Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

**BOOK OF AUTHORITIES OF QUEBEC CLASS ACTION PLAINTIFFS (RE: EXTENSION MOTIONS)**

September 30, 2019

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Applicants

## AUTHORITIES

**Court of Appeal for Saskatchewan**

**Citation:** ***Industrial Properties Regina Limited v Copper Sands Land Corp.,*** **2018 SKCA 36**

**Date: 2018-05-23**



**Docket: CACV3176**

Between:

**Industrial Properties Regina Limited**

*Appellant*
*(Respondent)*

And

**Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp.**

*Respondents*
*(Applicants)*

**Docket: CACV3177**

Between:

**101297277 Saskatchewan Ltd.**

*Appellant*
*(Respondent)*

And

**Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp.**

*Respondents*
*(Applicants)*

**Docket: CACV3178**

Between:

**Affinity Credit Union 2013**

*Appellant*
*(Respondent)*

And

**Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp.**

*Respondents*
*(Applicants)*



REVISED JUDGMENT: The text of the original judgment has been corrected with text of the erratum (released May 23, 2018) appended.

| | |
|---|---|
| Before: | Herauf, Ryan-Froslie and Schwann JJ.A. |
| Disposition: | Appeal allowed in part |
| Written reasons by: | The Honourable Mr. Justice Herauf |
| In concurrence: | The Honourable Madam Justice Ryan-Froslie<br>The Honourable Madam Justice Schwann |
| On Appeal From: | QBG 1693 of 2017, Saskatoon |
| Appeal Heard: | March 5, 2018 |
| Counsel: | Diana K. Lee, Q.C. and Alexander Shalashniy<br>for Industrial Properties Regina Ltd.<br>Rick Van Beselaere, Q.C. for 101297277 Saskatchewan Ltd.<br>Ryan A. Pederson for Affinity Credit Union<br>Jeffery M. Lee, Q.C. and Paul Olfert for the Respondents |

**Herauf J.A.**

## I. INTRODUCTION

[1] The respondents are six corporations, all of which are owned and controlled by one individual. The appellants represent the secured creditors of one or more of the respondents. On December 20, 2017, the respondents were granted an initial order, a sale approval and vesting order and access to interim financing pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. The appellants appealed those orders to this Court. The appeal was heard on March 5, 2018. On March 9, 2018, the Court allowed the appeal in part with more extensive written reasons to follow. These are those reasons.

## II. BACKGROUND FACTS

[2] The assets of the respondents consist of a trailer park (Copper Sands Trailer Park) and an incomplete water treatment and waste water treatment facility located on lands owned by the respondents, and undeveloped lands known as the Willow Rush property. The Copper Sands Trailer Park is the respondents' only functioning business and has two employees.

[3] As of November 2017, the respondents owed the appellants, collectively, in excess of $10,725,000. When the appellant, Affinity Credit Union, commenced foreclosure proceedings, the respondents applied pursuant to the *CCAA*, seeking the following relief, *inter alia*:

(a) an initial order staying creditor enforcement to facilitate the companies' restructurings, including the sale of Willow Rush; and

(b) an order authorizing interim financing up to $1.25 million with a priority charge, to enable it to complete the water treatment facility.

[4] On November 15, 2017, the parties argued the matter before a Chambers judge. The appellants firmly opposed the relief sought by the respondents, challenging the appropriateness of *CCAA* proceedings in the circumstances. The appellants were skeptical of the legitimacy of the Willow Rush sale and questioned whether the water treatment facility was capable of completion and, if so, whether it could produce viable capital. Due to these concerns, amongst

others, the appellants opposed the initial order and the interim financing, stressing the prejudice the creditors would suffer if these orders were granted.

[5] After hearing submissions, the Chambers judge concluded the respondents' application was premature and adjourned the matter to enable the respondents to confirm the validity of the Willow Rush sale and to file additional material relating to completion of the water treatment facility ((21 November 2017) Saskatoon, QBG 1693/2017 (Sask CA) [*November fiat*]).

[6] The matter was returned to the Court of Queen's Bench on December 11, 2017. At that time, in addition to the application for an initial order and interim financing, the respondents asked the Chambers judge to grant sale approval and a vesting order pursuant to s. 36 of the *CCAA*, to facilitate the sale of the Willow Rush property.

