, the petitioners entered into an option and lease agreement with Renewable Energy Systems Canada Inc. by which an option is granted to develop wind farms on the petitioners' lands.

[54] None of these post-*CCAA* transactions were approved by the Court, as was required under the existing court orders.

[55] I accept the petitioners' submissions that the failure to bring these matters to the Court arose through inadvertence. The Province, who has security on the lands, supports the transactions. In any event, the counterparties to these agreements now

require court approval to regularize the transactions and provide certainty for the developments to proceed.

[56] I am satisfied that, had the matters been raised at the outset, approval would have been granted. I approve these transactions and retroactively authorize the petitioners having entered into them.

Conclusion

[57] The orders are granted on the terms sought. I approve the settlement agreement, the changes to the interim financing and approve, retroactively, the arrangements with respect to the wind farms. I extend the stay of proceedings to March 31, 2025. Finally, I grant the Claims Process order.

[58] On a final note, as did many counsel on this application, the Court wishes to extend its thanks to the many people whose hard work led to this significant resolution, one that allowed this restructuring to go forward. That group of people includes the Court appointed Mediator, the Honourable Thomas Cromwell, the Monitor and the Monitor's counsel, who were all able to assist in the mediation process. In addition, the Court's thanks go to the other parties and their counsel whose good faith efforts and hard work resulted in this resolution that provides significant benefits to all concerned.

"Fitzpatrick J."

Enron Canada Corp. v. Campbell's Industrial Supply Ltd., 2000 ABCA 16

Date: 20000114
Docket: 99-18564, 99-18565, 99-18566, 99-18567
99-18568, 99-18569, 99-18570, 99-18571

IN THE COURT OF APPEAL OF ALBERTA

THE HONOURABLE MR. JUSTICE WITTMANN IN CHAMBERS

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

BETWEEN:
Appeal #99-18564

ENRON CANADA CORP. and
THE CREDITORS' COMMITTEE

Appellants

- and -

CAMPBELL'S INDUSTRIAL SUPPLY LTD.

Respondent

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF
THE HONOURABLE MR. JUSTICE S. J. LoVECCHIO DATED NOVEMBER 9, 1999

AND BETWEEN:
Appeal #99-18565

ENRON CANADA CORP. and
THE CREDITORS' COMMITTEE

Appellants

- and -

NATIONAL-OILWELL CANADA LTD.

Respondent

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF
THE HONOURABLE MR. JUSTICE S. J. LoVECCHIO DATED NOVEMBER 9, 1999

AND BETWEEN

Appeal #99-18566

ENRON CANADA CORP. and
THE CREDITORS' COMMITTEE

Appellants

- and -

HALLIBURTON GROUP CANADA INC.

Respondent

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF
THE HONOURABLE MR. JUSTICE S. J. LoVECCHIO DATED NOVEMBER 9, 1999

AND BETWEEN:
Appeal #99-18567

ENRON CANADA CORP. and
THE CREDITORS' COMMITTEE

Appellants

- and -

BARRINGTON PETROLEUM LTD.

Respondent

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF
THE HONOURABLE MR. JUSTICE S. J. LoVECCHIO DATED NOVEMBER 9, 1999

AND BETWEEN:
Appeal #99-18568

ENRON CANADA CORP. and
THE CREDITORS' COMMITTEE

Appellants

- and -

PETRO-CANADA OIL AND GAS

Respondent

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF
THE HONOURABLE MR. JUSTICE S. J. LoVECCHIO DATED NOVEMBER 9, 1999

AND BETWEEN:
Appeal #99-18569

ENRON CANADA CORP. and
THE CREDITORS' COMMITTEE

Appellants

- and -

TRANSALTA UTILITIES CORPORATION

Respondent

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF THE
HONOURABLE MR. JUSTICE S. J. LoVECCHIO PRONOUNCED SEPTEMBER 7, 1999

AND BETWEEN:
Appeal #99-18570

ENRON CANADA CORP. and
THE CREDITORS' COMMITTEE

Appellants

- and -

DR. ROBERT WILLIAMS

Respondent

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF THE
HONOURABLE MR. JUSTICE S. J. LoVECCHIO PRONOUNCED SEPTEMBER 7, 1999

AND BETWEEN:
Appeal #99-18571

ENRON CANADA CORP. and
THE CREDITORS' COMMITTEE

Appellants

- and -

FOUNDERS ENERGY LTD.

Respondent

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF
THE HONOURABLE MR. JUSTICE S. J. LoVECCHIO DATED NOVEMBER 9, 1999

MEMORANDUM OF DECISION

COUNSEL:

A. H. Trawick, Q.C. and A Robert Anderson
For Enron Canada Corp. (appellant)

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For The Creditors' Committee (appellant)

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D. W. Mann
For Barrington Petroleum Ltd. and
for Petro-Canada Oil and Gas (respondents)

S. F. Collins and L. B. Robinson
For TransAlta Utilities Corp. and
for Dr. Robert Williams (respondents)

K. A. Staroszik
For Founders Energy Ltd. (respondent)

MEMORANDUM OF DECISION OF THE
HONOURABLE MR. JUSTICE WITTMANN

Introduction

[1] These are applications for leave to appeal decisions of LoVecchio, J. sitting as the supervising chambers judge under the ***Companies' Creditors Arrangement Act*** R.S.C. 1985 c.C-36 as amended (CCAA). The decisions involve claims bar orders and claims bar dates and the circumstances in which such orders and dates can be amended or extended so as to permit late filing creditors to attain status under the CCAA, having filed after the claims bar date, contrary to the claims bar orders.

[2] In allowing the respondents to file late, LoVecchio, J. applied a standard analogous to that employed under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985 c.B-3 (the ***BIA***). The applicants assert that this is the wrong test as a matter of principle in the circumstances of these cases.

Facts

[3] On March 2nd, 1999 Blue Range Resource Corporation (Blue Range) obtained an *ex parte* order granted by LoVecchio, J. pursuant to the CCAA.

[4] On April 6th, 1999, the Monitor, Price Waterhouse Coopers Inc., was granted an order that the claims against Blue Range not proven in accordance with the procedures set out in the order would be "deemed to be forever barred and could not thereafter be advanced as against Blue Range in Canada or elsewhere", (the claims bar order) unless filed by May 7th, 1999 (the claims bar date).

[5] On April 30th, 1999 an order was granted to the Monitor extending the claims bar date (the further claims bar order) for certain creditors who had not been served with the April 6th order to June 15th, 1999. (the further claims bar date).

[6] The further claims bar order also stated that claims which were not proven in accordance with the procedure set out "shall be deemed to be forever barred" unless filed by the further claims bar date.

[7] Also on April 30th, 1999, LoVecchio, J. granted an order changing the joint venture partner claim process providing for filing of claims by joint venture partners on or before June 15th, 1999.

[8] On June 11th, 1999, an order was granted permitting contingent creditors, once identified, to file claims within 15 days of receipt of notice.

[9] A number of interim reports of the Monitor were in evidence, and many of them note claims that have yet to be filed. In the Monitor's Report to Voting Claimants it was stated at p.5:

> It is not possible to determine the amount of the disputed claims at this time. The amount of the disputed claims will be known by the meeting on July 23, 1999. We anticipate that there will ongoing litigation and negotiations to resolve the disputed claims for an extended period of time after July 23, 1999.

This Report, although not dated, appears to have been made prior to July 23rd, 1999 and after June 22nd, 1999.

[10] On July 23rd, 1999, a plan of arrangement sponsored by Canadian Natural Resources Limited (the CNRL plan of arrangement) was voted upon and approved by the eligible voting creditors of Blue Range. No applications were made prior to July 23rd, 1999 to vary any of the claims bar orders or dates.

[11] The respondents in these applications, styled at the "known late claimants" applied to LoVecchio, J. to vary the claims bar orders by seeking an extension of the claims bar dates such that they would be permitted to pursue their respective claims notwithstanding non-compliance of the claims bar orders.

[12] In applications heard September 7th and 8th, 1999, LoVecchio, J. made orders allowing the respondents TransAlta Utilities Corporation and Dr. Robert Williams to file claims late, notwithstanding the claims bar orders and dates. These orders were, in effect, re-considered by LoVecchio, J. on the basis of the reasoning contained in his November 9th, 1999 decision and will be treated as if they were decided according to the reasons set out November 9th, 1999.

[13] On November 9th, 1999, LoVecchio, J. rendered his decision extending the claims bar dates, and, in essence, varying the April claims bar orders to permit late filing by the respondents in these applications.

[14] The affidavit of evidence of Peter C. M. Keohane, Assistant General Counsel at Enron Canada Corp., (Enron) the largest single creditor, filed in support of these applications, indicates that Enron is wholly dissatisfied with the November 9th, 1999 decision of LoVecchio, J. as is the Creditors' Committee. One of the principal points deposed to in the affidavit of Keohane is that the creditors, in determining how to vote for the CNRL plan of arrangement on July 23rd, 1999, relied on the fact that late claims would not be allowed unless exceptional circumstances were proven.

Leave to Appeal under the CCAA

[15] The section of the CCAA governing appeals is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[16] This Court has most recently stated the criteria to be applied in an application for leave to appeal pursuant to the CCAA in ***Re Blue Range Resource Corporation*** [1999] A.J. No. 975 at para. 2, 3, 4 (C.A.), where Fruman, J.A. said that an appellate court should exercise its power sparingly in scrutinizing leave applications under the CCAA because a judge exercising a supervisory function under the CCAA has an ongoing management process similar to a judge making orders in the course of a trial. There must be serious and arguable grounds that are of real and significant interest to the parties. This general criteria is derived from ***Re Multitech Warehouse District*** (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.); ***Luscar Ltd. v. Smoky River Coal Ltd.***, [1999] A.J. No. 185 at para. 22 (C.A.). The general criteria has been subsumed in ***Med Finance Company S.A. v. Bank of Montreal*** (1993) 22 C.B.R. (3d) 279 at 282 (B.C.C.A.). Although this case involved a leave to appeal pursuant to the ***BIA***, the four elements applicable to appeals under the CCAA are:

> (1) whether the point on appeal is of significance to the practice;
> (2) whether the point raised is of significance to the action itself;
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> (4) whether the appeal will unduly hinder the progress of the action.

[17] The application before me proceeded on the basis that these criteria are not disputed by any party. It is rather the application of the criteria to the facts which is in dispute.

The Decision of LoVecchio, J.

[18] Three issues were dealt by the learned chambers judge. They are stated at paragraph 16 of his judgment as follows:

> (1) Should the Court under all circumstances refuse to extend either or both of the Claims Bar Date or the period during which an appeal may be made, when it was the Court that had established the particular milestones in the course of its supervisory role of the reorganization of Blue Range under the Act?
>
> (2) If the answer to Issue (1) is no, in what prescribed circumstances should the Court so extend?

> (3) If the answer to Issue (1) is no and the Court has established prescribed circumstances for an extension, in this case, have each of the Applicants, in their particular situation, established that they are within the prescribed circumstances?

