Court File No._____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, and 12334992 Canada Inc.

Applicants

FACTUM

May 14, 2026

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PART I – OVERVIEW

1. The Applicants, Nunavut Iron Ore, Inc., 12334992 Canada Inc. and Baffinland Iron Mines Corporation ("**BIM Corp.**"), together with Baffinland Iron Mines LP ("**BIM LP**", and together with the Applicants, the "**Debtors**"), are a group of affiliated entities engaged in iron ore mining operations at the Mary River Mine (the "**Mine**"), located in the Qikiqtani Region of Nunavut on Baffin Island, Canada. The Mine has been in commercial production since 2015 and is one of the highest-grade iron ore mines in the world, with historic average iron content mined in excess of 67%. It is also one of the most remote mines in the world. BIM LP and BIM Corp. (collectively, "**Baffinland**") are collectively the largest private employer in Nunavut, employing approximately 1,200 people, including approximately 300 Inuit employees.

2. Despite the rich mineral deposit at the Mine and the significant revenues earned by its operations, the Debtors are in financial distress driven by several factors: (a) significant capital expenditures on a proposed railway that was ultimately rejected by the federal Minister of Northern Affairs; (b) high-debt servicing costs from substantial indebtedness; (c) constrained transportation and shipping capacity that limits production and revenue streams; and (d) the high costs associated with the current operations model.

3. For the year ended December 31, 2025, Baffinland reported a net loss of $102.4 million[1], and their current liabilities exceeded their current assets by $761 million.[2] The Debtors are in breach of their senior secured credit facility, triggering cross-defaults under

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1 Unless otherwise stated, all references are to United States dollars.

2 Since NIO's consolidated financial statements include a significant goodwill impairment charge, Baffinland's and 123 Canada Inc.'s consolidated financial statements provide a more accurate representation of the Debtors' operating financial position and are therefore used for the purposes of this factum.

their term credit facility and their senior secured notes, owe significant past-due trade payables and lack the funds to satisfy these obligations.

4. Although they have undertaken significant cost-reduction measures, the Debtors remain unable to generate sufficient revenue to cover their fixed operating costs and service their outstanding debt obligations at their current production levels. The Debtors are currently operating on a week-to-week basis from a cash-flow perspective and prospective investors have been unwilling to provide further equity capital.

5. Compounding these challenges, the Mine depends entirely on arctic diesel and jet fuel delivered by sea during a narrow annual shipping window from mid-July to mid-October. Because sealift procurement requires lead time and global competition for fuel remains intense, Baffinland must act promptly to secure committed volumes and vessel capacity. The Debtors lack the liquidity to do so and if adequate fuel supply is not secured before the shipping window closes, the Mine would be forced to curtail or cease operations entirely.

6. A disruption to the Mine would have far-reaching consequences for the Inuit communities, Inuit businesses that provide services to the Mine, the approximately 1,200 workers who depend on the continued operation of the Mine, and for the Nunavut economy more broadly.

7. This factum is filed in support of the Applicants' request for an Initial Order declaring that the Applicants are debtor companies to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") applies and that BIM LP shall be bound by, and entitled to the protections and benefits of, the Initial Order as though it were an Applicant, as well as the following relief:

(a) granting a stay of proceedings against the Debtors for an initial period of not more than ten days, subject to further order of this Court;

(b) appointing FTI Consulting Canada Inc. ("**FTI**" or the "**Proposed Monitor**") as the court-appointed monitor of the Debtors;

(c) authorizing the Debtors to continue using their existing cash management system;

(d) the granting of priority charges against the property of the Debtors as follows: (i) first, an administration charge in the amount of $2 million to secure the fees and disbursements of the Proposed Monitor, its counsel, and counsel to the Debtors (the "**Administration Charge**"); and (ii) second, a directors' and officers' charge in the amount of $14 million to indemnify the directors and officers of the Debtors or any member of the Operating Committee (defined below) for obligations and liabilities incurred in such capacities (the "**D&O Charge**").

8. The relief sought in the Initial Order is limited to what is reasonably necessary to allow the Debtors to stabilize the operations and continue operating during the initial ten-day stay of proceedings. The Applicants are seeking a date for a comeback hearing (the "**Comeback Hearing**") to be held within ten days of the Initial Order.

PART II – FACTS

9. The facts underlying this Application are more fully set out in the Affidavit of Celeste van Tonder, sworn May 14, 2026, filed in support of this Application.[3]

A. The Debtors

10. The Debtors are Nunavut Iron Ore, Inc. ("**NIO**"), 12334992 Canada Inc. ("**123 Canada Inc.**"), BIM Corp. and BIM LP. They are private companies owned principally[4] by: (a) ArcelorMittal Canada Inc., an indirect subsidiary of ArcelorMittal S.A. ("**Arcelor**"), a global leader in steel and mining; and (b) funds managed by the Energy and Minerals Group ("**EMG**"), a Texas-based private investment firm specializing in the energy and minerals sectors.[5] An organizational chart in respect of the Debtors is found at **Appendix A.**

11. **NIO:** NIO is an Ontario corporation headquartered in Toronto.[6] It is the sole shareholder of BIM Corp. and a 57.5% limited partner of BIM LP, and its principal assets are those interests. NIO has provided a limited recourse guarantee of Baffinland's secured indebtedness and is the issuer of certain unsecured notes due 2029.[7]

12. **BIM Corp.**: BIM Corp. is an Ontario corporation headquartered in Oakville, with operations in Iqaluit, Nunavut.[8] It is the sole general partner of BIM LP, holds a 4.25% interest in BIM LP, and carries on Baffinland's business and operations in that capacity.[9]

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3 All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Affidavit (defined below).
4 A remaining minority of shareholders hold approximately 0.1% of the equity.
5 Affidavit of Celeste van Tonder sworn May 14, 2026 [the "**Initial Affidavit**"], ¶17.
6 Initial Affidavit, ¶19; Initial Affidavit at Exhibit "A", Corporate Profile Report of NIO dated April 1, 2026.
7 Initial Affidavit, ¶20.
8 Initial Affidavit, ¶21; Initial Affidavit at Exhibit "B", Corporate Profile Report of BIM Corp. dated April 1, 2026.
9 Initial Affidavit, ¶22.

13. **BIM LP**: BIM LP is an Ontario limited partnership based in Oakville.[10] It beneficially owns substantially all of the Debtors' assets, including the Mine, and employs all employees.[11]

14. **123 Canada Inc**.: 123 Canada Inc. is a federal corporation with its registered office in Oakville and a wholly owned subsidiary of BIM LP.[12] It holds prospective mineral claims unrelated to Baffinland's iron ore operations and is dependent on Baffinland for funding.[13]

(i) Corporate Governance of the Debtors

15. NIO is governed by a unanimous shareholders agreement among NIO, Arcelor, EMG, BIM Corp. and BIM LP. The agreement vests all decision-making authority in an operating committee (the "**Operating Committee**"), which has delegated supervision of NIO's business and affairs, including day-to-day management of the Mine, to MRP OP, LP (the "**EMG Operator**").[14] Key members of the EMG Operator work from Baffinland's Toronto office.[15]

B. Business and Operations

16. Baffinland operates the Mary River Mine, located in the Qikiqtani Region of Nunavut on Baffin Island, Canada. The Mine contains some of the highest-grade iron ore deposits ever discovered, with historical average iron content mined exceeding 67%.[16]

17. Baffinland's operations on Baffin Island take place at three locations: (a) the Mine site; (b) the port located at Milne Inlet; and (iii) a gravel road connecting the Mine site to Milne

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10 Initial Affidavit, ¶23; Initial Affidavit at Exhibit "C", Limited Partnership Profile Report of BIM LP dated April 1.
11 Initial Affidavit, ¶24.
12 Initial Affidavit, ¶25-26; Initial Affidavit at Exhibit "D", Corporate Profile Report of 123 Canada Inc. dated April 1, 2026.
13 Initial Affidavit, ¶26.
14 Initial Affidavit, ¶27-28
15 Initial Affidavit, ¶28.
16 Initial Affidavit, ¶7-8, 30-31.