[7] In his fiat ((20 December 2017) Saskatoon, QBG 1693/2017 (Sask CA) [*December fiat*]), the Chambers judge granted the respondents' applications. The Chambers judge granted the initial order, imposing a stay of creditor enforcement for 30 days, authorized $1.25 million interim financing, $800,000 of which was to be used to "complete the commissioning of the water treatment utility", $337,500 for the cost of the *CCAA* proceedings, and $112,500 for "ongoing costs", and granted the sale approval and vesting order. The vesting order was set to expire on January 12, 2018, if the proposed sale did not close.

[8] Pursuant to ss. 13 and 14(1) of the *CCAA*, the appellants sought leave from this Court to appeal the initial order, the interim financing and the sale approval and vesting order. Before leave was granted and before the expiry of the vesting order, the Willow Rush sale closed for the asking price of $4.2 million. For this reason, leave to appeal relating to the sale and vesting order were denied. Leave was granted on the issue of whether it was appropriate to grant the initial order for *CCAA* protection and to grant $1.25 million interim financing.

[9] On March 9, 2018, the Court concluded the Chambers judge had erred in granting the interim financing and the appeal related to that aspect of the matter was allowed. The appeal relating to the appropriateness of the initial order was dismissed.

## III. STANDARD OF REVIEW

[10] Decisions made pursuant to the *CCAA* are highly discretionary and attract deference from this Court. In *Stomp Pork Farm Ltd., Re*, 2008 SKCA 73, 311 Sask R 186 [*Stomp Pork*], Jackson J.A. articulated the Court's general reluctance to intervene in *CCAA* matters, noting the familiarly *CCAA* judges have with the different parties involved and the Chambers judge's meaningful understanding of the circumstances:

> [25] The Court recognizes that there is a general reluctance on behalf of appellate courts to intervene in decisions taken by restructuring judges in *CCAA* matters. The mix of business and legal decisions made in real time can make it difficult to say, after the fact and with any degree of precision, that one particular decision would have been better than another. Further, the Court is hesitant to elevate a decision in one restructuring to a principle of law that will hamper the appropriate exercise of discretion in another. …

[11] Although appellate courts exercise their right of review sparingly, *CCAA* decisions are not immune from appellate intervention. Judges making *CCAA* orders must exercise their discretion judiciously, which requires considering relevant factors and reaching a legally correct conclusion: *Stomp Pork* at para 27; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 at para 26, [2005] 8 WWR 224. As Dr. Janis P. Sara explains, appellate courts will intervene in limited circumstances:

> Appellate courts will accord a high degree of deference when asked to interfere with the exercise of authority of a *CCAA* court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of authority or there is a fundamental question of the lower court's jurisdiction.
>
> (*Rescue! The Companies' Creditors Arrangement Act*,
> 2d ed (Toronto: Carswell, 2013) at 181)

[12] In *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 [*Century Services*], the Supreme Court discussed a court's wide discretion in *CCAA* matters. The Supreme Court explained that this judicial discretion must be exercised in furtherance of the legislation's remedial purposes:

> [59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[13] The standard of review with respect to the exercise of judicial discretion, such as in *CCAA* matters, is set out in *Rimmer v Adshead,* 2002 SKCA 12 at para 58, 217 Sask R 94:

> … [T]he powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise. The discretion is that of the judge of first instance, not ours. Hence, our function, at least at the outset, is one of review only: review to determine if, in light of such criteria, the judge abused his or her discretion. Did the judge err in principle, disregard a material matter of fact, or fail to act judicially? Only if some such failing is present are we free to override the decision of the judge and do as we think fit. Either that, or the result must be so plainly wrong as to amount to an injustice and invite intervention on that basis. …



[14] Applying this standard of review, we see no merit to the appellants' argument that the Chambers judge erred in granting the initial order. However, we are of the opinion the Chambers judge failed to consider the mandatory factors enumerated in s. 11.2(4) of the *CCAA* prior to granting the interim financing. This error resulted in a wrongful exercise of discretion given the preliminary nature of the *CCAA* proceedings.