LoVecchio, J. answered the first issue in the negative, stating that the Court should not, under all circumstances, refuse to extend either or both the claims bar date or the period during which an appeal may be made when it was the court that had established "the particular milestones in the course of its supervisory role of the re-organization of Blue Range under the [CCAA]".

[19] With respect to Issue No. 2, LoVecchio, J. decided that ". . . the prescribed circumstances in which a creditor should be allowed to assert or amend a claim after the expiry of the applicable date should be similar those in which a creditor would be allowed to take such action under the ***Bankruptcy and Insolvency Act.***" In dealing with this issue, LoVecchio, J. analysed, among other things, ***Lindsay v. Transtec Canada Ltd.*** (1994), 28 C.B.R. (3d) 110 (B.C.S.C.). He also considered the approach under the ***United States Bankruptcy Code***, when dealing with Chapter 11 matters. Ultimately, he adopted a "more flexible approach" akin to the ***BIA*** approach on the basis that he was essentially dealing with a liquidation.

[20] With respect to Issue No. 3, he found that each of the applicants had established that in their particular situation they were within the prescribed circumstances "mandated by the ***BIA*** approach".

Argument

[21] The argument of Enron and the Creditors' Committee was to the effect that all of the elements of the subsumed criteria have been met. The summary of their argument is as follows:

> (1) Claims bar orders are an integral part of CCAA proceedings and have been granted in numerous such proceedings in Alberta.
> (2) The purpose of claims bar orders is, amongst other things, to enable creditors to meaningfully assess and vote on a plan of arrangement, and to ensure a timely and orderly completion of the CCAA proceedings.
> (3) The decision is the first of its kind in Canada and there is no appellate authority in Alberta or elsewhere precisely on point.
> (4) The reliance placed on a claims bar order by the Creditors' Committee and Enron can be essentially meaningless if the flexible ***BIA*** approach is later followed.
> (5) That the appeal of the decision is on its face serious and of some merit.

[22] The respondents argued in summary as follows:

> (1) The decision of LoVecchio, J. draws a distinction between CCAA

> proceedings that are in essence a liquidation and those that are not and can be restricted to its own facts.
> (2) The purpose of CCAA is to encourage a fair and expedient disposition and this is consistent with maintaining flexibility in reviewing each late claimant notwithstanding a claims bar date and claims bar order.
> (3) The quantum of the known late claims are insignificant and stand in the ratio of $1.4 Million to $93 Million in the class of unsecured creditors and therefore the point raised is not of significance to the action;

Decision

[23] It is the practice of this Court when granting leave to appeal not to give detailed reasons to ensure that the panel hearing the case will be unfettered. I am granting leave on the following issue, having found that the criteria for leave to appeal have been met.

[24] In argument before me, it was specifically put to counsel whether any party took the position that claims bar orders were beyond the power of the learned chambers judge to make pursuant to the CCAA. Counsel agreed that the power was not in dispute. The appeal will not therefore be proceeded with on the issue of the power of the Court to make claims bar orders and set claims bar dates.

[25] Also, counsel agreed the Court has power to amend claims bar orders and claims bar dates, notwithstanding the purported finality of the claims bar date. Therefore, the power of the Court to amend claims bar orders will not be in issue on appeal.

[26] The issue upon which leave to appeal is granted is thus reduced to one and will be stated as follows:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimant, and applying the criteria to each case, what is the result?

[27] In granting leave on this issue, the parties are not restricted in putting forward any alternate approach to the ***BIA*** approach, including the approach followed under the United States Bankruptcy Code which was considered and rejected by LoVecchio, J.

[28] Leave is therefore granted on the above terms.

APPLICATION HEARD on December 21, 1999

MEMORANDUM FILED at Calgary, Alberta
this 14th day of January, 2000

_____

WITTMANN, J.A.

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

COUNSEL: *Douglas J. Wray and Jesse B. Kugler*, counsel for the Applicant, Communications, Energy and Paperworkers Union of Canada ("CEP")
David Byers and Maria Konyukhova, counsel for the Monitor

PEPALL J.

REASONS FOR DECISION

Introduction

[1] The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

[2] On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**

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 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.

NO EXERCISE OF RIGHTS OR REMEDIES

16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the 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 claim for lien.

[3] On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, "Claim" is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date[1] (a "Prefiling Claim") and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a "Restructuring Claim"). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

[4] On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

[5] On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

---

[1] The Filing Date was October 6, 2009, the date of the initial order.

[6] John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership ("CTLP"), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley's termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

> The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA][2]. The Union reserves its right to make further submissions in this regard.

[7] In spite of the parties' good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

[8] The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

> (a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept,

[2] The words in brackets were omitted but presumably this was the intention.

> settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief Restructuring Advisor in the CMI Entities; and
>
> (b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

[9] The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr. Bradley to his employment.

[10] CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

[11] For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

[12] Since the commencement of the *CCAA* proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

[13] Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of

Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

[14] The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to the terms of the claims procedure order.

Issues

[15] Both parties agree that the following two issues are to be considered:

(a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?

(b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

[16] In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley's employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective

agreement would have the effect of depriving the griever of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

[17] Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

[18] The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

[19] The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

[20] As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA* proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in *Health Services and*

Support – Facilities Subsector Bargaining Assn. v. British Columbia[3], the claims procedure order does not interfere with freedom of association.

[21] Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

Discussion

1. Stay of Proceedings

[22] The purpose of the *CCAA* has frequently been described but bears repetition. In *Lehndorff General Partner Limited* [4], Farley J. stated:

> The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

[23] The stay provisions in the *CCAA* are discretionary and very broad. Section 11.02 provides that:

> (1) A court may, on an initial application in respect of the 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;

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[3] [2007] S.C.J. No. 27.

[4] (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at para. 6.

> (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.

[24] As the Court of Appeal noted in *Nortel Networks Corp.*[5], the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the *CCAA* and in particular to enable continuance of the company seeking *CCAA* protection: *Lehndorff General Partner Limited* [6].

[25] Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the

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[5] [2009] O.J. No. 4967 at para. 33.

[6] *Supra*, note 4 at para. 10.

restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in *Lendorff General Partner Limited* [7]*:*

> 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 effect 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.

[26] In *Canwest Global Communications Corp.*[8], I had occasion to address the issue of lifting a stay in a *CCAA* proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Re Canadian Airlines Corp.*[9] and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy*"[10]. They included where:

> a) a plan is likely to fail;
>
> b) 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);
>
> c) the applicant shows necessity for payment;
>
> d) 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;

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[7] *Ibid*, at para. 6.

[8] (2009) O.J. 5379.

[9] (2000) 19 C.B.R. (4th) 1.

[10] (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

> e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;
>
> f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;
>
> g) there is a real risk that a creditor's loan will become unsecured during the stay period;
>
> h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;
>
> i) it is in the interests of justice to do so.

[27] The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp.*[11]:

> There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", 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.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

[28] There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Luscar Ltd. v. Smoky River Coal Limited*[12], the issue was whether a judge had

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[11] *Supra*, note 8 at para. 32.

[12] [1999] A.J. No. 676.

the discretion under the *CCAA* to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the *CCAA* or whether the court should stay the proceedings while the dispute was resolved by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

> The above jurisprudence persuades me that "proceedings" in section 11 includes the proposed arbitration under the B.C. *Arbitration Act.* The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under section 11 of the *CCAA*.[13]

[29] I do recognize that the *Luscar* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

[30] In considering balance of convenience, CEP's primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy

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[13] *Ibid*, at para. 33.

before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

[31] The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

[32] Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley's employment, he can recognize Mr. Bradley's right to reinstatement by monetizing that right. This was done for a multitude of other claims in the *CCAA* proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

[33] The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent *CCAA* debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

[34] That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to

Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

[35] As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

[36] In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

[37] Section 33 of *CCAA* was added to the statute in September, 2009. The relevant sub-sections now provide:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in

> force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> 33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

[38] Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Company*[14]. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*." [15] He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.[16]

[39] In *Canwest Global Communications Corp.*[17], I wrote that section 33 of the *CCAA* "maintains the terms and obligations contained in the collective agreement but does not alter priorities or status."[18] In that case when dealing with the issue of immediate payment of severance payments, I wrote:

> There are certain provisions in the amendments that expressly mandate certain employee related payments. In those

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[14] 2010, Q.C.C.S. 2590.

[15] *Ibid*, at para. 31.

[16] *Ibid*, at para. 35.

[17] [2010] O.J. No. 2544.

[18] *Ibid*, at para. 32.

> instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.[19]

[40] I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

[41] Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

[42] CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the

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[19] *Ibid*, at para. 33.

following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*[20], the Supreme Court of Canada stated:

> We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. …
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.[21]

[43] In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

Conclusion

[44] Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

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[20] *Supra*, note 3.

[21] *Ibid*, at at paras. 19 and 29.

Pepall J.

Released: April 7, 2011

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: April 7, 2011

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bul River Mineral Corporation (Re),* 2014 BCSC 1732

Date: 20140915
Docket: S113459
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9

And

In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Colin D. Brousson
Counsel for CuVeras, LLC:	William C. Kaplan, Q.C. Peter Bychawski
Counsel for Eldon Clarence Stafford	J. Roger Webber, Q.C.
Counsel for Gordon Preston and Carol Preston	Robert M. Curtis, Q.C.

Counsel for the Monitor, Deloitte Restructuring Inc.	Tevia R.M. Jeffries
Place and Date of Hearing:	Vancouver, B.C. September 3 and 5, 2014
Place and Date of Judgment:	Vancouver, B.C. September 15, 2014

Introduction

[1] These are longstanding proceedings under the *Companies' Creditors Arrangement A*ct, R.S.C., 1985, c. C-36 (the "*CCAA*"), having been commenced some three and a half years ago in May 2011. Since that time, the petitioners have made slow and steady progress toward the goal of presenting a plan of arrangement to their creditors and certain equity participants.

[2] The principal petitioners, being Bul River Mineral Corporation ("Bul River") and Gallowai Metal Mining Corporation ("Gallowai"), are the owners of certain mining properties and related assets in the Kootenay region of British Columbia. As a result of these proceedings, Bul River and Gallowai now have some indication that the mine is viable. This has been accomplished mainly due to the participation of CuVeras, LLC ("CuVeras") who has, since late 2011, provided interim financing which allowed this further development work to continue to this point in time.

[3] Some years ago, Bul River and Gallowai completed a claims process to identify not only trade creditors but also claims of its common and preferred shareholders. Now that Bul River and Gallowai, with the assistance and sponsorship of CuVeras, are on the cusp of preparing a plan of arrangement for consideration by the stakeholders, those claims have become of central importance.

[4] Some of the claims that were advanced through the claims process were not critically considered by either the petitioners or the court-appointed monitor, Deloitte Restructuring Inc. (the "Monitor"). However, at this late date, the characterization of certain claims and the validity of certain claims have been put in issue and will have a profound impact on the manner in which these restructuring proceedings go forward.

[5] At present, the general intention is that the restructuring will take place along the lines of a Letter of Agreement between the petitioners and CuVeras dated May 23, 2014. By that agreement, a newly formed British Columbia entity ("Newco") will be created and the shares in Newco will be distributed to CuVeras and other related parties and also to non-voting preferred shareholders. Trade creditors will also

participate in Newco. This Letter of Agreement is the product of some history, sometimes contentious, between the petitioners and CuVeras which was discussed in the court's earlier reasons: *Bul River Mineral Corporation (Re)*, 2014 BCSC 645.