Inlet, known as the "**Tote Road**". All processed ore is hauled along the Tote Road to the port at Milne Inlet, where it is shipped on ocean-going vessels to customers during the open-water season (mid-July to mid-October).[17]

18. Administrative functions for Baffinland, including finance, legal, human resources, permitting, corporate development and procurement, are based out of Oakville and Toronto.[18] On Baffin Island, Baffinland owns significant infrastructure, including an airport, two several-hundred-bed camps, diesel generators, and crushing, maintenance and shipping facilities.[19]

19. Baffinland employs approximately 1,088 employees at the Mine, making it the largest private employer in Nunavut. Approximately 300 of these employees are Inuit and 830 are hourly unionized employees represented by the International Union of Operating Engineers, Local 793. The remainder are workers flown in and out of the Mine site to work on a 21-day-on/21-day-off rotation. An additional 112 employees are based in Oakville, Ontario.[20]

(i) Production Capacity, Approvals and Impediments to Expansion

20. The scope of Baffinland's permissible mining, transportation, shipping and environmental and socio-economic obligations are governed by nearly 190 project-specific terms and conditions in Nunavut Impact Review Board Project Certificate No. 005, as amended November 17, 2023. Among other things, the Project Certificate limits the transportation of ore along the Tote Road to 4.2 Mtpa[21] and restricts the number of vessels

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17 Initial Affidavit, ¶33.
18 Initial Affidavit, ¶34.
19 Initial Affidavit, ¶37.
20 Initial Affidavit, ¶76.
21 Production capacity at the Mine is measured in millions of metric tonnes per annum ("**Mtpa**"), which measures the total mass of ore that the mine is producing or handling over the course of a year.

permitted to enter Milne Inlet, which constrains the amount of iron ore that Baffinland produces and sells annually.[22]

21. The Mine was originally approved on December 28, 2012. Baffinland had then proposed a 150-kilometre railway south from the Mine to a planned deep-water port at Steensby Inlet (the "**Steensby Railway**") at an estimated cost of $5.7 billion, but in the interim obtained approval to use the Tote Road and Milne Inlet at 4.2 Mtpa.[23] The Steensby Railway proposal was abandoned in 2013 due to low iron ore prices and a lack of investment capital.[24]

22. A map displaying: (a) the current route from Mine to the port at Milne Inlet; and (b) the proposed Steensby Railway is set out below:[25]

23. In 2018, Baffinland sought approval for a $910 million railway parallel to the Tote Road to Milne Inlet (the "**Milne Railway**"), which would have increased capacity to approximately

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22 Initial Affidavit, ¶47; Initial Affidavit at Exhibit "F", Nunavut Impact Review Board Project Certificate No. 005, as amended by Amendment 005 dated November 17, 2023.

23 Initial Affidavit, ¶40. Although that volume was increased to 6 Mtpa between 2018 and 2024, that increased capacity has since expired, and Baffinland's permitted volume has reverted to 4.2 Mtpa.

24 Initial Affidavit, ¶42.

25 Initial Affidavit, ¶41.

12 Mtpa. The Nunavut Impact Review Board recommended refusal of the Milne Railway proposal in May 2022 on environmental and community impact grounds, and the federal Minister of Northern Affairs rejected the proposal on November 16, 2022. The regulatory approvals for the Steensby Railway remain intact, and Baffinland has recently revived plans to finance and build the Steensby Railway, which would increase capacity to approximately 22 Mtpa at a cost of at least $4 billion.[26] Baffinland does not currently have sufficient capital committed to advance the project.

(ii) Access and Mining Rights

24. Baffinland's operations are situated on a combination of Inuit-owned and Crown lands on Baffin Island. Surface access to the Inuit-owned lands underlying the Mine site, the Milne Inlet port and most of Tote Road is held under a long-term commercial lease from the Qikiqtani Inuit Association ("**QIA**"), while access to the adjacent Crown lands required for ship-loading at Milne Inlet is held under a lease from the federal Crown.[27]

25. Baffinland and 123 Canada's mining rights cover approximately 352,937 hectares and comprise: (a) mining leases and mineral claims granted by the Government of Canada under the Nunavut Mining Regulations, which together account for the substantial majority of the tenure and confer both production and exploration rights; and (b) contractual rights, granted by Nunavut Tunngavik Inc. under a 2008 Exploration Agreement, to progressively acquire a 100% interest in three additional exploration areas.[28]

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26 Initial Affidavit, ¶43-45.
27 Initial Affidavit, ¶68, 70.
28 Initial Affidavit, ¶69.

(iii) Benefits and Royalty Agreements

26. BIM Corp. and the QIA are parties to an impact benefits agreement, which provides for quarterly royalties of at least C$1.25 million, priority employment, education and contracting opportunities for Inuit individuals and firms, and joint governance through an Executive Committee and Management Committee. The Debtors intend to continue paying amounts owing to the QIA under the Benefits Agreement if the Initial Order is granted.[29]

27. Baffinland is also party to two royalty agreements with shareholders of NIO (or their affiliates). In exchange for cumulative funding contributions of $300 million made under these respective royalty agreements, Baffinland is required to pay a quarterly royalty of $0.50 per dry metric tonne of iron ore shipped from Milne Inlet, although the amounts are accruing and unpaid. The royalty agreements have been registered on title to the mining rights.[30]

(iv) Offtake and Marketing Arrangements

28. To ensure a year-round revenue stream despite the limited open-water season, Baffinland has offtake arrangements with IRH Global Trading Ltd. ("**IRH**"), under which IRH: (a) acquires all iron ore products produced by Baffinland upon their deposit at Milne Inlet port; (b) is generally assigned sales agreements entered into by Baffinland with buyers; and (c) pays Baffinland an amount equal to the end-buyer sale price less a stocking fee.[31] Glencore AG ("**Glencore**"), Baffinland, NIO have a marketing agreement in place under which

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29 Initial Affidavit, ¶71-72.

30 Initial Affidavit, ¶73-75; Initial Affidavit at Exhibit “J”, Royalty Agreement dated March 25, 2024; Initial Affidavit at Exhibit “K”, Royalty Agreement dated December 23, 2024.

31 Initial Affidavit, ¶54-56.

Glencore is paid a marketing free equal to 2% of the price paid by the end-buyer.[32] The offtake arrangements provide Baffinland with its primary source of operating cash flow.[33]

C. Financial Position of the Debtors

(i) Assets and Liabilities

29. For the year ended December 31, 2025, Baffinland and 123 Canada Inc. reported a net loss of $102.4 million, with current liabilities exceeding current assets by $761 million.[34] NIO, on a consolidated basis, reported a net loss of $545.1 million for the same period. This figure, however, includes a $423 million goodwill impairment loss relating to the value of the Mine. Since NIO's consolidated financial statements include a significant non-cash impairment charge, Baffinland's and 123 Canada Inc.'s consolidated financial statements more accurately represent the Debtors' operating financial position.[35]

(ii) Secured Obligations

30. The Debtors' have approximately the aggregate principal amount of $777 million secured debt owing primarily to (a) holders of senior secured notes due 2026 (the "**2026 Notes**") issued by Baffinland, (b) Opps XII BLIM Holdings, L.P., an entity affiliated with Oaktree Capital Management LP ("**Oaktree**"), and Hartree Partners, LP ("**Hartree**") under a loan and letter of credit facility, and (c) Export Development Canada ("**EDC**") under a term loan facility, which are described further below.[36]

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32 Initial Affidavit, ¶52; Initial Affidavit at Exhibit "G", Glencore Marketing Agreement dated December 9, 2020.
33 Initial Affidavit, ¶55.
34 Initial Affidavit, ¶88; Initial Affidavit at Exhibit "L", Nunavut Iron Ore, Inc., Consolidated Financial Statements (Audited) for the Year Ended December 31, 2025.
35 Initial Affidavit, ¶85; Initial Affidavit at Exhibit "L", Nunavut Iron Ore, Inc., Consolidated Financial Statements (Audited) for the Year Ended December 31, 2025.
36 Initial Affidavit, ¶89.