## IV. THE INITIAL ORDER

[15] The first formal step in *CCAA* proceedings is the debtor company applying to the court for an initial order. The terms of initial orders are provided for in ss. 11.02(1) and (3) of the *CCAA*:

> **11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> …
>
> (3) *The court shall not make the order unless*
>
> (a) *the applicant satisfies the court that circumstances exist that make the order appropriate; and*

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

[16] The purpose of the initial order is to stay creditor enforcement in order to maintain the debtor corporation's "status quo" for a specified and limited period so that it may develop a plan to be presented to creditors for their consideration. The initial order staying creditor enforcement provides the debtor corporation some breathing room to allow it to prepare, file and seek approval from creditors and ultimately the courts of its proposed plan: *Rescue! The Companies' Creditors Arrangement Act* at 31.

[17] Pursuant to ss. 11.02(1) and (3), the court may grant an initial order staying creditor enforcement for a term not exceeding 30 days, if the applicant satisfies the court that the appropriate circumstances exist and that it is acting in good faith and with due diligence.

## A. Appropriate circumstances

[18] In *Century Services*, the Supreme Court discussed the remedial objectives of the *CCAA* and explained that "appropriate circumstances" exist when an order advances these remedial objectives by providing the conditions under which the debtor can attempt to reorganize:

> [60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed. …
>
> …
>
> [70] … Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. *The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. …
>
> (Emphasis added)

[19] The evidentiary burden the debtor corporation must satisfy to establish "appropriate circumstances" for the purposes of a 30-day stay order is not exceptionally onerous*: Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 at para 14, 9 CBR (6th) 161 [*Alberta Treasury*]; *Matco Capital Ltd. v Interex Oilfield Services Ltd.* (1 August 2006)

Docket No. 06108395 (Alta QB) [*Matco*]; *Hush Homes Inc., Re*, 2015 ONSC 370 at paras 51–53, 22 CBR (6th) 67; *Redstone Investment Corp., Re*, 2014 ONSC 2004 at paras 49–50.

[20] As the Supreme Court noted in *Century Services*, initial *CCAA* orders are made in the "hothouse of real-time litigation" (at para 58). The debtor corporation is often in crisis-mode due to its failure to meet creditor obligations and is seeking *CCAA* protection to obtain some breathing room to enable it to get its affairs in order without creditors knocking at the door. Therefore, to obtain an initial 30-day order, the applicant is not required to prove it has a "feasible plan" but merely "a germ of a plan": *Alberta Treasury* at para 14. The court must assess whether the circumstances are such that, with the initial order, the debtor corporation has a "reasonable possibility of restructuring": *Matco*. To require the applicant corporation to present a fully-developed restructuring plan or have the support of all its creditors at the initial stage of *CCAA* proceedings, although desirable, is not expected. To impose such a threshold to establish "appropriate circumstances" would unduly hinder the purpose of an initial order which, as the Supreme Court explained in *Century Services*, is to provide the conditions under which the debtor can *attempt* to reorganize.

[21] For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. If the debtor corporation satisfies this onus, the court may grant the initial application and provide the conditions under which the debtor corporation can attempt to reorganize, namely, staying creditor enforcement to preserve the debtor corporation's status quo for a limited period of time. If, however, the debtor corporation fails to satisfy this onus and the court determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: *Rescue! The Companies' Creditors Arrangement Act* at 53–54.

### B. Good faith and due diligence

[22] In addition to proving appropriate circumstances, the applicant corporation must convince the court that it is acting in good faith and with due diligence pursuant to s. 11.02(3)(b). Despite the wording of s. 11.02(3)(b) indicating "good faith and due diligence" applies only to orders under subsection (2), that being orders "other than initial applications", the Supreme

Court in *Century Services* determined good faith and due diligence applies to initial orders as well:

> [69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).
>
> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. …

[23] Although it is a consideration for granting an initial order, courts generally defer the in-depth analysis of good faith and due diligence to subsequent applications, such as the extension of the initial 30-day order: Rogers, Sieradski & Kanter, "What Does 'Good Faith' Mean in Insolvency Proceedings?" Vol 4-4 Insolvency Institute of Canada (Articles) (WL). If, however, the court determines the debtor corporation is not seeking *CCAA* protection in good faith or there is convincing evidence of a lack of due diligence, the court may deny an initial order on the basis of a failure to satisfy the baseline requirement in s. 11.02(3)(b): see *Alberta Treasury*.

## C. Did the Chambers judge err in granting the initial order?

[24] The appellants submit the Chambers judge erred in concluding the respondents had satisfied the "appropriate circumstances" and "good faith and due diligence" requirements contained in ss. 11.02(3)(a) and (b).