[6] One of the claims is that advanced by Gordon and Carol Preston (the "Preston Claim"), which CuVeras contends is an equity claim as opposed to a debt claim. Another claim is that advanced by Eldon Stafford (the "Stafford Claim"), which CuVeras contends is not a valid claim against Bul River or Gallowai. The substance of the issue before the court therefore is two-fold: (a) the proper categorization of the Preston Claim and (b) whether the Stafford Claim is a valid claim against the petitioners.

[7] As will become apparent from the discussion below, the resolution of these issues will significantly impact how any restructuring plan can be crafted and will also impact all stakeholders in terms of how the Newco shares will be distributed between the various stakeholders. There is some urgency in resolving these last issues before the restructuring can proceed. All involved, including the Monitor, state that it is necessary for the petitioners to exit this *CCAA* proceeding as quickly as possible. At this time, a plan of arrangement sponsored by CuVeras is the only option available to the petitioners so as to avoid a liquidation and bankruptcy.

Background

[8] The petitioners are also known as the Stanfield Mining Group (the "Group"). The Group carried on the business of developing a mining property situated near the Bull River just outside of Fernie, British Columbia. It is effectively controlled by the estate of Ross Stanfield ("Stanfield") which holds 100% and 99.9% of the voting common shares in the parent companies, Zeus Mineral Corporation and Fort Steele Mineral Corporation, respectively. As stated above, the two principal companies involved in the development and operation of the mine within the Group are Bul River and Gallowai.

[9] The mine, known as the Gallowai Bul River Mine, is not currently in production. There has been significant underground development to this point such

that the petitioners and CuVeras consider that with a relatively modest further investment the mine could be placed into production.

[10] Bul River and Gallowai were incorporated in the 1980s. Commencing in the mid-1990s, Stanfield began raising funds for the development of the mine. The marketing program focused on "sophisticated investors" which are, through securities regulation statutes, defined as persons with a net worth in excess of $1 million willing to invest a minimum of $100,000 in a given venture. The persons targeted by Stanfield's marketing campaign were farmers in Alberta, particularly around Edmonton, Red Deer and Medicine Hat, as well as farmers from the area around Regina, Saskatchewan.

[11] Until 2010, Stanfield engaged in a sophisticated marketing program to sell redeemable preferred non-voting shares to these investors. Over that period of time, approximately $229 million was invested in consideration of which preferred shares in Bul River and Gallowai were issued.

[12] The marketing program involved repeated representations as to the ore content of the mine. Stanfield continually referred to the mine as an "elephant" mine, meaning that the mineral resources were enormous. Over the years, the program included visits to the mine site and presentations to potential investors by Stanfield. Those presentations referred to the history of the mine and the future prospects of the mine, including development plans and the levels of ore content (copper, gold and platinum). The presentations also involved discussion as to when production would commence and typically production was forecast to commence within a foreseeable period of time, be it one or two years from the date of the meeting.

[13] The same representations were also made in written materials, including a report from Phillip De Souza ("De Souza"), a professional engineer.

[14] Some potential investors executed subscription agreements for shares during those visits to the mine or immediately thereafter. Some returned to the mine for

subsequent tours and subsequent purchases. In some instances, Stanfield recruited current investors to further market the preferred shares to other investors.

[15] These representations by Stanfield were made in the face of contemporaneous reports which questioned the value of the resources announced by the Group. These included papers published by the British Columbia Ministry of Energy and Mines in 2000 in which it was reported that they were unable to confirm the gold grades reported by the Group. In 2006, a professional conduct hearing in Alberta was held arising from charges that De Souza's report was "deficient and misleading". The panel issued reasons which were published in January 2008 in which it concluded that De Souza's conduct constituted unskilled practice and unprofessional conduct.

[16] Eventually, Stanfield's activities caught the attention of various provincial securities regulators. In May 2010, the British Columbia Securities Commission (the "Commission") issued a Notice of Hearing against Stanfield, Bul River and Gallowai seeking to order them to produce an independently prepared technical report fully compliant with NI 43-101 (Standards of Disclosure for Mineral Projects) that would include an estimate of the mineral resources available at the mine.

[17] Ross Stanfield died on August 3, 2010.

[18] By the fall of 2010, in addition to being faced with the Commission proceedings, certain preferred shareholders had taken legal action against the Group in light of the failure to comply with redemption obligations arising in respect of the preferred shares. Stanfield's grandson, George Hewison, is the sole beneficiary of Stanfield's estate. He stepped in to continue the work of the Group as best he could. In late 2010 or early 2011, undertakings were given to the securities regulators in British Columbia and Alberta by which the petitioners agreed not to issue any new securities without their consent.

[19] The evidence would later establish that the representations made by Stanfield regarding the mine resources were false. A technical report was later prepared by

Rosco Postle and Associates Inc. ("RPA") in March 2011 that provided some review of the available mineral resources at the mine. Both the RPA report and a later report prepared by Snowden Mining Industry Consultants in March 2013 would indicate that while there is valuable ore in the mine, the quantity of the resources is markedly less than what was indicated in the representations made to investors.

[20] On May 26, 2011, the Group sought and obtained creditor protection pursuant to the *CCAA* and an Initial Order was granted at that time.

[21] At the time of the *CCAA* filing, the Class A common voting shares in Bul River and Gallowai were held by the Stanfield estate. Other Class B and Class E common non-voting shares were held by investors.

[22] As of the date of filing, the petitioners had no secured creditors. The petition referenced debt obligations of $904,000 to trade suppliers and two unsecured judgments totalling $386,135. Various preferred non-voting shares were held by investors in Classes C, D and F. The petition materials indicated that amounts owing for "redeemable shares" (i.e., the preferred shares) were approximately $137,718,557. The holders of both common and preferred shares comprise some 3,500 individual investors.

[23] The subscription agreements for the preferred shares provided that the shares were redeemable at the end of five years from the date of the subscription together with a "preferred cumulative annual dividend" of 12.75%. There is no evidence of any significant redemption of the preferred shares. Rather, as redemption dates arose, preferred shareholders were approached to execute extension agreements extending their redemption rights from a given date to a date defined by the commencement of production from the mine. Many preferred shareholders signed those extension agreements, some did not. For those who did not, some of them demanded redemption of their shares. For the most part, those investors were told that there was no money to redeem the shares.

[24] Accordingly, the largest liability faced by the petitioners is that arising from the preferred shares. The preferred shareholders appear to have certain claims arising from their holdings. Firstly, they have a claim for payment of the redemption amount plus the accumulated dividend. Secondly, they may have a claim for misrepresentation against the Group, giving rise to potential remedies of rescission of their subscription agreements, damages, or both.

The Claims Process

[25] In August 2011, the Group prepared a list of creditors (the "Creditor List") in support of seeking a claims process order. The list actually included not only trade claims but also shareholder claims. Not surprisingly, the purpose of the claims process was to assist the Group in developing its restructuring plan.

[26] On August 19, 2011, the court approved a Claims Process Order, which authorized the petitioners to conduct a claims process for the determination of any and all claims against them (the "Claims Process"). The Claims Process Order defined "claims" that were to be determined in the Claims Process as follows:

> … indebtedness, liability or obligation (including an equity obligations arising from the ownership of equity shares) …
>
> … all obligations of or ownership interests in the Petitioners or any of them arising from or relating to the holding of a Share.

[27] Under the Claims Process Order, all "Known Creditors" (defined in the Claims Process Order as all creditors shown on the books and records of the petitioners as having a claim in excess of $250), including holders of shares, were to receive a claims package from the petitioners that included an instruction letter, a Notice of Dispute, a Proof of Claim, and a copy of the Claims Process Order (the "Claims Package"). The Claims Process was also advertised in certain publications. The Creditor List indicating such Known Creditors was posted on the Monitor's website, as was noted in the Claims Package, such that both creditors and shareholders were able to view it. The process of determining claims was as follows:

a) all creditors and shareholders were given the opportunity to review the Creditor List;

b) in the event a creditor or shareholder agreed with the "Claim Particulars" listed in the Creditor List (which included the number and class of shares), the creditor or shareholder did not need to file a Proof of Claim with the petitioners. In that event, the Claim Particulars in the Creditor List would be deemed to be the creditor or shareholder's proven claim for voting and distribution purposes under any restructuring plan subsequently filed by the petitioners;

c) in the event a creditor or shareholder objected to the Claim Particulars in the Creditor List, or wished to advance another claim, the creditor or shareholder had to, on or before October 17, 2011 (the "Claims Bar Date"), deliver to the petitioners, with a copy to the Monitor, a notice of such objection in the form of a Notice of Dispute, together with a Proof of Claim and supporting documentation;

d) in the event a Notice of Dispute was not submitted on or before the Claims Bar Date, the creditor or shareholder was deemed to have accepted the amount owing and all other Claim Particulars set out in the Creditor List, and was forever barred from advancing any other claim against the petitioners or participating in any plan subsequently filed by the petitioners;

e) where a Notice of Dispute and/or Proof of Claim was filed by a creditor or shareholder, the petitioners were deemed to have accepted it unless they delivered to the creditor or shareholder a Notice of Disallowance on or before October 31, 2011 (later extended to November 15, 2011); and

f) in the event of the petitioners delivering a Notice of Disallowance, a creditor or shareholder had 21 days to seek a determination from the court of the validity and value of and particulars of the claim by filing and serving

> the petitioners and the Monitor with application materials. A creditor or shareholder who failed to file and serve such materials by the deadline was deemed to have accepted the particulars of its claim set out in the Notice of Disallowance.

[28] The Claims Process Order did not contemplate the appointment of a claims officer or the participation of the Monitor in the process of assessing the validity of the Proofs of Claim and/or Notices of Dispute submitted to the petitioners through the Claims Process. Nor did the Claims Process allow any independent review of claims submitted by other creditors of the petitioners or by CuVeras as the interim financier.

(i) Jurisdiction of the Court

[29] Before turning to claims process orders specifically, it is important to keep in mind the broad remedial objectives of the *CCAA* to facilitate a restructuring rather than a liquidation of assets: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 15-18, 56. As the Supreme Court of Canada has noted, it is now well recognized that a supervising judge of a *CCAA* proceeding has a "broad and flexible authority" or statutory jurisdiction to makes such orders as are necessary to achieve those objectives: *Century Services* at paras. 19, 57-66.

[30] The discretionary authority of the court is confirmed by s. 11 of the *CCAA* which provides that the court may make any order that it considers "appropriate in the circumstances". As Madam Justice Deschamps observed in *Century Services*, whether an order will be appropriate is driven by the policy objectives of the *CCAA*:

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

> successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] Claims process orders are an important step in most restructuring proceedings. In *Timminco Limited (Re)*, 2014 ONSC 3393, Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within *CCAA* proceedings:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
>
> [42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".
>
> [43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[32] The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring. My comments in *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 are apposite:

> [38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all

> stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> [39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356. To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[33] Nevertheless, issues can and do arise that no one is able to foresee at the time of the claims process order. In that event, the court retains its discretion to address the application of the claims process order: *Timminco* at para. 38. In that case, the claims process order specifically allowed the court to order a further claims bar date. No such provision is found in the Claims Process Order but I do not consider that its absence is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances.