31. The secured debt and its priority rankings on distribution, as established by the intercreditor agreement[37] among Baffinland, the collateral agent for the 2026 Noteholders, Oaktree, Hartree and EDC, are summarized below:[38]

	Secured Debt	**Total Principal Amount**
First	Oaktree and Hartree	$126.5 million
Second (pari passu)	Holders of 2026 Notes	$575 million
	EDC	$75 million

32. The Debtors are in breach of their credit facility with Oaktree and Hartree, which has led to cross defaults under their term facility with EDC and the 2026 Notes. These defaults have not been waived and are ongoing.[39]

(iii) Unsecured Obligations

33. The Debtors also have various unsecured creditors including: (a) unsecured note holders of NIO, who own $230.9 million in notes and are owed $81.7 million in deferred interest as at September 30, 2025;[40] (b) Arcelor, who holds $27.9 million in promissory notes executed by NIO;[41] (c) EMG and its affiliates, who are owed a liability of $27.9 million by NIO;[42] (d) Toromont Arctic Limited and Toromont Industries Limited Ltd. in the amount of approximately C$17.1 million on March 9, 2026;[43] (e) Glencore, as a result of Baffinland and NIO's respective failures to perform under two separate sale agreements;[44] and (f) approximately $87 million in past-due trade payables.[45]

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37 Initial Affidavit, ¶109-110; Initial Affidavit at Exhibit "Y", Intercreditor Agreement dated June 27, 2018.
38 Initial Affidavit, ¶91.
39 Initial Affidavit, ¶12, 94, 102-103, 106-108.
40 Initial Affidavit, ¶118-119.
41 Initial Affidavit, ¶120.
42 Initial Affidavit, ¶120.
43 Initial Affidavit, ¶124.
44 Initial Affidavit, ¶114-117.
45 Initial Affidavit, ¶126.

34. The Debtors do not have sufficient liquidity to repay their obligations.[46]

D. Baffinland's Financial Difficulties

35. Despite the potential profitability of the Mine, Baffinland has suffered from ongoing liquidity challenges arising from four converging factors: (a) significant capital expenditures incurred in relation to the Milne Railway proposal; (b) high debt-servicing costs; (c) high operating costs, and (d) transportation and shipping limits. Collectively, these factors have limited the Mine's profitability while depleting the Debtors' cash reserves.[47]

36. ***Capital Expenditures***. In anticipation of regulatory approval for the Milne Railway, the Debtors incurred over $1.06 billion in capital expenditures between 2017 and 2022 and entered into significant contracts. When the Milne Railway was ultimately rejected by the regulatory authorities, these expenditures left the Debtors carrying significant debt attributable to a project that could not proceed.[48]

37. ***High Debt Service Costs***. Baffinland currently pays approximately $2.5 million per month in interest under the Credit Facility and EDC Term Facility, and $25 million bi-annually to the holders of the 2026 Notes. Baffinland is in default under each of these instruments.[49]

38. ***High Operating Costs***. The Mine's remote location requires that all supplies, fuel, and equipment be shipped to Milne Inlet during the narrow open-water season, and that the entire workforce be flown in and out on a three-week rotation. Iron ore must be trucked along

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46 Initial Affidavit, ¶142.
47 Initial Affidavit, ¶127.
48 Initial Affidavit, ¶128.
49 Initial Affidavit, ¶129.

the Tote Road to the port at Milne Inlet - an inherently costly method that limits throughput. In addition, volatile fuel prices have exacerbated the Debtors' financial difficulties.[50]

39. ***Transportation and Shipping Limits***. Baffinland is approved to only transport and ship only 4.2 Mtpa of iron ore. The revenue generated at this level is insufficient to cover the Mine's high operating costs and Baffinland's debt-servicing obligations.[51]

E. Baffinland's Response to Financial Difficulties

(i) Cost-Reduction Measures

40. The Debtors have undertaken substantial cost-reduction and capital-raising measures to address their liquidity constraints. These include reductions in working capital commitments, renegotiation of key supplier contracts, and a workforce reduction.[52] The Debtors have also pursued additional sources of capital, including securing $300 million through the royalty agreements and a rights offering by NIO for aggregate gross proceeds of up to approximately $35 million in March 2026. The Debtors also pursued a recapitalization transaction in respect of the 2026 Notes, which was ultimately unsuccessful.[53]

41. These measures have proven insufficient to offset constrained revenues and high debt-servicing costs. The Debtors' most viable path to long-term financial sustainability is the advancement of the Steensby Railway project, which would increase production capacity at the Mine to up to 22 Mtpa.[54] However, the capital required to construct the Steensby Railway

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50 Initial Affidavit, ¶131-132.
51 Initial Affidavit, ¶130.
52 Initial Affidavit, ¶133.
53 Initial Affidavit, ¶135.
54 Initial Affidavit, ¶137.

is substantial, and the Debtors' existing debt load has deterred prospective investors and prevented Baffinland from refinancing its indebtedness on acceptable terms.[55]

F. Need for CCAA Protection

42. The Debtors are in default under the Credit Facility and the EDC Term Facility and 2025 Notes.[56] The Debtors owe $87 million in past-due trade payables.[57] The Debtors face the imminent risk of creditor enforcement action. Indeed, certain suppliers and vendors have already filed liens against Baffinland or placed it on restricted supply terms.[58]

43. All supplies, fuel, and equipment must be shipped by sea to the Mine during a narrow shipping window, and the workforce must be flown in on a rotational basis from across Canada. The Debtors are operating on a week-to-week basis from a cash-flow perspective and face substantial near-term expenses (approximately $100 million) to procure their annual fuel and supply requirements for shipment commencing in July. Failure to secure committed fuel volumes could impair Baffinland’s ability to operate the Mine through the next year.[59]

44. A closure of the Mine would not just impact the Debtors and their creditors. As discussed above, Baffinland is the largest private employer in Nunavut. The Mine is of significant economic importance to the Qikiqtani Region and to Nunavut more broadly. A disruption to Baffinland's operations would have far-reaching consequences for the Inuit

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55 Initial Affidavit, ¶138.
56 Initial Affidavit, ¶141.
57 Initial Affidavit, ¶142.
58 Initial Affidavit, ¶145.
59 Initial Affidavit, ¶143-144.

communities, businesses that provide services to the Mine and approximately 300 Inuit workers who depend on the continued operation of the Mine.[60]

45. CCAA protection is required to preserve the going-concern value of the Debtors' business, protect the interests of all stakeholders, and provide the Debtors with the opportunity to stabilize operations, secure debtor-in-possession financing and pursue a a refinancing, recapitalization, restructuring plan, investment, or sale solicitation process (or any combination of the foregoing) designed to maximize value for the benefit of all stakeholders.[61]

PART III – ISSUES

46. The principal issues before the Court are whether:

(a) the CCAA applies to the Applicants;

(b) the stay of proceedings, and other benefits under the Initial Order, should be extended to BIM LP;

(c) the stay of proceedings is necessary;

(d) the FTI should be appointed as the proposed Monitor; and

(e) the Court should grant the Administration Charge and the D&O Charge (each as defined below).

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60 Initial Affidavit, ¶146.
61 Initial Affidavit, ¶147-148.