[25] In support of this argument, the appellants contend *CCAA* proceedings are not appropriate as the respondents have only one active business, the Copper Sands Trailer Park, which has only two employees. The appellants argue *CCAA* proceedings are not needed to "avoid the social and economic costs of liquidating assets" as there are no such consequences given the minimal business activity of the respondents.

[26] In addition, the appellants submit the Chambers judge failed to consider the creditors' lack of faith and confidence in management when determining whether the initial order was appropriate. The appellants also allege the Chambers judge failed to provide adequate reasons for his conclusion that the respondents were acting in good faith and with due diligence.

[27] The Chambers judge determined the respondents were engaged in active business, which was "facing a looming liquidity condition or crisis" if an initial order and a stay of proceedings were not granted (*November fiat* at para 15). The Chambers judge concluded the "initial stay of proceedings [would] give the applicants the time to restructure and refinance their operations" (*December fiat* at para 14).

[28] The Chambers judge was satisfied the respondents were not seeking *CCAA* protection merely to postpone inevitable liquidation:

> [10] In this case I find that the applicants, or at least MDI Utility Corp. and CSLC, are engaged in an active business rather than being simply real estate developers as alleged by the respondents. CSLC operates a mobile home park. MDI Utility Corp. is completing a water treatment utility to provide wastewater treatment services to both the existing mobile home park and an upcoming Tanglewood development on CSLC lands. This is not a situation where the applicants seek CCAA protection for the purpose of obtaining more time to sell or refinance property as was the situation in *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145; *Redekop Properties Inc. (Re)*, 2001 BCSC 1892; and *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 AR 296.
>
> (*December fiat*)

[29] As for whether there was a reasonable possibility of restructuring, the Chambers judge noted he was "satisfied that the completion of the water treatment utility [would] add to the overall net worth" of the respondents (*December fiat* at para 13). The Chambers judge also noted that the respondents had, at the time of the initial application, secured an interim financer willing to fund the completion of the water treatment utility and the *CCAA* proceedings.

[30] On this basis, the Chambers judge concluded as follows:

> [14] I am satisfied that the applicants have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that an order for an initial stay of proceedings is appropriate. ...
>
> (*December fiat*)

[31] As discussed, the purpose of the initial order is to stay creditor enforcement to grant the debtor corporation a limited period of time to attempt to devise a viable restructuring plan. To obtain an initial order, the debtor corporation must satisfy the court that the initial order will "usefully further" its efforts towards attempted reorganization. The debtor corporation is not required, at this stage of the proceedings, to provide a full-fledged restructuring plan, but is required to show, at the very least, it has a "germ of a plan": see *Alberta Treasury*. The court

must be convinced the debtor corporation is not seeking *CCAA* proceedings simply to delay the inevitable liquidation in order to "buy time".

[32] It is clear the Chambers judge was cognizant of these purposes and the baseline considerations, which the respondents had to satisfy prior to receiving the initial order. The Chambers judge concluded the initial order would usefully further the remedial purposes of the *CCAA* by providing the conditions upon which the respondents could attempt to reorganize their affairs. He was satisfied on the evidence before him, that there was at least a "germ of a plan", given the fact the respondents had secured interim financing to facilitate the commissioning of the water treatment facility.

[33] It is also clear the Chambers judge considered the creditors' lack of confidence. In his fiat, the Chambers judge stated: "[u]fortunately, and unlike many *CCAA* applications, all of the respondent secured creditors oppose the application" (*November fiat* at para 21). Despite this, the Chambers judge determined the initial order was appropriate in the circumstances based on the factors discussed above. The Chambers judge was entitled to reach this conclusion. Whether the creditors have lost confidence in the debtor corporation's management is something the court must consider when assessing whether to grant an initial order. However, the creditors' lack of faith is not determinative and does not necessarily dictate denying an initial application: *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para 27, 96 BCLR (4th) 77; *Pacific Shores Resort & Spa Ltd., Re.*, 2011 BCSC 1775 at paras 40–44 and 49(c).