[34] This, of course, is a different issue in that by the failure of the petitioners to deliver a Notice of Disallowance in respect of the claims in issue, they were deemed to have been accepted by the petitioners. This is not a case where a creditor is seeking to avoid the consequences of not filing materials by the time of the Claims Bar Date. Nevertheless, in my view, the court still retains the statutory jurisdiction to consider the validity of claims that might otherwise, by the Claims Process Order, be deemed to have been accepted.

[35] The Prestons and Mr. Stafford do not suggest that the court lacks the jurisdiction to reconsider the issues that arise in relation to their claims. The Prestons do, however, contend that it is not appropriate that any reconsideration take place at this time.

(ii) Review of the Claims

[36] The stated purpose of the *CCAA* is to facilitate compromises and arrangements between companies and their creditors (see also s. 6 of the *CCAA*). In

accordance with that fundamental objective or purpose, it is axiomatic that it is necessary to determine what are the true claims of the creditors as might be compromised or arranged.

[37] A "creditor" is not defined in the *CCAA*, unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") where it is defined as meaning "a person having a claim provable as a claim" under that *Act* (s. 2). Both the *CCAA* and the *BIA* define "claim" by reference to liabilities "provable" under the *BIA*. Specifically, s. 2(1) of the *CCAA* defines "claim" as meaning:

> any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.

Section 2 of the *BIA* defines a "claim provable in bankruptcy" as "any claim or liability provable in proceedings under this Act by a creditor".

[38] Section 121(1) of the *BIA* addresses which claims are "provable claims":

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

[39] In substance, this same statutory definition is applied in the *CCAA* and represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24. In addition, as noted by CuVeras, this definition is essentially used in the Claims Process Order by its definition of "Claim".

[40] Various authorities establish that a "provable debt" must be due either at law, or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process: *Excelsior Electric Dairy Machinery Ltd. (Re)*, [1923] 2 C.B.R. 599 (Ont. S.C.), 3 D.L.R. 1176; *Farm Credit Corporation v. Dunwoody Limited,* [1988] 68 C.B.R. (N.S.) 255 (Alta. C.A.), 51 D.L.R. (4th) 501, leave to appeal to S.C.C. refused, 73 C.B.R. (N.S.) xxvii (note), 100 60 D.L.R. (4th) vii (note);

Central Capital Corp. (Re), [1995] 29 C.B.R. (3d) 33 (Ont. Gen. Div.), O.J. No. 19 ("*Central Capital*"), aff'd [1996] 27 O.R. (3d) 494 (C.A.), 38 C.B.R. (3d) 1 ("*Central Capital* (ONCA)"); *Negus v. Oakley's General Contracting* (1996), 40 C.B.R. (3d) 270 (N.S.S.C.), 152 N.S.R. (2d) 172.

[41] In a *CCAA* proceeding, a claims process order is the means by which the "claims" of the creditors are determined. By reason of that process, the debtor is able to determine the nature and extent of its debts and liabilities so as to enable it to formulate a plan of arrangement. There are no rules as to when a claims process may be implemented although it is usually early in the process in anticipation of a plan and distributions to creditors. In that respect, a debtor company will be seeking some certainty regarding the determination of claims for that purpose.

[42] In *Timminco*, the Court, prior to citing relevant authorities at para. 52, outlined many of the factors that might be considered by the court in relation to deciding whether to allow claims to be advanced after the claims bar date:

> [51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay[?] (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[43] As I have stated above, the broad jurisdiction of the court under s. 11 of the *CCAA* allows the court to make such orders as are "appropriate". While the above factors have been considered in the past, there is no finite list that detracts from a consideration of all relevant circumstances. Nevertheless, the general considerations of delay and prejudice typically arise, just as they do in this case.

[44] I return to the factual circumstances relating to the Claims Process and the Claims Process Order. The petitioners were themselves responsible for reviewing the Proofs of Claim and/or Notices of Dispute submitted in the Claims Process. The

principal individual involved in the review was Mr. Hewison who did so with the assistance of counsel. It is apparent that the only factors considered in his review included whether a claim related to a trade debt or whether it related to an equity interest in the petitioners.

[45] The Prestons argue that the Claims Process was well known to everyone and that its purpose was to establish the amount and nature of all claims. This is clearly self-evident, but back in late 2011, it was the case that the course of the restructuring proceedings was anything but certain. In fact, the ability of the petitioners to continue the proceedings was tenuous and they were scrambling to find interim financing which they eventually secured with CuVeras in November 2011. By that time, the Claims Process was essentially completed. Even so, understandably, the parties were concerned to proceed as quickly as possible to obtain further technical reports on the proven or inferred mine resources in order to determine whether a viable mine even existed. They did receive those later reports, which included a further RPA report and the Snowden report. In these circumstances, Mr. Hewison did not undertake any substantive review of the claims.

[46] The Prestons further say that, since they faithfully complied with the Claims Process Order, it would be patently unfair to now revisit the characterization of their claim. While they raise the matter of the three year plus delay, no elements of prejudice have been alleged. In my view, the delay, while relevant, will have little effect on the ability of the parties to address the substance of the matter. Nor have any rights been extinguished or compromised by reason of any delay. Accordingly, the objective of certainty has less force in this case where the plan of arrangement has yet to be formulated and the claimants have yet to consider that plan and vote on it. I note that similar considerations were at play in *Timminco* where it was apparent that no plan would ever be put to the creditors.

[47] Finally, the Prestons argue that the Claims Process Order constituted the sole form of adjudication of the validity and nature of the claims submitted. It is true, of course, that the petitioners had an opportunity to consider these claims.

[48] As discussed below, the petitioners did not forward any Notice of Disallowance in respect of the Proofs of Claim later filed by the Prestons and Mr. Stafford. Mr. Hewison considered that the Stafford Claim should be categorized as an "investment" in the mine. Further, with respect to the Preston Claim, he was not aware of the significance of the distinction between an equity claim and a debt claim. In retrospect, and now knowing what type of plan of arrangement is possible, Mr. Hewison recognizes that this was in error. It appears that a combination of factors - including Mr. Hewison's lack of familiarity with the past transactions, inadequate record keeping, lack of resources and distraction in terms of larger issues more relevant to the survival of the mine - all contributed to a less rigorous review and analysis of these claims.

[49] It is the case, however, that the petitioners were acting in good faith, albeit without a full appreciation of the issues arising in respect of these claims and the also the consequences of their inaction.

[50] More importantly, aside from the petitioners, other stakeholders have a significant interest in whether a claim is valid or not and that any claim be properly characterized. Based on the anticipated form of the restructuring plan, the inclusion of the Stafford Claim and characterization of the Preston Claim will impact the recovery of these stakeholders. These other creditors or stakeholders of the petitioners did not have any opportunity up to this point in time to review the claims. I would again note that the Claims Process Order did not contemplate any review of the claims by these other stakeholders, such as was the case in *Steels Products* (see paras. 13-15).

[51] Nor has the Monitor participated in any review of these claims. I do not say this as any criticism of the Monitor as the Claims Process Order did not expressly provide for any such independent review. Nor does the Claims Process Order contemplate that any other independent review of the claims be completed which might have highlighted the issues. The Monitor did report on the Claims Process from time to time (particularly, its report from June 2012 and January 2013),

however, no such issues were identified. As such, the Monitor did not conduct a critical review of the claims, similar to what a trustee in bankruptcy might have done under s. 135 of the *BIA*.

[52] In these circumstances, and in retrospect, the Claims Process lacked procedural safeguards that might have avoided this problem: *Steels Products* at paras. 38-39.

[53] In these circumstances, I disagree with the Prestons that the Claims Process Order constitutes an adjudication of these issues by which CuVeras or any other stakeholder is estopped in bringing these issues forward. It is clear that to this point, no such adjudication has occurred.

[54] As I have indicated above, a Claims Process Order is intended to be a fair, reasonable and transparent method of determining and resolving claims against the estate. In certain circumstances, these objectives fail to be achieved through no fault of the participants. That does not preclude the court from considering the issues on their merits so as to achieve the fundamental objective under the *CCAA* to facilitate a restructuring based on valid claims. This would also include a consideration of the proper characterization of the Preston's claim: *Steels Products* at para. 42.

[55] Simply put, if the Claims Process results in a claim being advanced which is not truly a debt of the petitioners or results in a claim being improperly characterized, the fairness and transparency of these proceedings are inevitably compromised such that the objectives of the *CCAA* will not be fulfilled.

[56] My comments in *Steels Products* apply equally here:

> [46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

[57] Even at this late stage in the proceedings, and considering the ongoing supervisory role of the court, I consider that it is appropriate to address the issues relating to both the Preston Claim and the Stafford Claim on their merits. This is particularly so given the significant repercussions to other stakeholders and the lack of any prejudice to the Prestons and Mr. Stafford.

Discussion

(a) The Preston Claim

[58] The Preston Claim is advanced as a debt claim in these proceedings, a position that is disputed by CuVeras who contends that in fact, it is an equity claim as defined in the *CCAA*.

(i) The Proof of Claim

[59] The Creditor List referenced the Prestons as holding various Class E (2,102) and Class F (2,400) preferred shares.

[60] In October 2011, the Prestons, through their counsel, submitted a Proof of Claim and Notice of Dispute.

[61] The genesis of the claim was as described in a Statement of Claim filed in the Alberta Court of Queen's Bench against Gallowai on May 27, 2010. The claim was as follows: in October 2004, the Prestons subscribed for 2,400 Class F preferred shares in Gallowai in consideration of the payment to Gallowai of $120,000; Gallowai is alleged to have covenanted to redeem the preferred shares at the expiry of five years after the allotment date; the Prestons demanded redemption of the shares and the payment of dividends which was to be by way of issuance of Class E shares; Gallowai refused to respond to their demands; and the Prestons claimed the right to redeem the Class F preferred shares for $120,000 plus either dividends in the form of Class E common shares or, alternatively, cash payment of dividends at 12.75% per annum.

[62] On November 19, 2010, default judgment was granted in favour of the Prestons for the claimed amount of $120,000 plus the cash dividend interest rate for

a total judgment of $214,527.10 including court ordered costs. The Prestons attempted to register their judgment in British Columbia in June 2011 after the court ordered a stay arising under the Initial Order, but nothing turns on that step.

[63] The Proof of Claim indicates that the Prestons were advancing both a trade claim for the judgment amount and also a claim for non-voting shares arising from the allegation that they continue to hold the 2,102 Class E shares noted on the Creditor List.

(ii) Historical Approach to Equity Claims

[64] Before I turn to the current statutory regime arising from amendments to the *CCAA* and *BIA* in 2009, I will review the authorities which applied before these amendments were enacted.