PART IV – LAW AND ANALYSIS IN RESPECT OF THE INITIAL ORDER

A. The CCAA Applies to the Applicants

(i) This Court has Jurisdiction over the Applicants

47. Per subsection 9(1) of the CCAA, a debtor company may apply for protection under the CCAA in the province where its registered head office or chief place of business in Canada is situated.[62]

48. This Court is the most appropriate venue for these CCAA proceedings. The registered head office of Baffinland and 123 Canada is located in Oakville, Ontario, where the entity's financial, legal, human resources and procurement operations are conducted.[63] Members of the EMG Operator work from Baffinland's Toronto office,[64] meaning that decision-making authority for the business similarly resides there. Moreover, the registered head office of NIO is located in Toronto, Ontario.[65]

(ii) The Applicants are "Affiliated Debtor Companies" entitled to CCAA Protection

49. The CCAA applies to a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million.[66] The Applicants satisfy both requirements. A "debtor company" is one that "is bankrupt or insolvent".[67] The term "insolvent" is not defined under the CCAA. However, it is well-established that in a CCAA application, courts may interpret this term by

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62 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ["**CCAA**"], s. 9(1).
63 Initial Affidavit, ¶21, 23, 25, 34.
64 Initial Affidavit, ¶28.
65 Initial Affidavit, ¶19.
66 CCAA, s. 3(1).
67 CCAA, s. 2(1).

reference to "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act* ("**BIA**").[68] Subsection 2(1) of the BIA provides the following:

> …"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
> (a) who is for any reason unable to meet his obligations as they generally become due,
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

50. The tests for insolvency under the BIA are disjunctive, meaning that the Applicants need only satisfy one of the above tests to be found insolvent.[69] Further, where there is an affiliated group, as in the instant case, companies that are part of the group are not required to individually satisfy the definition of insolvency if the group, taken as a whole, is insolvent, and if it is appropriate that all the companies in the group be included as part of the CCAA.[70]

51. The Applicants, are "affiliated debtor companies" and it is appropriate that all the companies be included as part of the CCAA for the following reasons:

(a) a "company" is defined as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province…".[71] NIO and BIM Corp., as Ontario *Business Corporations Act*

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68 *Stelco Inc., Re*, 2004 CarswellOnt 1211 (ONSJ Commercial List), [2004] OJ No 1257 ["***Stelco***"], ¶22; *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422 ["***Nordstrom***"], ¶26.

69 *Stelco*, ¶28.

70 *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, ¶25-30, cited in *Earth Boring Co. Ltd.,* 2025 ONSC 2422, ¶26.

71 CCAA, s. 2(1).

corporations, and 123 Canada as a federally incorporated corporation, meet this definition;

(b) the Applicants are "affiliates" because BIM Corp. is a wholly-owned subsidiary of NIO, 123 Canada is a wholly-owned subsidiary of BIM Corp. and all of them are controlled by the EMG Operator[72];

(c) The business of the Debtors is the ownership and operation of the Mine.[73] As general partner of BIM LP, BIM Corp. at law "is fully liable to each creditor of the business of the limited partnership".[74] BIM Corp. also has financial obligations as a party to various commercial agreements concerning the operation of the Mine.[75] In addition, NIO is the guarantor of all of Baffinland's secured indebtedness[76] and 123 Canada is entirely dependant on Baffinland for funding and has no independent source of income[77];

(d) the Debtors' total indebtedness, liabilities and obligations, on a consolidated basis, exceed C$5,000,000;[78]

(e) the Debtors current liabilities exceed the current value of their assets[79] such that on a balance sheet test, the Debtors are insolvent; and

(f) the Debtors lack sufficient cash flow to cover their fixed operating costs and service their outstanding debt obligations and they are operating on week-to-week basis from a cash-flow perspective.[80]

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72 CCAA, ss. 3(2) - 3(4).
73 Initial Affidavit, ¶7, 30.
74 *Limited Partnerships Act*, R.S.O. 1990, c. L.16, ss. 8-9. *Forvest Trust S.A. v. Devine Entertainment Film Library Limited Partnership*, 2013 ONSC 3347, ¶54-63 citing *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 (ONSJ Commercial List), [1993] OJ No 14, ¶17.
75 See, for example, the Benefits Agreement. Initial Affidavit, ¶71.
76 Initial Affidavit, ¶20.
77 Initial Affidavit, ¶26.
78 Initial Affidavit, ¶87-88.
79 Initial Affidavit, ¶88.
80 Initial Affidavit, ¶10, 144.

B. This Court Should Extend the Stay and Other Benefits and Protections of the Initial Order to BIM LP

52. The Applicants seek to extend the Stay (defined below) and other benefits and protections of the Initial Order to BIM LP as if it were an "Applicant" thereunder. This Court has broad jurisdiction to do so under sections 11 and 11.02(1) of the CCAA, which is limited only to what is "appropriate in the circumstances."[81]

53. It is well established that where the operations of a partnership are "integral and closely related to the operations of the Applicant", it is appropriate to extend the protection of the relief granted under the Initial Order to that partnership to ensure fulfilment of the purposes of the CCAA.[82] Such relief has been granted on multiple occasions.[83]

54. BIM LP is the principal operating entity of the Mine. It owns substantially all of the Debtors' assets (including the beneficial interest in the related mining claims and leases, and the bank accounts used to fund operations and collect iron ore revenue), conducts the Mine's operations, and employs the business' personnel.[84] NIO's limited partnership interest in BIM LP is also pledged as security under the 2026 Notes, the Credit Agreement, and the EDC Term Facility.[85] BIM LP requires the Stay to prevent uncoordinated enforcement by its many creditors. Extending the Stay to the Applicants without BIM LP would frustrate the purposes of the CCAA.

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81 CCAA, ss. 11 & 11.02(1); *Nordstrom*, ¶29-32.
82 Initial Affidavit at para 17; *Nordstrom,* ¶30; *Target Canada Co. (Re)*, 2015 ONSC 303 ["***Target***"], ¶42-43.
83 *Gesco Industries Inc. (Re)*, 2023 ONSC 3050 Endorsement of Penny J. (May 25, 2023), ¶19-20; *Nordstrom*, ¶30; *Target*, ¶42-43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124, ¶37; *Just Energy Corp. (Re)* ["***Just Energy***"], 2021 ONSC 1793, ¶116; *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215, ¶25-27.
84 Initial Affidavit, ¶7, 24, 76.
85 Initial Affidavit, ¶20.

C. A Stay of Proceedings is Necessary

55. Subsection 11.02(1) of the CCAA allows this Court to grant the stay of proceedings being sought by the Applicants for a period of up to 10 days (the "**Stay**").[86]

56. It is well-established that a stay of proceedings under the CCAA provides a debtor with "breathing space" while it consults with its stakeholders, preserves business value and attempts to avoid the social and economic costs of liquidating the entire business.[87] Given the Debtors' liquidity crisis, defaults under its secured obligations and non-payment of its trade creditors, without the Stay, there will be "a free-for-all in which individual creditors would fight it out to enforce their rights without regard for the company's survival or the maximization of its liquidation value".[88] Indeed, certain of Baffinland's secured creditors have already provided Baffinland with a notice of default under these obligations.[89] The initial Stay should be granted as it is reasonably necessary to maintain the *status quo* and give the Debtors the breathing space they require to stabilize their operations.

D. The Proposed Monitor Should be Appointed

57. Section 11.7 of the CCAA provides that when granting the Initial Order, this Court must concurrently appoint a person to monitor the Applicants' business and financial affairs. FTI has consented to act as monitor in these CCAA proceedings and is a licensed insolvency trustee within the meaning of subsection 2(1) of the BIA. FTI is not subject to any restriction to act as monitor under section 11.7(2) of the CCAA.[90] FTI has extensive experience acting

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86 CCAA, s. 11.02.
87 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 ["***Century Services***"], ¶14-15; *Just Energy*, ¶30.
88 *Century Services*, ¶22.
89 Initial Affidavit, ¶107.
90 CCAA, s. 11.7(2).

as a Court-appointed monitor in CCAA proceedings, including in respect of mining companies.

E. This Court Grant the Administration Charge and the Directors' Charge

(i) The Administration Charge Should be Granted

F. The Applicants request that this Court grant a first-priority charge (the "**Administration Charge**") in the amount of $2 million on all of the Debtors' present and future assets, property and undertakings in favour of FTI, as the Proposed Monitor, counsel to the Proposed Monitor, and counsel to the Applicants.