[34] Upon review, although his reasons are not extensive, it is clear the Chambers judge properly considered whether the baseline considerations contained in ss. 11.02(3)(a) and (b) were satisfied. Given the real time nature of *CCAA* proceedings, Chambers judges are not required to give extensive reasons addressing each and every argument raised by the parties when granting initial applications (*Alberta Treasury Branches v Conserve Oil Corporation*, 2016 ABCA 87 at paras 14–15, 35 CBR (6th) 6). We also note that the Chambers judge was not required to undertake an in-depth analysis to determine good faith and due diligence at this stage of the proceedings as a more in-depth analysis will be taken if the respondents make an application to extend the order or if they seek additional court orders.

[35] Given the deference afforded to a chambers judge making *CCAA* decisions, this Court will only intervene if the lack of reasons leads to a reasonable belief that the Chambers judge ignored or misconceived the evidence *in a way that affected his conclusion* (*York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, 2010 ONCA 393, 262 OAC 232). This threshold for intervention is not met in this case. Therefore, the appellants' appeal regarding the initial order is dismissed.



## V. INTERIM FINANCING

[36] In addition to granting the initial order, the Chambers judge authorized the respondents to obtain interim financing up to $1.25 million. The interim financing was given a priority charge upon the respondents' assets and over the claims of the appellants. The appellants appealed this order on the grounds the Chambers judge failed to consider the relevant factors pursuant to s. 11.2(4) of the *CCAA* prior to granting the order with respect to interim financing.

[37] Pursuant to s. 11.2(1) of the *CCAA*, a debtor corporation may apply to the court at any stage of the proceedings for interim financing. As Dr. Janis Sarra explains, "interim financing" refers primarily to the working capital that the debtor corporation requires in order to continue operating during restructuring proceedings, as well as to finance the costs of the *CCAA* process (*Rescue! The Companies' Creditors Arrangement Act* at 197). The underlying premise of interim financing is that it is a benefit to all stakeholders "as it allows the debtor to protect going-concern value while it attempts to devise a plan of compromise or arrangement acceptable to creditors" (at 197). Interim financing is generally granted to ensure the debtor corporation can continue its essential operations, such as "keeping the lights on" and paying employees, while it undergoes the *CCAA* proceedings.

[38] Before an order allowing interim financing to be obtained can be granted, the court must consider, among other things, the factors enumerated in s. 11.2(4). If granted, the court may order the interim financing have a priority charge over the corporation's assets pursuant to s. 11.2(2):

> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by

> the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (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.

[39] If the applicant corporation applies for interim financing at the same time as it applies for an initial order, the court must be diligent in its consideration of the factors enumerated in s. 11.2(4). The court must assess whether it is imperative and appropriate to order interim financing at the very outset of *CCAA* proceedings. Given that the purpose of seeking and granting an initial order is to provide the conditions upon which the debtor corporation can plan a compromise or reorganization to present to its creditors, the court must be cautious when asked to authorize large sums of interim financing at the initial stage, unless there is evidence that the financing is needed to enable the debtor corporation to undergo this planning process. This is especially important when the applicant is seeking a priority charge on the interim financing.

## A. Did the Chambers judge err in allowing interim financing to be obtained?

[40] The appellants submit the Chambers judge erred in granting the respondents $1.25 million interim financing due to his failure to consider one or more of the factors identified in s. 11.2(4).

[41] The Chambers judge provided the following reasons for authorizing the interim financing at the same time he granted the initial application:

> [13] I also approve the interim financing order sought by the applicants. The interim financing lender, Staheli Construction Ltd., has agreed to advance the sum of $1,250,000 to the applicants subject to obtaining a first charge on the assets of the company. The $1,250,000 will be allocated $800,000 to complete the commissioning of the water treatment utility owned by MDI Utility, $337,500 for the cost of the CCAA proceedings and $112,500 for the ongoing costs of the applicants according to the proposed monitor's initial report. The respondents say that they will be prejudiced by any priority charge given to the interim lender and suggest that the completion of the water treatment utility adds little to no value to the overall net worth of the applicants. However, I am satisfied that the completion of the water treatment utility will add to the overall net worth of the applicants and the monitor will ensure that the $800,000 is being appropriately used for the purpose intended.
>
> (*December fiat*)

[42] This analysis fails to consider multiple factors in s. 11.2(4), namely the period of time the parties were expected to be subject to *CCAA* proceedings pursuant to s. 11.2(4)(a) and "whether the loan would enhance the prospects of a viable compromise or arrangement" pursuant to s. 11.2(4)(d).