[65] Historically, equity and debt claims have been treated differently in an insolvency proceeding given the fundamental difference in the nature of such claims. That different treatment resulted in the subordination of equity to debt claims. The basis for this judicially developed principle was that equity investors are understood to be higher risk participants. Creditors, on the other hand, have been held by the courts to have chosen a lower level of risk exposure that should generally result in priority over equity investors in an insolvency context.

[66] In *Sino-Forest Corporation*, 2012 ONCA 816, affirming 2012 ONSC 4377, the Court of Appeal commented with approval on the analysis of Morawetz J. in the court below:

> [30] Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described [at paras. 23-25]:
>
> > Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
> >
> > The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited

> upside potential when purchasing shares. Creditors have no corresponding upside potential.
>
> As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement [citations omitted].

[67] See also *Central Capital* at paras. 41-42; *Central Capital* (ONCA) at 510-11, 519.

[68] In light of that key distinction, courts in the past have embarked upon a consideration as to the true characterization of certain claims in an insolvency context. There is considerable authority that in making that determination, the court will consider the true substantive nature or character of the claim, rather than the form of the claim.

[69] The leading case is the Supreme Court of Canada's decision in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 ("*CDIC*"). In that case, the issue was whether money advanced to the debtor bank was in the nature of a loan or a capital investment for the purpose of determining whether the creditors advancing the funds ranked *pari passu* with other unsecured creditors in a winding-up proceeding. Mr. Justice Iacobucci stated that the approach was to determine the "substance" or "true nature" of the transaction (563, 588). His oft quoted statements are found at 590-91, the relevant principles of which can be summarized as follows:

a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;

b) the characterization of a transaction under review requires the determination of the intention of the parties;

c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and

d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

[70] One type of financial instrument that typically has elements of both equity and debt are preferred shares, where arguably rights of redemption and rights to payment of dividends evidence debt characteristics.

[71] The issue of the characterization of preferred shareholder claims in an insolvency context was addressed in *Central Capital* (ONCA). In that case, the court had to characterize a claim arising from the right of retraction in respect of certain preferred shares. Although differing in the result, the majority opinions and the dissenting opinion at the appellate court level were consistent in an approach toward determining the *substance* of the claim in terms of whether it was a "provable debt". In dissent, Finlayson J.A. stated:

> … I do not think that describing the documents as preferred shares is conclusive as to what instrument the parties thought they were creating. In the second place, it is not what the parties call the documents that is determinative of their identity, but rather it is what the facts require the court to call them. The character of the instrument is revealed by the language creating it and the circumstances of its creation.
>
> (at 509).
>
> ...
>
> Thus, in looking at the substance of the transaction that led to the issuance of the preference shares, it appears to me that the retraction clauses were promises by Central Capital to pay fixed amounts on definite dates to the appellants. They evidenced a debt to the appellants.
>
> (at 512).

Justice Laskin specifically addressed the "substance of the relationship" at 535-36. In addition, Weiler J.A. focused on the "true nature" of the transaction or relationship:

> In order to decide whether the obligation of Central Capital to redeem the preferred shares of the appellants is a claim provable in bankruptcy, it is necessary to characterize the true nature of the transaction. The court must look to the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability by the company: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3

> S.C.R. 558, 97 D.L.R. (4th) 385. In this case, the decision is not an easy one. Where, as here, the agreements between the parties are reflected in the articles of the corporation, it is necessary to examine them carefully to characterize the true relationship. It is not disputed that if the true nature of the relationship is that of a shareholder-equity relationship after the retraction date and at the time of the reorganization, then the appellants do not have a claim provable in bankruptcy. Consequently, they will not have a claim under the CCAA.
>
> (at 519).

[72] In *Blue Range Resource Corp. (Re)*, 2000 ABQB 4, Madam Justice Romaine found that a shareholder's claim for alleged share loss, transaction costs and cash share purchase damages was in substance an equity claim or a claim by the shareholder for a return of its investment. See also *EarthFirst Canada Inc. (Re)*, 2009 ABQB 316.

[73] In *Return on Innovation v. Gandi Innovations* , 2011 ONSC 5018, leave to appeal refused, 2012 ONCA 10, the Court was characterizing indemnity claims advanced by certain individual directors and officers against the debtor, the Gandi Group. That indemnity claim arose by reason of a claim by TA Associates Inc. against them for damages for claims relating in part to TA's US$50 million equity investment in the Gandi Group. Mr. Justice Newbould at the Ontario Superior Court concluded that TA's claim was an equity claim and that therefore, the indemnity claim was also, in substance, an equity claim.

[74] I have also been referred to *Dexior Financial Inc. (Re)*, 2011 BCSC 348. Mr. Justice Masuhara there found the claim to be an equity claim even though the shareholder had given notice of an intention to seek retraction of the shares prior to the filing. Citing *CDIC* and *Central Capital* (ONCA), the Court found that the notice did not change the original intention or substance of the claim.

(iii) The New Statutory Approach

[75] In September 2009, Parliament enacted substantial amendments to the *BIA* and *CCAA* in relation to the treatment of claims arising from equity in an insolvency proceeding.

[76] One of the principle amendments was the prohibition that the court may not sanction a plan of arrangement unless all debt claims are to be paid in full before payment of any "equity claims". Section 6(8) of the *CCAA* provides:

> (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[77] The definitions of "equity claim" and "equity interest" are found in the *CCAA*, s. 2(1):

> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (*a*) a dividend or similar payment,
>
> (*b*) a return of capital,
>
> (*c*) a redemption or retraction obligation,
>
> (*d*) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (*e*) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);
>
> "equity interest" means
>
> (*a*) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt[.]

[78] Section 22.1 further restricts the right of creditors having equity claims from voting on a plan of arrangement:

> 22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

[79] Substantially these same amendments were made to the *BIA* in respect of proposal proceedings under that *Act* in ss. 2, 54(2)(d) and 60(1.7).

[80] The effect of the amendments was considered by Pepall J. (as she then was) in *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229. In that case, the court had

no difficulty in finding that the claims of preferred shareholders for declared but unpaid dividends and requests for redemption were equity claims within the above definition. In addition, the approach of the courts in the past in looking at the substance or true nature of the claim was applied in finding that related claims for compensatory damages or amounts due on rescission were caught by the definition of "equity claim": paras. 32-34. As such, all the claims were not provable debts under the *CCAA*.

[81] The court in *Nelson Financial Group* noted that the introduction of section 6(8) in the *CCAA* provided greater certainty in the treatment to be accorded equity claims and lessened the "judicial flexibility" that previously prevailed in characterizing such claims.

[82] Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, it also represented a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest Corporation* (ONCA) at paras. 24, 34-60. Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might have previously escaped such characterization will now be caught by the *CCAA*.

[83] The claim of the Prestons is set out in their Statement of Claim. The claim is for the return of their capital investment under the redemption rights of the preferred shares. Their claim also included a claim to unpaid dividends, whether by cash payment or the issuance of other shares, being Class E common shares. It is clear that their claims, as evidenced by the Statement of Claim, fall within the definition of "equity claim" in subparas. (a)-(c).

[84] The Prestons do not dispute that their claim, as described and but for one qualification, would fall within the definition. They contend, however, that by reason of their obtaining default judgment against Gallowai, they have transformed their equity claim into a debt claim that is a provable claim in the *CCAA* proceeding.

(iv) The Effect of the Judgment

[85] The 2009 amendments have not affected the ability of the court to continue to analyze the *substance* of the claims, albeit in the context of the expanded definition of "equity claim". This is evident from the approach of the court in *Nelson Financial Group* at paras. 28 and 34.

[86] In *Sino-Forest Corporation*, the court found that certain Shareholder Claims for damages claimed in a class action lawsuit clearly fell within the definition of "equity claims": ONSC at para. 84. Further, certain Related Indemnity Claims were also advanced against the estate by the auditors who were named in the class action lawsuit. These auditors also faced claims for damages relating to their role in what were said to be misrepresentations in the financial statements that led to the loss of equity by the class members. Again, consistent with the historical approach of the courts, Morawetz J. focused on the "substance" of the claim: para. 85. He stated:

> [79] The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.
>
> [80] The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.
>
> …
>
> [82] It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

The Court of Appeal upheld this approach: *Sino-Forest Corporation* (ONCA) at paras. 37, 58.

[87] I would note in this regard that the Claims Process Order expressly provided:

> THIS COURT ORDERS that the categorization of Claims into Trade Claims, non-voting Shares, and Voting Shares does not in any way set classes or categories for the purposes of priority or voting on a restructuring plan issued by the Creditors and shall not prejudice any party or the Petitioners from applying at a later date to set such classes or priorities in connection with voting on a plan;

[88] The Prestons argue that their obtaining of a judgment against Gallowai has resulted in a replacement or transformation of their equity claim with a debt claim.

[89] The Prestons place considerable reliance on the decision in *I. Waxman & Sons Ltd. (Re)*, [2008] 89 O.R. (3d) 427 (S.C.), 40 C.B.R. (5th) 307, which was decided prior to the 2009 amendments to the *CCAA*. In that case, Morris sued I. Waxman & Sons Limited ("IWS") for lost profits, profit diversions and improper distributions for bonuses paid. He obtained judgment against IWS and asserted that claim in the later bankruptcy proceedings.

[90] The court began by noting that Morris' claim was not for his share of his current equity in IWS, but was, in substance, a claim related to dividends and diverted profits by way of bonuses. Justice Pepall found that the judgment was a debt claim:

> [24] There is support in the case law for the proposition that equity may become debt. For example, declared dividends are treated as constituting a debt that is provable in bankruptcy. As Laskin J.A. stated in *Central Capital Corp. (Re)*, "It seems to me that these appellants must be either shareholders or creditors. Except for declared dividends, they cannot be both." And later, "Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared, it is a debt on which each shareholder can sue the corporation." Similarly, in that same decision, Weiler J.A. stated, "As I understand it, counsel does not question that when a dividend has been lawfully declared by a corporation, it is a debt of the corporation and each shareholder is entitled to sue the corporation for his [portion]: see *Fraser and Stewart*, supra, at p. 220 for a list of authorities." In *East Chilliwack Fruit Growers Co-operative (Re)*, the B.C. Court of Appeal held that an agricultural co-operative member who had exercised a right of redemption and remained only to be paid was an unsecured creditor with a provable debt. Declared bonuses may also sometimes constitute debt: *Stuart v. Hamilton Jockey Club* [footnotes omitted].
>
> [25] Secondly, the claims advanced by Morris are judgment debts. As stated by Weiler J.A. in *Central Capital*, ". . . in order to be a provable claim within the meaning of s.121 of the BIA, the claim must be one recoverable by legal process: *Farm Credit Corp. v. Holowach (Trustee of)*." Clearly a

> judgment constitutes a claim recoverable by legal process. By virtue of the judgment, the money award becomes debt and it is properly the subject of a proof of claim in bankruptcy. In this regard, the facts in this case are unlike those in *Re Blue Range Resource Corp. (Re),* or *National Bank of Canada v. Merit Energy Ltd.* Those cases involved causes of action that had been asserted in court proceedings, but in neither case had judgment been rendered [footnotes omitted].

[91] In my view, *Waxman* is of little assistance to the Prestons.