59. Section 11.52 of the CCAA gives this Court the power to grant an administration charge. In *Canwest Publishing*, this Court identified a list of non-exhaustive factors to consider when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[91]

60. The proposed Administration Charge is warranted, necessary and appropriate in the circumstances, given that:

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91 *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2009 CarswellOnt 6184 (ONSJ Commercial List) ["***Canwest***"], [2009] OJ No 4286, ¶54.

(a) the business is complex. The Mine is an integral part of the economy of Nunavut, including as the Territory's largest private employer and as a commercial partner of the Inuit population;[92]

(b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout these proceedings;[93]

(c) the Debtors anticipate no unwarranted duplication of roles;

(d) the Debtors have worked with FTI and other professionals to estimate the proposed quantum of the Administration Charge, and the parties believe it to be reasonable and appropriate in the circumstances;[94]

(e) holders of the 2026 Notes, Oaktree, Hartree and EDC are the only secured creditors of the Applicants that will be affected by the Administration Charge and have received notice of this Application; and

(f) the Proposed Monitor supports the Administration Charge.

(ii) The D&O Charge Should be Granted

61. Section 11.52 of the CCAA gives this Court the power to grant a priority charge to directors and officers as security for an indemnity by the Applicants.[95] In *Canwest Publishing*, this Court held that the purpose of a directors' and officers' charge is to "keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur" during that process.[96] Accordingly, a directors' and officers' charge is a crucial component of the insolvency process because it avoids the destabilizing

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92 Initial Affidavit, ¶14, 146.
93 Initial Affidavit, ¶156.
94 Initial Affidavit, ¶157.
95 CCAA, s. 11.51.
96 *Canwest*, ¶48.

effect that a global loss of a company's executive management team has on a company.[97] Courts will grant such charges if reasonable and necessary in the circumstances and where the applicant was unable to acquire adequate insurance at a reasonable cost.[98]

62. This Court identified four factors in *Jaguar Mining Inc., Re* that must be satisfied before granting a directors' charge:

(a) notice has been given to the secured creditors likely to be affected by the charge;

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

(d) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.[99]

63. In the present case, the Debtors are managed directly and indirectly by the Operating Committee. The D&O Charge protects the current and future directors and officers and members of the Operating Committee to the extent such member is or was directly or indirectly exercising the powers of the directors of any of the Debtors against obligations and liabilities they may incur in such capacity after the commencement of the CCAA proceeding, except to the extent that any such claims or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct. The amount of the D&O

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97 *Canwest*, ¶48.
98 CCAA, ss. 11.001 & 11.51(3).
99 *Jaguar Mining Inc., Re*, 2014 ONSC 494, ¶45.

Charge represents payroll and vacation obligations for Baffinland's employees for the 10-day period between the date of the Initial order and the Comeback Hearing, which payroll obligations are always one week in arrears.[100]

64. The D&O Charge is necessary because the Debtors do not have sufficient funds to satisfy indemnities that could arise following the commencement of the CCAA Proceedings. The Debtors maintain director and officer insurance but the insurance may include contractual contingencies and uncertainty associated with possible coverage. The Debtors do not believe the insurance coverage is sufficient to cover against potential liabilities and were unable to obtain adequate additional insurance at a reasonable cost.[101]

65. The Applicants submit that it is appropriate in these circumstances for this Court to grant the proposed D&O Charge, given that:

(a) the D&O Charge does not secure obligations incurred by a director or officer as a result of the directors' or officers' gross negligence or wilful misconduct;[102]

(b) the quantum of the D&O Charge was developed in consultation with the Proposed Monitor and the Proposed Monitor is of the view that the D&O Charge and its quantum is reasonable and appropriate in the circumstances;[103]

(c) the D&O Charge is limited to the indemnifications and liabilities Debtors' directors, members of the Operating Committee and officers may face during the initial ten days of these CCAA proceedings;[104] and

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100 Initial Affidavit, ¶158, 161.
101 Initial Affidavit, ¶161.
102 Initial Affidavit, ¶161.
103 Initial Affidavit, ¶164.
104 Initial Affidavit, ¶164.

(d) the beneficiaries of the D&O Charge will resign unless the D&O Charge is granted and their expertise and knowledge is necessary for the business' continued operation.[105]

PART V – ORDER SOUGHT

66. For all of the foregoing reasons, the Applicants request that this Court grant the proposed relief by making an order substantially in the form of the Initial Order found at Tab 3 of the Application Record.

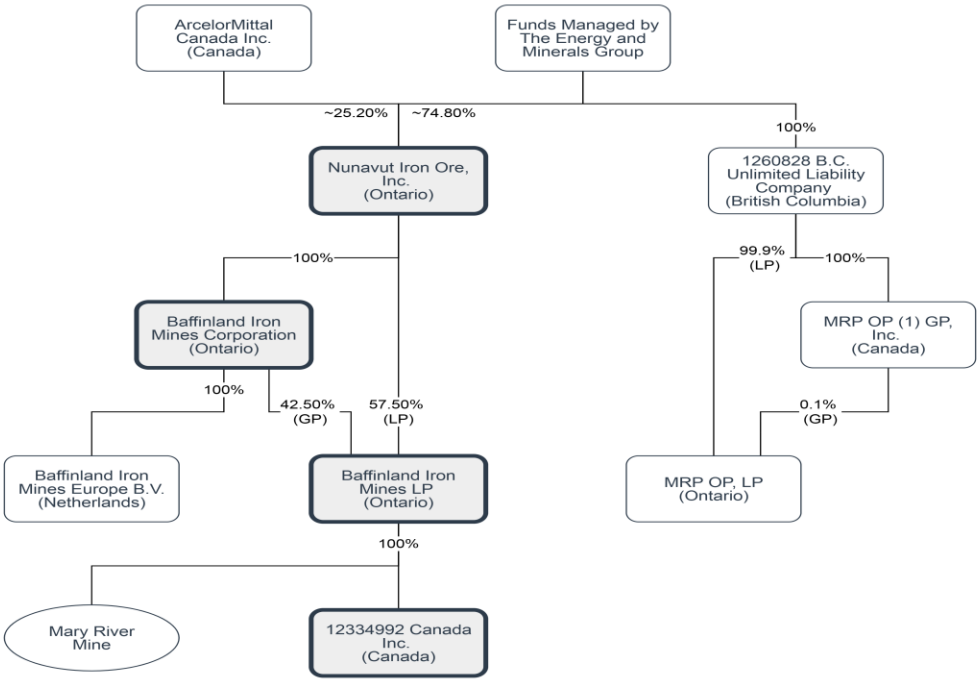
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of May, 2026.

Davies Ward Phillips & Vineberg LLP
Counsel for the Applicants

[105] Initial Affidavit, ¶162.

APPENDIX A

ORGANIZATIONAL CHART OF DEBTORS
(Debtors are shaded in grey)



SCHEDULE A
LIST OF AUTHORITIES

Case Law

1. *4519922 Canada Inc. (Re)*, 2015 ONSC 124
2. *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2009 CarswellOnt 6184 (ONSJ Commercial List), [2009] OJ No 4286 [See Schedule C]
3. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
4. *Earth Boring Co. Ltd.*, 2025 ONSC 2422
5. *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299
6. *Forvest Trust S.A. v. Devine Entertainment Film Library Limited Partnership*, 2013 ONSC 3347
7. *Gesco Industries Inc. (Re)*, 2023 ONSC 3050, Endorsement of Penny J. (May 25, 2023) [See Schedule C]
8. *Jaguar Mining Inc., Re*, 2014 ONSC 494
9. *Just Energy Corp. (Re)*, 2021 ONSC 1793
10. *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422
11. *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215
12. *Stelco Inc., Re*, 2004 CarswellOnt 1211 (ONSJ Commercial List), [2004] OJ No 1257 [See Schedule C]
13. *Target Canada Co. (Re)*, 2015 ONSC 303

Legislation

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
2. *Limited Partnerships Act*, R.S.O. 1990, c. L.16

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).