[92] Firstly, the facts are distinguishable by reason of the fact that the Preston Claim is for recovery of their capital or equity, rather than simply a return on capital as was the case in *Waxman*. I would note that the Preston default judgment obtained in 2010 does include the dividend interest on the preferred shares. What is somewhat anomalous is that this was claimed in the alternative to the issuance of the Class E common shares. Even so, the Prestons in their Statement of Claim did advance a claim for 2,102 Class E common shares and continue to do so by their Proof of Claim, all consistent with what the petitioners had ascribed to them in the Creditor List. It is not clear to me how they can advance both claims.

[93] Secondly, in para. 24 of *Waxman*, the Court focused on the prevailing authority at the time prior to the amendments by which declared dividends were considered debt as opposed to equity. At present, the 2009 amendments make clear that this type of claim now clearly falls within the definition of “equity claim” in subpara. (a): *CCAA*, s.2(1).

[94] With respect to the comments of the Court in *Waxman*, para. 25, I agree with CuVeras that the Court was simply observing that a judgment debt will normally satisfy the requirements of the claim being recoverable by legal process, one of the requirements of a “provable claim”, as noted above. These comments do nothing more than note the obvious - that in ordinary circumstances, a judgment is a claim recoverable by legal process. I do not interpret these comments as obviating an analysis of the true nature of a claim, whether represented by a judgment or not.

[95] Accordingly, I do not view *Waxman* as standing for the proposition advanced by the Prestons, namely that a judgment transforms an equity claim into a debt claim

such that no further analysis or characterization by the court is necessary. This would have applied even before the enactment of the 2009 amendments, but certainly is more evident now given the expansive definition now contained in the *CCAA*.

[96] Indeed, the later comments of Justice Pepall in *Nelson Financial Group* suggest that she only decided in *Waxman* that by reason of a judgment, an equity claim *may* become debt:

> [32] The substance of the arrangement between the preferred shareholders and Nelson was a relationship based on equity and not debt. Having said that, as I observed in *I. Waxman & Sons.* there is support in the case law for the proposition that equity may become debt. For instance, in that case, I held that a judgment obtained at the suit of a shareholder constituted debt. An analysis of the nature of the claims is therefore required. If the claims fall within the parameters of section 2 of the *CCAA*, clearly they are to be treated as equity claims and not as debt claims [footnotes omitted].

[97] The Court in *Dexior Financial* at para. 16 commented on *Waxman* but those comments were clearly *obiter* as no judgment had been obtained in that case. See also *EarthFirst Canada* at para. 4.

[98] At its core, the issue before the court is a narrow one - namely, whether a shareholder, having an equity claim but who obtains a judgment before the filing, has become a debt claimant rather than an equity claimant for the purposes of the insolvency proceeding? In my view, they do not, for the reasons below.

[99] In light of the dearth of authority on the issue, I consider that the court must start from first principles.

[100] I return to the comments in *Century Services* regarding the remedial purposes of the *CCAA* and the broad and flexible authority of this court to facilitate a restructuring that is fair, reasonable and equitable in accordance with either the express will of Parliament, as specifically dictated in the *CCAA*, or as might be reasonably interpreted as falling within those broad purposes.

[101] At its core, the policy objectives of the *CCAA* are a fair and efficient resolution of competing claims in a situation (insolvency) where all obligations or expectations cannot be fulfilled. What is "fair" is a flexible or uncertain concept and needless to say, what is fair will likely be differently interpreted depending on which stakeholder you ask. Nevertheless, Parliament has clearly signalled that the policy objectives continue to be that equity will take a back seat in terms of any recovery where there are outstanding debt claims. This was so before September 2009 and is even more decidedly so now, given the express and expansive statutory treatment of equity claims that now applies.

[102] In my view, the characterization of claims by the court continues to have an important role in fulfilling that purpose. I have already outlined the considerable authority from Canadian courts in respect of such claims, both pre- and post-amendments. Particularly, the court continues to have a role in applying these new equity claims provisions by considering the true nature or substance of those claims. In many cases, the matter is now considerably clearer given the definition of "equity claims". What is most important, however, is that form will still not trump substance in the consideration of this issue.

[103] As was noted by counsel for CuVeras, the obtaining of a judgment does not necessarily mean that it will be recognized as a debt for the purpose of an insolvency proceeding. There are many provisions of the *BIA* and *CCAA* which allow for the challenge of certain pre-filing transactions or events that may be the basis for supposed rights in the proceeding. For example, the payment of a dividend and redemption of shares may be attacked (*BIA*, s. 101). Another example is that either the granting of a judgment against the debtor or payment of monies such as redemption amounts that resulted in a preference being obtained may be challenged (*BIA*, s. 95). Both of these provisions apply in a *CCAA* proceeding: *CCAA*, s 36.1.

[104] These types of provisions reflect the policy choices of Parliament in terms of allowing for the recovery of assets transferred away from the debtor even before the filing so that those assets are brought back into the estate for the benefit of the

entire stakeholder group to be distributed in accordance with the legislation. Similarly, some established rights may be challenged in certain circumstances (such as by way of the preference provisions).

[105] In the same manner, the new equity provisions in the *CCAA* reinforce that it remains an important policy objective that equity claims be subordinated to debt claims. In *Sino-Forest Corporation*, the Court of Appeal focused on the purpose of the 2009 amendments and stated:

> [56] In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

[106] This same recognition of the sound policy objectives of insolvency legislation was noted by Laskin J.A. in *Central Capital* (ONCA). He commented at 546 that "[p]ermitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection."

[107] I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.

[108] Some arguments were advanced by CuVeras and the Prestons as to the timing of the judgment. Indeed, the Preston judgment was obtained well in advance of the filing, by some six months. The Prestons cite *Blue Range* at para. 38 in respect of the importance of timing. However, the timing issue there was the filing of the insolvency proceeding, not the granting of a judgment. I agree that the filing of the proceeding is a significant crystallizing event, however, what is important in this case is the ability of the court to analyze the true nature of the claim. Further, whether a judgment is obtained on the eve of the filing or even years before, I consider that it is a distinction without a difference in terms of the court's role in

ensuring that a proper characterizing of the claim has taken place in accordance with the *CCAA*.

[109] The fact remains that there are thousands of other preferred shareholders holding shares in Bul River and Gallowai whose claims are in essence the same - namely, for a return of their capital and the promised return on that capital (and perhaps other damage claims). The evidence indicates that many of them had also made demand for a return of their preferred share investments and their return on capital well before the filing date. Those claims are clearly equity claims. From the perspective of the policy objective of treating similar claims in a similar fashion (i.e., fairness), it makes little sense to me that a similarly situated preferred shareholder without a judgment should be treated differently than one who does.

[110] Nor does it accord with the policy objectives particularly identified in s. 6(8) of the *CCAA* that by the simple mechanism of obtaining a judgment an equity claimant should be elevated to a debt claimant which would inevitably diminish the recovery of other "true" debt claimants.

[111] The Prestons argue that this will open the floodgates to an endless analysis of claims reduced to judgments resulting in increased cost and inefficiencies in these types of proceedings. I see no merit in this submission given that this decision relates to only equity claims and by no stretch of the imagination has the previous litigation on the point overwhelmed the court system across Canada. In any event, if that is the will of Parliament, then there is little ability in this court to take a different approach.

[112] The courts have not been hesitant in preventing claimants from recharacterizing their claims such that an equity claim is indirectly advanced where no direct claim could be made: *Sino-Forest Corporation*, ONSC at para. 84 (although the Court of Appeal preferred to express the same sentiment in terms of the purpose of the *CCAA*). In *Return on Innovation*, Newbould J. stated, consistent with the "substance over form" approach that the court's decision will not be driven by the form of the legal action:

> [59] The Claimants assert that the claim for US $50 million by TA Associates cannot be an equity claim because it is based on breaches of contract, torts and equity. I do not see that as being the deciding factor. TA Associates seeks the return of its US $50 million equity investment because of various wrongdoings alleged against the Claimants and the fact that the claim is based on these causes of action does not make it any less a claim in equity. The legal tools that are used [are] not the important thing. It is the fact that they are being used to recover an equity investment that is important.

[113] Similarly, in addition to the "legal tools" not being determinative, neither are the legal *forms* of recovery determinative, such as the obtaining of a judgment.

[114] In summary, the *CCAA* policy objectives in relation to equity claims are clear. In my view, those objectives are best achieved by the continued approach of the court, both pre- and post-*CCAA* amendments, to consider the substance or true nature of the claim. This accords with the ongoing supervisory jurisdiction of the court to exercise its statutory discretion to achieve the purposes of the *CCAA*. In particular, the court's fundamental role is to facilitate a restructuring that is fair and reasonable to all stakeholders in accordance with the now very clearly stated objective of allowing recovery to debt claimants before any recovery of equity claims. Section 6(8) reflects that the court has no ability to proceed otherwise.

[115] Within those broad objectives, in my view, it is of no importance that prior to the court filing, a claimant with an equity claim has obtained a judgment. That judgment still, in substance, reflects a recovery of that equity claim and therefore, the claim comes within the broad and expansive definition in the *CCAA*. Accordingly, for the purposes of the *CCAA*, that claim or judgment must still, of necessity, bear that characterization in terms of any recovery sought within this proceeding. I conclude that any contrary interpretation, such as advanced by the Prestons, would result in the clear policy objectives under the *CCAA* being defeated.

[116] Nor I do not accept that, as argued by the Prestons, applying this characterization amounts to a collateral attack or an "undoing" of the judgment from the Alberta court. As noted by CuVeras, the obtaining of a judgment by a creditor does not mean that insolvency laws do not apply to it. Judgments are affected by insolvency proceedings all the time. Recoveries of judgments are stayed by such

proceedings and as stated above, they can be attacked as fraudulent preferences. All that results from my conclusions is that notwithstanding the granting of the judgment, within these *CCAA* proceedings, the judgment is to be characterized in accordance with the true nature of the underlying claim, which is an equity claim.

[117] For the above reasons, I conclude that the Preston Claim is an equity claim within the meaning of the *CCAA*.

(b) The Stafford Claim

[118] The Stafford Claim is advanced as a debt claim in these proceedings. That position is disputed by CuVeras who contends that, in fact, it is a claim owed by Stanfield personally and not by either Bul River or Gallowai such that it cannot be advanced in this *CCAA* proceeding.

(i) The Proof of Claim

[119] The Creditor List referenced Mr. Stafford as holding Class B common shares (3,340), Class D preferred shares (4,200) and Class E preferred shares (17,548). He therefore received a Claims Package from the petitioners.

[120] Mr. Stafford took no issue with the shareholdings alleged to be held by him in accordance with the Creditor List. However, on October 14, 2011, a Notice of Dispute and Proof of Claim were submitted on behalf of Mr. Stafford. This was done by Carol Morrison, who was exercising a power of attorney for Mr. Stafford by reason of his mental and physical incapacity that occurred at least as early as November 2010.

[121] The Notice of Dispute refers to “claim not listed” as the “reason for dispute”. The Proof of Claim submitted by Mr. Stafford notes the “type of claim” as “other – loan and accrued interest 50% Bul River Mineral Corp. and 50% Gallowai Metal Mining Corp.” The Stafford Claim submitted is for outstanding principal and interest under a loan in the total amount of $2,587,174.

[122] The supporting documentation submitted for Mr. Stafford includes a copy of a loan agreement between Stanfield in his personal capacity, as borrower, and Mr. Stafford, as lender, dated June 12, 1990, 21 years before the CCAA filing (the "Stafford Loan Agreement"). The Stafford Loan Agreement references a loan in the principal amount of $150,000, accruing interest in the amount of 20% per annum "on the Principal", calculated yearly and not in advance.

[123] Pursuant to the terms of the Stafford Loan Agreement, Stanfield borrowed these funds for the purpose of "investing the funds in the costs of the ongoing research and development of a Process" with "Process" being defined as a "new improved method or process for extracting precious metals from ore". Paragraphs 6 and 8 of the Stafford Loan Agreement provided for a bonus payable to Mr. Stafford equal to the amount of the Principal, if the "Process" proved successful (as declared by an independent metallurgical consultant). As CuVeras submits, on its face, this was not a loan directly related to the mine or the petitioners.

(ii) Dealings in Respect of the Stafford Loan Agreement

[124] For obvious reasons, the death of Ross Stanfield and the incapacity of Mr. Stafford result in a situation where no individual is in a position to shed light on the intentions of the parties in relation to this loan. Mr. Hewison is similarly unable to provide any evidence about the loan, save for referring to such documents as have been found in relation to this loan. Those documents do provide some indication as to the how Stanfield, Bul River and Gallowai addressed this loan up to the time of the *CCAA* filing.

[125] There are two resolutions of the directors of Bul River, dated October 1994 and February 1996 respectively, that are essentially the same. Both refer to the "need of major amounts of additional financing" and authorize Stanfield to negotiate, on behalf of Bul River, potential sources of debt or equity financing, to settle the terms of the financing, and to sign, seal and deliver any agreements necessary to secure funding required by the company. I agree that these resolutions on their face clearly do not authorize Stanfield to act as an agent for Bul River. They merely

authorize him to act directly in the name of the company with the company as principal in respect to those transactions. These resolutions also do not reference any loan by Mr. Stafford to Stanfield made years before in June 1990.

[126] Bul River also appears to have prepared a schedule of loan payments as of December 31, 2006. That schedule shows payment of interest to Mr. Stafford by Stanfield personally from June 1995 to September 1998 totalling approximately $183,000. In 1999 and 2000, Gallowai appears to have made interest payments of $40,000 and from that time forward, some person (unidentified) made interest payments of $25,000 for 2001 and 2002. From 2004 to 2006, it appears that Bul River made interest payments of $22,500 and principal payments of $26,000 to Mr. Stafford. Mr. Stafford's own calculations show further payments of interest from 2007 to 2009 totalling $58,000.

[127] Accordingly, in respect of his $150,000 loan, as of 2009, Mr. Stafford had received $328,100 in interest payments and $26,000 in principal payments for a total recovery of $354,100.

[128] Leaving aside the interest and principal payments referred to above, the involvement of Bul River and Gallowai in respect of the Stafford Loan Agreement arose, from a corporate perspective, in 2003. At that time, various resolutions were passed by the directors of Bul River. Mr. Stafford places great reliance on these resolutions and as will become apparent from the discussion below, the issue largely turns on the legal effect of these resolutions. As such, I will describe the resolutions in some detail.

[129] The first resolution is dated May 13, 2003. It provides:

> WHEREAS:
>
> A. Loans, loan repayments and principal and interest payments which were property for the benefit of, or were the responsibility of, the Company have for some years been done, as a matter of convenience, in the name of the Company's President, [Stanfield] - and as a result debit and credit entries have improperly been posted to Stanfield's Shareholder Loan Account.
>
> B. Stanfield has requested that the situation described above be corrected…

> C. The Companies' accountant has examined the financial records and has verified that the said situation has occurred with respect to the Company as well as Gallowai…
>
> D. Management has proposed, based on professional advice, that for convenience and simplicity the various Loan Accounts involving Stanfield, the Company and the Other Companies be consolidated in the books of the Company.
>
> …
>
> NOW THEREFORE, IT IS RESOLVED:
>
> 1. THAT the Loan Accounts and payments referred to above be recognized as solely the responsibility of the Company and it be confirmed that Stanfield was, in being named in the transactions, acting solely on behalf of the Company and that he had no personal, legal or beneficial interest in, or any liabilities as a result of, any of the transactions.
>
> 2. THAT the Agreement dated this May 13, 2003 between the Company, Stanfield and the Other Companies be approved and that Stanfield or any other officer or director of the Company be authorized to sign and deliver it on behalf of the Company.
>
> 3. THAT the Company assume the obligations of the Other Companies to Stanfield pursuant to the shareholder account in their records, to be offset by inter-company accounts whereby each of the Other Companies will be indebted to the Company for the amount of shareholders accounts assumed by the Company.

[130] The second resolution of Bul River is dated October 20, 2003 and relates to the May 2003 resolution. The resolution references that Stanfield is having difficulty providing full documentary verification and back-up for his expenditures for which he was requesting reimbursement. In addition, the preamble to the resolution states in part:

> D. Acceptance of liability to Stanfield at this date poses some special problems due to the fact that some of the disbursements that he has requested to be reimbursed for precede the last date that the financial statements of the company were audited – and such statements did not include the expenditures.

Concern was expressed whether or not the acceptance of these responsibilities would be acceptable to Bul River's auditors. The resolution authorizes the engagement of the auditors for the purpose of conducting a special audit of the expenditures made by Stanfield. There is no evidence as to the result of that special audit or if it even took place.

[131] The third resolution of Bul River is dated November 30, 2003 and is of particular significance. It reads as follows:

> WHEREAS:
>
> A. Ross Stanfield …has submitted various claims for recognition of corporate liabilities to third parties ... as shareholder's loans for transactions undertaken as agent on behalf of the Company, Gallowai … to finance the exploration of the British Columbia properties owned by the Companies ("Properties").
>
> B. Stanfield and the Companies signed an Agreement dated May 13, 2003 recognizing the fact that Stanfield has acted as agent on behalf of the Companies since 1972 and had personally undertaken a variety of transactions as agent for the Companies to finance the exploration of the Properties.
>
> C. Stanfield has submitted the following claims pursuant to the Agreement for the Director's consideration and approval.
>
> 1. Exploration Loans
>
> These loans were negotiated between 1983 and 2002 personally by Stanfield, as the agent of the Company, and all funds were advanced to the Companies as shareholders loans from him. Payments were made on the loans with his own personal funds or shareholdings. The Directors were provided with a summary of individual loans and accrued interest for review. Files have been prepared for corporate record keeping purposes that include the documentation and amortization schedules supporting each loan.
>
> Balances as at December 31, 2002
>
> | | |
> |---|---|
> | Loan principal | $1,886,413 |
> | Accrued interest | $6,281,004 |
>
> …
>
> **NOW THEREFORE**, the undersigned acting as a group excluding … [Stanfield], RESOLVE:
>
> 1. THAT the loans, accrued interest and share subscriptions detailed in paragraph C.1 above, negotiated by Stanfield as agent on behalf of the Companies, be accepted as liabilities of the Companies.
>
> …
>
> 3. THAT the resolution passed by the full Board dated May 13, 2003 that the Company accept all of the above described liabilities on behalf of the other Companies – to be offset by inter-company accounts whereby each of the other Companies will be indebted to the Company for the amounts assumed by the Company – be further approved and ratified.

[132] It should be noted that the agreement between Stanfield and Bul River (and perhaps others) dated May 13, 2003 has not been located. Nor have any similar resolutions from the directors of Gallowai been found.

[133] In addition, no one has been able to locate a copy of the summary of the loans as of December 2002 referred to in paragraph C.1 of the November 2003 resolution. Mr. Hewison refers in his evidence to a spreadsheet in the name of Bul River referencing "Mine Development Loans" for the year ended December 2003 which indicates a loan from Mr. Stafford of $150,000 with accrued interest of $899,236.39. The total interest figure for all loans is slightly different (lower) than the interest amount referenced in the November 2003 resolution which was as of December 31, 2002. In any event, CuVeras does not dispute that Mr. Stafford would likely have been on the list referred to in the November 2003 resolution.

[134] No audited financial statements have been produced pre-2003, as might have been amended arising from the special audit authorized in October 2003.

[135] Also in evidence are various letters from Bul River to Mr. Stafford concerning these loans.

[136] On April 23, 2007, a letter was sent to Mr. Stafford's accountant enclosing various amended 2006 T5 (Statement of Investment Income) forms or slips that were apparently issued to Mr. Stafford by Gallowai and Bul River, each as to 50% of interest paid or payable pursuant to the Stafford Loan Agreement. The letter indicates that as of 2006, the amount of such interest was just over $1.5 million (which included the $150,000 bonus amount supposedly due pursuant to the Stafford Loan Agreement).

[137] On March 6, 2008, Mr. Stafford received correspondence from Bul River's controller concerning the 2006 T5s slips from Bul River and Gallowai. Later letters from the controller dated April 2, 2008, February 12, 2009 and January 19, 2010 refer to T5 slips being issued by Bul River and Gallowai for 2007, 2008 and 2009 relating to accrued interest on the Stafford Loan Agreement. Finally, T5 slips for 2010 appear to have been issued by Bul River and Gallowai for that taxation year.

[138] There is no evidence that Mr. Stafford knew anything about the 2003 resolutions by Bul River. It does appear to be the case that he began receiving

interest payments from Gallowai in 1999 and these would continue together with the payment of some principal by either Gallowai or Bul River to 2009. Bul River would also later send Mr. Stafford, commencing in 2007 and continuing to 2010, certain details or statements relating to the loan and the T5 slips.

(iii) Legal Basis for the Stafford Claim

[139] For the reasons set out below, CuVeras submits that the Stafford Claim is not a debt claim against Bul River and Gallowai and ought to be expunged from the Creditor List. CuVeras argues that Mr. Stafford cannot satisfy the onus placed upon him to prove his claim against those petitioners.

[140] At the outset, it is clear that Mr. Stafford advanced his loan to Stanfield personally, and not to either Bul River or Gallowai. The 2003 resolutions confirm that such was the case and, indeed, the amounts were noted in the books of Bul River and Gallowai as shareholder loans owing to Stanfield personally in that respect.

[141] CuVeras made substantial arguments on the later involvement of Bul River and Gallowai in terms of whether those petitioners became the principal obligants under the Stafford Loan Agreement. These arguments related to whether or not there had been a valid assignment of the Stafford Loan Agreement from Stanfield to Bul River and Gallowai. While Mr. Stafford agreed with these submissions, it is helpful to set out these issues and arguments in order to put in focus the later arguments of Mr. Stafford (which are contested by CuVeras).

[142] I agree that there is no basis upon which Mr. Stafford can contend that Stanfield assigned the Stafford Loan Agreement to Bul River and Gallowai. There is no evidence that Gallowai agreed to anything, since the resolutions were only that of Bul River's directors.