Date 2026-05-14

Signature

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

2.

2(1) Definitions

In this Act,

…

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; ("compagnie")

…

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;

("compagnie débitrice")

…

3.

3(1) Application

This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

3(2) Affiliated Companies

For the purposes of this Act,

> (a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
>
> (b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

3(3) Company Controlled

For the purposes of this Act, a company is controlled by a person or by two or more companies if

> (a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
>
> (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

3(4) Subsidiary

For the purposes of this Act, a company is a subsidiary of another company if

> (a) it is controlled by
>
> > (i) that other company,
> >
> > (ii) that other company and one or more companies each of which is controlled by that other company, or
> >
> > (iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

…

9.

9(1) Jurisdiction of court to receive applications

Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

…

11 General power of court

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

…

11.001 Relief reasonably necessary

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.

…

11.02

11.02(1) Stays, etc. — initial application

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

11.02(2) Stays, etc. — other than initial application

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

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

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

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

11.02(3) Burden of proof on application

The court shall not make the order unless

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

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

11.02(4) Restriction

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

…

11.51

11.51(1) Security or charge relating to director's indemnification

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

11.51(2) Priority

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

11.51(3) Restriction — indemnification insurance

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

11.51(4) Negligence, misconduct or fault

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

…

11.7

11.7(1) Court to appoint monitor

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.

11.7(2) Restrictions on who may be monitor

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).

2. *Limited Partnerships Act*, R.S.O. 1990, c. L.16

8. Rights of general partners

A general partner in a limited partnership has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners except that, without the written consent to or ratification of the specific act by all the limited partners, a general partner has no authority to,

(a) do any act in contravention of the partnership agreement;

(b) do any act which makes it impossible to carry on the ordinary business of the limited partnership;

(c) consent to a judgment against the limited partnership;

(d) possess limited partnership property, or assign any rights in specific partnership property, for other than a partnership purpose;

(e) admit a person as a general partner;

(f) admit a person as a limited partner, unless the right to do so is given in the partnership agreement; or

(g) continue the business of the limited partnership if a general partner dies, retires or becomes incapable as defined in the *Substitute Decisions Act, 1992* or a corporate general partner is dissolved, unless the right to do so is given in the partnership agreement.

…

9. Liability of limited partner

Subject to this Act, a limited partner is not liable for the obligations of the limited partnership except in respect of the value of money and other property the limited partner contributes or agrees to contribute to the limited partnership, as stated in the record of limited partners.

SCHEDULE C
SUPPLEMENTAL AUTHORITIES

1. *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2009 CarswellOnt 6184 (ONSJ Commercial List), [2009] OJ No 4286
2. *Gesco Industries Inc. (Re)*, 2023 ONSC 3050, Endorsement of Penny J. (May 25, 2023)
3. *Stelco Inc., Re*, 2004 CarswellOnt 1211 (ONSJ Commercial List), [2004] OJ No 1257

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

Canwest Global Communications Corp., Re

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

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

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

Pepall J.

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

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

***Pepall J.*:**

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

(ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

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

3 No one appearing opposed the relief requested.

Backround Facts

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

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

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

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

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic

environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

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

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

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

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

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

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

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

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for

certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US $393.25 million.

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

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

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

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

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

Proposed Monitor

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

Proposed Order

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

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

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their

obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

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

(b) Stay of Proceedings

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

(b) Partnerships and Foreign Subsidiaries

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

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

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

(C) DIP Financing

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

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,

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

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

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

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

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

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

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

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

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need

for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

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

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

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

(d) Administration Charge

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

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

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

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

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

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

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

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

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

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect

to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

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

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

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card

Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

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

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

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

if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

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

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

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom

are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

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

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

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

Annual Meeting

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

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

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

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

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

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

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

Conclusion

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

Application granted.

Footnotes

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

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

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

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

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

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

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

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

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

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

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

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

CITATION: Gesco Industries Inc. (Re), 2023 ONSC 3050
COURT FILE NO.: CV-23-00699824-00CL
DATE: 230525

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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 GESCO INDUSTRIES INC., GESCO GP ULC and TIERRA SOL CERAMIC TILE LTD.

BEFORE: Penny J.

COUNSEL: *Elizabeth Pillon and Philip Yang* for the Applicants

Monique Sassi for the Monitor

Jeffrey Levine and Waël Rostom for the Bank of Nova Scotia

Natasha MacParland for Ironbridge Equity Partners Management Limited

HEARD: May 19, 2023

ENDORSEMENT

[1] The applicants have made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as am., and seek an initial order.

[2] On May 19, 2023, after reviewing the material filed and hearing oral submissions, I granted the relief sought with written reasons to follow. These are my reasons.

Background

[3] The applicants and closely related entities comprise the Gesco group, which is a distributor of various floor covering alternatives. Gesco is the largest flooring distributor in Canada and one of the largest in North America in in terms of market share. The Gesco group serves a base of approximately 2,200 long standing, recurring customers through four main distribution channels: (a) dealer; (b) residential contractor; (c) commercial contractor; and (d) lumber and business materials. Gesco does not own any real property. All of its operations are conducted from leased facilities located throughout Canada.

[4] The applicants collectively employ a total of 189 full-time employees; 33 of the applicants' employees at its warehouse operation in Brampton, Ontario are subject to a collective bargaining agreement between Gesco and UNIFOR Local 462. Gesco sponsors a defined contribution pension plan provided by Sunlife. All of the employees (including the bargaining unit members) are eligible to participate.

[5] Since 2019, the Gesco group been operating at a loss. It suffered a net loss for the fiscal year ended September 30, 2022 of nearly $11.5 million and an EBITDA loss of approximately $3.8 million from operating activities. For the six months October 1, 2022 to March 31, 2023, Gesco suffered a net loss of approximately $5.7 million and an EBITDA loss of approximately $4.2 million from operating activities. Gesco's current financial difficulties largely stem from issues encountered during the COVID-19 pandemic. While there are other contributing factors to Gesco's financial difficulties which are specific to its operations, some of these were exacerbated by the COVID-19 pandemic, supply chain issues, high product and freight costs and a subsequent slow down in demand and contraction in revenue and profit margins.

[6] Gesco's primary secured financing has come from the Bank of Nova Scotia through what is described as the ABL Credit Facility (capitalized terms of this nature have the meanings ascribed in the applicants' material). The ABL Credit Agreement represents the key secured indebtedness of the applicants. As of the beginning of May this year, Gesco was indebted to the Bank in respect of principal and accrued interest under the ABL Credit Agreement in the following amounts:

(a) Canadian and US Revolver: $21,653,447.79;

(b) Canadian Term: $1,748,299.17; and

(c) BCAP Loan: $6,375,933.8326

[7] Gesco has security registrations against various pieces of warehouse equipment used in its operations. Gesco also has accrued: (a) vacation pay of approximately $930,557; (b) commission payments of approximately $130,320; and (c) 165 hours of banked overtime. Gesco LP is indebted to the CRA in the amount of $3,907,920. Gesco owes approximately $26 million for accounts payable. One or more of the Gesco group are named as defendants in a number of ongoing lawsuits. In the aggregate, the amounts clamed are over $11 million.

[8] In July 2022, Gesco retained PwC as financial advisor to commence a process to seek refinancing. Due to deteriorating financial circumstances, the group was obliged to enter into a forbearance agreement with the Bank in August 2022. The Bank required Gesco to seek and obtain refinancing to repay its obligations under the credit agreement in full and in cash by no later than November 30, 2022. This milestone could not be achieved.

[9] In January 2023, Gesco expanded PwC's mandate to canvas the market for strategic parties who might want to acquire Gesco's operations as a going concern. While Gesco was in discussions with parties who had conducted due diligence, prior to May 2023 no binding offers were received.

[10] However, on May 8, 2023, Gesco began discussions with Ironbridge Equity Partners Management Limited regarding the potential of a going concern sale. Iron Bridge owned the Gesco group about a decade ago and is familiar with the Gesco group, the industry and with companies in distressed circumstances generally. These parties have negotiated the terms of a letter of intent, providing the framework for a going concern transaction with the applicants. Ironbridge is completing its due diligence and the parties are continuing negotiations with a view to entering into a definitive acquisition agreement by no later than June 8, 2023, with a proposed closing date of no later than June 15, 2023.

[11] Absent access to further funding, however, Gesco is unable to satisfy its obligations as they come due. Accordingly, the applicants have commenced these proceedings to obtain the flexibility and breathing space afforded by the CCAA to permit them the opportunity to complete discussions with Ironbridge and enter into and implement the acquisition agreement, which will permit a going concern sale for some or all of the business. The Bank is supportive of these discussions and is prepared to provide funding through the terms of a DIP facility agreement while the acquisition agreement is negotiated.

Issues

[12] The issues regarding the relief being sought are whether:

(a) the applicants meet the criteria for bringing an application under the CCAA;

(b) the relief being sought is reasonably necessary;

(c) the stay of proceedings should be granted;

(d) the stay of proceedings should be extended to Gesco Holdings and Gesco LP;

(e) the chief restructuring officer should be appointed;

(f) Gesco should be authorized to pay pre-filing arrears owing to critical suppliers, subject to the approval of the proposed monitor;

(g) the DIP Facility Agreement should be approved and the DIP Lender's Charge granted;

(h) the Administration Charge and the Directors' Charge should be granted: and

(i) the proposed monitor should be appointed.

Analysis

Jurisdiction and Need

[13] Subsection 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." Gesco's chief place of business is in Ontario. Gesco's head office is in Brampton, Ontario.

[14] The CCAA applies to a “debtor company" or “affiliated debtor companies” where the total of claims against the debtor or its affiliates exceeds $5 million. Gesco, Gesco GP, and Tierra Sol, as companies incorporated by or under an Act of Parliament or of the legislature of a province (Ontario, Canada, and Alberta, respectively), meet the CCAA definition of “company” and are therefore eligible to make this application under the CCAA.

[15] The applicants are insolvent due to the following:

(a) as demonstrated by the proposed monitor’s Cash Flow Statement, the applicants are unable to meet their obligations generally as they become due without the additional financing provided by the DIP Facility; and

(b) the applicants, either individually or together, have debts in excess of $5 million.

[16] Gesco has worked with its advisors and the proposed monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses. In each case, I must consider whether the requested relief is necessary for the immediate stabilization of Gesco’s businesses to protect it and the interests of its various stakeholders. I am required to limit any authorizations to what is required within the proposed initial stay period. Additional authorizations must be addressed at the comeback hearing.

Stay

[17] Section 11.02(1) of the CCAA provides that a court may grant an initial order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

[18] I am satisfied that the applicants require a stay of proceedings in order to provide them with the breathing room necessary to obtain the necessary funding to continue operations while pursuing various restructuring options The commencement of a CCAA proceeding to address the significant issues Gesco faces represents the only realistic path forward at this time. The inability to restructure in a coordinated, court-supervised manner would be potentially disastrous for many stakeholders of the Gesco group, including the employees and customers.

[19] The applicants seek to extend the stay of proceedings to Gesco Holdings and Gesco LP. The court’s authority to grant such an order is derived from the broad jurisdiction under s. 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. The court has, on numerous occasions, extended the initial stay of proceedings to non-applicants. It is, for example, just and reasonable to extend a stay of proceedings to: (a) one or more subsidiaries or affiliates of the CCAA applicants that has guaranteed the applicants’ secured loans; and (b) non-applicants who are deeply integrated with the applicants’ business operations.

[20] The extension of the stay of proceedings to Gesco Holdings is just and reasonable in the circumstances because Gesco Holdings is a guarantor under Gesco’s credit agreement with the Bank. The CCAA expressly applies, by its terms, to debtor companies, but not

partnerships. Where the operations of partnerships are integral and closely related to the operations of the Applicant, it is well-established that the court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. While Gesco LP is not an applicant, Gesco LP is the main operating entity of the Gesco group and therefore carries on operations that are integral to the business of the applicants. Gesco LP is also a borrower under the ABL Credit Agreement. The stay is extended to these non-applicant entities.

Chief Restructuring Officer

[21] Gesco has lost several key employees from October 2022 through February 2023 during its prefiling restructuring attempts. The departure of (and inability to replace) these employees has resulted in considerable operational turmoil and difficulty. The key employees who have resigned or were terminated during this time frame include the Chief Financial Officer, the Vice President of Operations, the Vice President of Sales, the Regional Sales Leader, and the Vice President of Human Resources. The applicants, therefore, seek approval to appoint David Planques, of Bellwood, as CRO. Mr. Planques was retained in November 2022 to assist Gesco with its restructuring efforts after the former Chief Financial Officer resigned. The proposed monitor is satisfied that a CRO is needed in these circumstances and is satisfied with the qualifications, expertise, and experience of Mr. Planques. The proposed monitor supports the applicants' retention of Mr. Planques as CRO under the terms of the CRO Engagement Letter. The Bank is also supportive.

[22] The court has the statutory jurisdiction to make any order appropriate in the circumstances under s. 11 of the CCAA. I am satisfied that the appointment of a CRO is appropriate. Mr. Planques' expertise will help to ensure ongoing corporate governance and assist the debtors in achieving the objectives of the CCAA.

Critical Suppliers

[23] The applicants are seeking authorization to pay pre-filing arrears to certain critical suppliers that provide essential services and/or products, although they do not seek a specific order under s. 11.4. There is ample authority, however, supporting the court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies.

[24] The evidence supports the conclusion that certain critical suppliers are essential to Gesco's on-going operations and its ability to implement a sale or liquidation in these CCAA proceedings. Gesco does not have any readily available means to replace critical suppliers if they refused to conduct further business. The proposed form of order provides that the proposed monitor will oversee all payments of pre-filing amounts made to critical suppliers, that payments will only be made with the express authorization of the proposed monitor and that payments will only be made to critical suppliers which the proposed monitor agrees are essential to Gesco's business operations. The maximum aggregate amount that may be paid to critical suppliers for pre-filing arrears is $400,000.

DIP Facility Agreement and Lenders' Charge

[25] Gesco is facing a liquidity crisis. The Cash Flow Statement demonstrates that Gesco expects the need for interim financing to fund these CCAA proceedings. The applicants are requesting approval of the DIP Facility between Gesco, Gesco LP and Gesco GP, as borrowers, and the Bank as the DIP Lender, the terms of which are further described in the DIP Facility Agreement attached to the pre-filing report of the proposed monitor.

[26] Under the terms of the DIP Facility Agreement, the Bank has agreed to loan the initial principal amount of $1,500,000 to Gesco, Gesco LP and Gesco GP during the initial ten day period of the CCAA proceedings. Access to the DIP Facility is conditional upon the provision of an order of the court approving the DIP Facility Agreement and granting the DIP Lender's Charge.

[27] Section 11.2 of the CCAA provides the court with the express statutory authority to approve the DIP Facility Agreement and the DIP Lender's Charge, and to provide that the DIP Lender's Charge rank in priority over the claim of any secured creditor of the debtor.

[28] I am satisfied that the notice requirements under s. 11.2(1) of the CCAA have been met. Given Gesco's circumstances, it cannot obtain alternative financing outside of these CCAA proceedings. The DIP Facility is necessary for the applicants to pursue their restructuring efforts, which are intended to preserve Gesco's business as a going-concern for the benefit of all its stakeholders. Without the DIP Facility, Gesco may not be able to continue operating. The quantum of the DIP Facility is reasonable and appropriate having regard to the Cash Flow Statement. Finally, the proposed monitor is supportive of the approval of the DIP Facility Agreement and corresponding DIP Lender's Charge. The Bank, as primary secured creditor, is also supportive, as demonstrated by the fact that the Bank is providing the DIP Facility.