[143] Even assuming that the November 2003 resolution was intended to effect a valid assignment of the obligations under the Stafford Loan Agreement from Stanfield to Bul River and Gallowai, it is of no legal effect in that it purports to assign the burden of Stanfield's obligations to Bul River and Gallowai. It is trite law that

neither the common law nor equity has ever permitted a debtor to unilaterally assign the burdens or obligations (as opposed to the benefits) of a contract to a third party without the consent of the creditor. Rather, in that case a novation is required: *Mills v. Triple Five Corp.* 1992 CanLII 6204 (Alta. Q. B.) at paras. 13-14, [1992] 136 A.R. 67.

[144] Novation involves the substitution of a new contract or obligation for an old one which is thereby extinguished: *Royal Bank of Canada v. Netupsky*, 1999 BCCA 561. In *Netupsky* at paras. 11-13, the court set out the essential elements that must be established to satisfy the test to establish novation:

> 1. the new debtor must assume complete liability for the debt;
>
> 2. the creditor must accept the new debtor as a principal debtor, and not merely as an agent or guarantor; and
>
> 3. the creditor must accept the new contract in full satisfaction and substitution for the old contract.

[145] Mr. Stafford bears the burden of proving novation which the Court in *Netupsky* described as a "heavy onus". Further, while the courts may look at the surrounding circumstances, including the conduct of the parties, they will not infer that a novation has occurred in the face of ambiguous evidence as to the parties' intention to effect a new agreement with the substituted party.

[146] As is noted by CuVeras, it is somewhat ironic to suppose that Mr. Stafford might have advanced this issue since he is the creditor and as noted in *Netupsky*, it is usually the "unwilling creditor" who is objecting to any suggestion of a novation. In any event, in this case there is no evidence to suggest that:

a) Mr. Stafford had any knowledge of the 2003 resolutions or was in any other way even advised by Stanfield, Bul River or Gallowai that it was intended that Bul River and Gallowai would assume the obligations under the Stafford Loan Agreement in place of Stanfield; and

b) Stanfield, Bul River, Gallowai and Mr. Stafford reached a consensus with respect to the terms upon which any purported new or substituted agreement would operate.

[147] Accordingly, it is clear, as agreed by CuVeras and Mr. Stafford, that novation did not occur such that Bul River and Gallowai assumed the obligations of Stanfield under the Stafford Loan Agreement with the consensus of Mr. Stafford. In addition, no privity of contract arose simply by reason of later payments to Mr. Stafford or issuance of T5 slips by Bul River and Gallowai. That Mr. Stafford was not directly involved in any such new contractual arrangements and that he only later "assumed" that Bul River and Gallowai were involved is made evident by his own loan summary attached to his Proof of Claim:

> Commencing in 2006, T5 slips were issued by Bul River Mineral Corporation and Gallowai Metal Mining Corporation (50% each). Assumption is therefore that ½ of Grand Total is receivable from each.
>
> [Emphasis added].

[148] Nor is there any suggestion that Bul River or Gallowai provided a guarantee of the Stafford Loan Agreement to Mr. Stafford. Finally, Mr. Stafford does not argue that Bul River and Gallowai are somehow estopped from denying that they are debtors of Mr. Stafford, particularly by reason of the interest and principal payments made by them and the T5 slips prepared by them which were then forwarded to Mr. Stafford.

[149] Having confirmed the agreement of CuVeras and Mr. Stafford on the above issues, I turn to Mr. Stafford's position, which is solely rooted in agency:

> The corporate minutes of Bul River Mineral Corporation confirm that the actions of Ross Hale Stanfield were as agent for the company and associated companies and confirmed by resolution to accept liability of agreements signed by Stanfield as legitimate debts of a company and acted on it accordingly[.]

[150] Essentially, Mr. Stafford's argument is that Stanfield was retroactively appointed as the agent of Bul River and Gallowai by reason of the November 2003 resolution such that he had the express or implied authority to bind Bul River and

Gallowai at the time of the loan. He relies in particular on s. 193(2) and (4) of the *Business Corporations Act*, S.B.C. 2002, c. 57:

> 193 (2) A contract that, if made between individuals, would, by law, be required to be in writing and signed by the parties to be charged, may be made for a company in writing signed by a person acting under the express or implied authority of the company and may, in the same manner, be varied or discharged.
>
> …
>
> (4) A contract made according to this section is effectual in law and binds the company and all other parties to it.

[151] It seems to be common ground that Stanfield was not acting as the agent of Bul River and Gallowai in 1990 when the loan was made. The Stafford Loan Agreement does not reference Stanfield acting as an agent and the Proof of Claim does not allege an agency relationship at the time of the Stafford Loan Agreement. Nor was Stanfield acting as the agent of Bul River and Gallowai during the ensuing 13 years when the loan was being administered. The allegation is that changes only occurred in 2003 when Stanfield decided he wanted to be reimbursed by Bul River and Gallowai for certain loans he had earlier made.

[152] I was referred to only one authority on the agency issue by CuVeras, being *Spidell v. LaHave Equipment Ltd.*, 2014 NSSC 255.

[153] In *Spidell*, LaHave Equipment Ltd. was a dealer for Case Canada Limited. The plaintiff Spidell purchased a Case Canada excavator from LeHave which was financed by Case Credit Limited. Spidell alleged that employees of LaHave made representations to him about the performance of the equipment. Spidell believed LaHave was a representative or agent or dealer for Case Canada. Spidell did not make the required payments to Case Credit and the equipment was repossessed. Spidell sued LaHave claiming damages for alleged misrepresentations. LaHave defended the action but subsequently went into bankruptcy. Only then did Spidell amend his pleading to add Case Credit and Case Canada as defendants, claiming LaHave was their agent. The issue on the summary trial was whether LaHave was in fact the agent of the Case companies.

[154] Mr. Justice Coughlan reviewed the law of agency, as follows:

> [21] In *Halsbury's Laws of Canada First Edition,* "Agency" paragraph HAY-2 the three essential ingredients of an agency relationship are:
>
> "1. The consent of both the principal and the agent.
>
> 2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position.
>
> 3. The principal's control of the agent's actions."
>
> And at Agency paragraph HAY -11 the manner in which an agency relationship may be created are set out:
>
> "1. the express or implied consent of principal and agent,
>
> 2. by implication of law from the conduct or situation of the parties or from the necessities of the case,
>
> 3. by subsequent ratification by the principal of the agent's act done on the principal's behalf, whether the person doing the act was an agent exceeding his authority or was a person having no authority to act for the principal at all,
>
> 4. by estoppel, or
>
> 5. by operation of the principles of law."
>
> [Emphasis added].

[155] Mr. Stafford relies in particular on the creation of agency by ratification as referred to above. Justice Coughlan said this about agency by ratification:

> [25] The conditions for an agency by ratification to be established were set out in *Halsbury's Laws of Canada, supra*, at Agency HAY-22 as follows:
>
> "**Three Conditions**. Actions by a principal after the agent has purported to act on the principal's behalf may amount to creation of agency by ratification. For this to occur, three conditions must be satisfied. First, the agent whose act is sought to be ratified must have purported to act for the principal; second, at the time the act was done the agent must have had a competent principal; and third, at the time of the ratification the principal must be legally capable of doing the act himself.["]

[156] The key consideration from the above quote is the first requirement. In this case, there is no evidence that Stanfield "purported to act" for Bul River and Gallowai as principals in 1990 when he entered into the Stafford Loan Agreement. In fact, the evidence is to the contrary in that he acted in his personal capacity and not as agent.

[157] I agree with CuVeras that agency by ratification assumes that there exists a relationship (even though perhaps mistaken) between the principal and agent at the time of the transaction which must later be ratified. One example is as noted in the *Halsbury's* quote above, namely where the agent exceeded his or his authority but later the unauthorized transaction is ratified or adopted by the principal. That is not what occurred in this case. Ratification of an agent's actions in that case cannot occur when no agency relationship existed in the first place. The second example of ratification described in *Halsbury's* (where the person had no authority to act but their actions were later ratified) still requires that the actions be done by the agent "on the principal's behalf" in purported furtherance of an agency relationship.

[158] Accordingly, the concept of ratification by Bul River and Gallowai of Stanfield's actions concerning the Stafford Loan Agreement as their agent has no application in this case.

[159] What occurred in this case is that many years later, in 2003, Stanfield, Bul River and Gallowai agreed that the companies would take over responsibility for payment of the Stafford Loan Agreement in place of Stanfield. But those arrangements were only between Bul River, Gallowai and Stanfield and not Mr. Stafford.

[160] Accordingly, we start from the proposition that there was no agency relationship between Stanfield and Bul River and Gallowai in 1990. The only parties to the Stafford Loan Agreement are Stanfield and Mr. Stafford.

[161] The only evidence suggesting any link between Mr. Stafford and Bul River and Gallowai arise from the fact that, commencing in April 2007, Mr. Stafford began to receive T5 slips from them. Payments were also made by Bul River and Gallowai commencing in 1999. Mr. Stafford argues that by reason of such actions, Bul River and Gallowai treated the Stafford Loan Agreement as their debt since they could not have issued T5 slips for someone else's debt. The 2003 resolutions are, of course, an internal document of Bul River but do indicate that Bul River at least intended to accept the Stafford Loan Agreement as its obligation. The basis upon which Bul

River was able to accept this obligation on behalf of Gallowai is unclear and not substantiated.

[162] Mr. Stafford argues that these events confirm that Bul River and Gallowai had assumed the obligations of Stanfield. But this argument brings us back to the legal bases for any liability on the part of Bul River and Gallowai that CuVeras raised and I discussed above (assignment, novation, guarantee and estoppel) and which arguments Mr. Stafford agreed did not apply.

[163] I agree with the submissions of CuVeras that these later actions of Bul River and Gallowai evidence an intention on the part of Bul River (and perhaps Gallowai) to take over or assume payment of the obligations of Stanfield under the Stafford Loan Agreement. In that sense, and without a novation, in substance these arrangements amount to Bul River and Gallowai agreeing to indemnify Stanfield in respect of his obligations to pay the Stafford Loan Agreement amounts and nothing more.

[164] I conclude that Mr. Stafford has not met the onus of proving that the amounts under the Stafford Loan Agreement are obligations or "provable debts" of Bul River and Gallowai.

[165] Both CuVeras and Mr. Stafford made submissions concerning the issue as to whether the Stafford Loan Agreement provided for compound interest or not. In light of my conclusions above, it is not necessary to address that issue.

Conclusion

[166] In accordance with the above reasons, the Court declares that:

a) the Preston Claim is an equity claim for the purposes of this *CCAA* proceeding; and

b) the Stafford Claim is not a debt claim as against Bul River and Gallowai. It follows that the Creditor List should be amended accordingly and that

> Mr. Stafford is not entitled to vote on or receive any distribution under any plan of arrangement as may subsequently be filed by those petitioners.

[167] If any party is seeking costs, then written submissions should be delivered to the court and the party against whom costs are sought within 30 days of delivery of these reasons. Any response shall be delivered within 15 days and any reply to that response shall be delivered with seven days of that date.

"Fitzpatrick J."