[29] A notable feature of the DIP Facility Agreement is that ongoing cash receipts in the ordinary course of business will be used to pay down the accrued balance under the Bank's Revolving Loan, just as they were pre-filing. The DIP Facility will only be used to pay post-filing expenses; it cannot be used to pay down pre-filing debt obligations.

[30] This structure under the DIP Facility Agreement is in accord with the express terms of and the policy underlying s. 11.2 of the CCAA. The DIP Facility Agreement preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By prohibiting the use of DIP advances to pay down the Revolving Loan, and by requiring that Gesco only use post-filing cash receipts to pay down the accrued balance under the Revolving Loan, the DIP Lender is in no better position with respect to its priority of its pre-filing debt relative to other creditors. As relative priorities are preserved, the status quo – creditors' relative pre-stay position – is undisturbed. Similar structures have been approved by this court in: *Comark Inc. (Re)*, 2015 ONSC 2010 at paras. 40-41; and *Performance Sports Group Ltd. (Re)*, 2016 ONSC 6800 at para. 22.

[31] I accept that it is essential that the DIP Facility Agreement be approved, and the DIP Lenders' Charge granted, so that the Gesco group may be certain that adequate financing

is available from the first day of these CCAA proceedings to support the operation of the business, vendor and customer relationships, and pursuit of the sale process to completion.

Administration Charge

[32] The applicants seek the grant of a super-priority Administration Charge in favour of the CRO, the proposed monitor, counsel to the proposed monitor, and counsel to the applicants. The Administration Charge being requested is in the amount of $800,000 in respect of the initial stay period.

[33] This amount reflects the fact that there have been extensive pre-filing efforts to restructure which have brought the applicants to the advanced point they are in the current proceedings. This is unlike, for example, a situation where an applicant is starting from scratch and has no legitimate pre-filing professional expenses of this nature. It is not proposed that the Administration Charge increase after the initial period is over. Indeed, it is possible that the quantum of this charge may diminish.

[34] I am satisfied that the Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

(a) the beneficiaries of the Administration Charge have provided and will continue to provide essential legal and financial advice throughout these CCAA proceedings;

(b) there is no anticipated unwarranted duplication of roles;

(c) the applicants' advisors have engaged in a significant amount of work on a pre-filing basis in exploring strategic alternatives, conducting the pre-filing strategic process (all as summarized above) and obtaining the DIP Facility for the benefit of the applicants' and their stakeholders. There is ample authority supporting the court's grant of a charge to secure payment of both pre- and post-filing administrative expenses in circumstances of this kind; and

(d) the proposed monitor believes that the proposed quantum of the Administration Charge is reasonable, and it is supported by the Bank.

Directors' Charge

[35] The applicants request a priority Directors' Charge in the initial amount of $600,000 in favour of the Gesco groups' current and future directors and officers. The Directors' Charge would rank subordinate to the Administration Charge.

[36] The Directors' Charge is intended to protect the current and future directors and officers against obligations and liabilities they may incur as directors and officers of Gesco after the commencement of the CCAA proceedings, except to the extent that any such claim or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[37] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the Directors' Charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it. The notice requirement is met in the circumstances.

[38] In *Jaguar Mining Inc., Re*, 2014 ONSC 494, Justice Morawetz (as he then was) stated that, in order to grant a directors' charge, the court must be satisfied of the following factors:

(a) notice has been given to the secured creditors likely to be affected by the charge;

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the directors at a reasonable cost; and

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

[39] During oral argument I questioned applicants' counsel about the fact that there seems to be directors' and officers' insurance in place already and, if this is so, whether the directors and officers would be deriving a benefit, or be "better off", post-filing than they were pre-filing because of the additional protection the Directors' Charge would be providing to them. Additional submissions were provided on this point. In essence, the applicants submit that remaining in office post-filing engages additional risk to the directors and officers because, in the event existing insurance coverage is inapplicable or insufficient, the Gesco group, being insolvent, will not be in a position to indemnify them if claims are made. The initial order is clear that the Directors' Charge is only applicable to the extent insurance coverage is not available.

[40] Earlier law concerning directors' charges focussed on the lack of any insurance to protect directors and officers. However, more recent precedent approving a directors' charge makes it clear that a charge is available not only where there is no or inadequate insurance but where uncertainty about the applicability of existing coverage, due to exclusions for example, will tend to discourage directors and officers from continuing to serve: examples include *MJardin Group, Inc. (Re)*, 2022 ONSC 3338 at paras. 32-33 and *Laurentian University of Sudbury*, 2021 ONSC 659 at paras. 54-59.

[41] I am satisfied that the additional risk associated with remaining in office during the CCAA proceedings and the need for stability, including the continued benefit of the experience and expertise of the directors and officers, justifies the Directors' Charge in the circumstances of this case. The Directors' Charge is reasonable because:

(a) the applicants will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring;

(b) the applicants cannot be certain whether the existing insurance will be applicable or respond to any claims made, and they do not have sufficient funds available to satisfy any given indemnity should their directors and officers need to call upon such indemnities;

(c) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct;

(d) absent approval by this court of the Directors' Charge in the amounts set out above, some or all of the directors and officers may resign;

(e) the amount being sought relates to estimated liabilities for wages, vacation pay and pensions accruing during the initial period only;

(f) the Directors' Charge will only apply to the extent insurance coverage is not available; and

(g) the proposed monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances. The Directors' Charge is also supported by the Bank, which is the entity likely to be most affected by the Directors' Charge.

Proposed Monitor

[42] PwC meets the technical requirements for appointment as Monitor. PwC is well positioned to fill the role, having acted as a pre-filing consultant to Gesco in the context of informal restructuring efforts. The applicants wish to enjoy the continued support of PwC in the role of Monitor to preserve and benefit from the knowledge and experience already gained. I find the appointment of Michelle Pickett, a Senior Vice President with PwC, as Monitor is warranted.

Conclusion

[43] For the reasons laid out above, the initial order is granted:

(a) there shall be a stay of proceedings against the applicants for ten days, which shall be extended to Gesco Holdings and Gesco LP;

(b) the CRO shall be appointed;

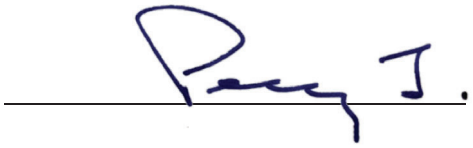
(c) Gesco is authorized to pay pre-filing arrears owing to critical suppliers, subject to the approval of the Monitor;

(d) the DIP Facility Agreement is approved and the DIP Lender's Charge granted;

(e) the Administration Charge and the Directors' Charge are granted; and

(f) PwC is appointed as Monitor.

[44] The come back hearing will take place before me at 10:00 AM on May 29, 2023 via Zoom.



Penny J.

Date: May 25, 2023

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004]
O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo

will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it

had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in

need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises

to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated

termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> > "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
> >
> > > (a) who is for any reason unable to meet his obligations as they generally become due,
> > >
> > > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> > >
> > > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a

contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources

sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75

D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past*. I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:

(a) identification of the debtor's stakeholders and their interests;

(b) arranging for a process of meaningful communication;

(c) dealing with immediate relationship issues arising from a CCAA filing;

(d) sharing information about the issues giving rise to the debtor's need to restructure;

(e) developing restructuring alternatives; and

(f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a

reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> > (a) the ability to meet liabilities as they fall due; and
> >
> > (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash

flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However,

as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due."

The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee*

of) v. Provisioners Maritimes Ltd. (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.

> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording*

Laboratories Inc. supra at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both

> Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.
>
> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse

which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case

however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

APPENDIX

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, and 12334992 Canada Inc.

Applicants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

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