[43] The appellants strongly opposed the use of any funds to complete the commissioning of the water treatment facility. In their view, it is a failed operation that will cost more than the allotted $800,000 to complete. Even if completed, the appellants are of the opinion the water treatment facility has no reasonable commercial value and therefore, its completion cannot result in a viable restructuring or compromise between it and the respondents. The appellants argued that granting interim financing to complete the water treatment facility would only result in the respondents incurring further debt; debt that will inevitably fall on the creditors' shoulders when the respondents are forced to liquidate, given that there is no chance of a successful restructuring. The appellants stressed that the interim financing would significantly prejudice their position as it has received a priority charge over the respondents' assets.

[44] Although the Chambers judge concluded the completion of the water treatment facility would "add to the overall net worth" of the respondents, he failed to consider whether this added net worth would enhance the prospect of a viable compromise pursuant to s. 11.2(4)(d). Given the creditors steadfast opposition to the interim financing, it was incumbent on the Chambers judge to consider this factor. It is clear the Chambers judge failed to do so. He also failed to

consider the length of time the parties would be subject to *CCAA* proceedings pursuant to s. 11.2(4)(a).

[45] There was no evidence of urgent circumstances dictating a need to permit the respondents to obtain interim financing with a priority charge at this stage of the proceedings. Given that the respondents' only active business is the Copper Sands Trailer Park, which receives a monthly income that is sufficient to keep the lights on and to pay the only two employees, the interim financing was not needed to preserve the status quo or maintain the respondents' essential operations. Moreover, there was no evidence the interim financing was needed to enable the respondents' *planning* of the compromise or arrangement it would eventually present to the creditors. To the contrary, there was evidence that granting interim financing to complete the water treatment plan would *deter* the parties from reaching a viable compromise at this stage of the proceedings.

[46] Given the preliminary stage the *CCAA* proceedings were at, there was no detailed plan evidencing how the commissioning of the water treatment facility would contribute to a viable restructuring of the respondents. As discussed above, a detailed plan is not a prerequisite to obtain an initial order. However, something more concrete and justifiable is needed in order to grant interim financing for something that is beyond what is needed to preserve the debtor corporation's status quo.

[47] We note that this is not a situation where there was unanimous creditor support for the interim financing to fund the commissioning of the water treatment facility. The creditors strongly opposed the funds being sought to facilitate the construction of a project they viewed as an inevitable failure. This fact further detracts from the appropriateness of granting the interim financing, with a priority charge, at this preliminary stage of the proceedings.

[48] The Chambers judge erred by failing to properly consider how these facts impacted the likelihood of a viable compromise or arrangement being made with respect to the respondents pursuant to s. 11.2(4)(d).

## VI. CONCLUSION

[49] In conclusion, we find no error with the Chambers judge's determination that "appropriate circumstances" existed and that the respondents were acting in good faith and with due diligence so as to merit granting the initial 30-day order. The Chambers judge did, however, err in permitting the respondents to obtain $1.25 million interim financing when he granted the initial order.

[50] Therefore, the appeal is allowed in relation to the interim financing and the part of the initial order relating to interim financing is set aside. The remaining components of the initial order remain intact and the other grounds of appeal are dismissed. We note that our decision does not prevent the respondents from initiating another application for interim financing at a later date if they so choose.

[51] Since there was divided success, there will be no order as to costs with respect to the appeal or the leave application.

"Herauf J.A."

Herauf J.A.

I concur. "Ryan-Froslie J.A."

Ryan-Froslie J.A.

I concur. "Schwann J.A."

Schwann J.A.

# Rescue!

## *The Companies' Creditors Arrangement Act*

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the order, in perpetuity, and in conflict with the priorities of other creditors' claims.[106] It was thus stayed under the *CCAA* stay order. Morawetz J. held that the OMOE was entitled to file a claim for any costs of remedying the environmental conditions at the facility; however, it was not, as a regulatory body, entitled to attempt to use the order to create a priority that it did not otherwise have access to under the statute.[107]

## 7. Extension of the Stay

After the initial 30-day stay period, which is the maximum period that the initial stay is available under an initial order, the stay may be extended for longer limited periods. The court's granting or denial of an extension of the stay order will depend in part on the amount of confidence creditors and the court have in the progress being made in the resolution of the debtor's affairs and the negotiations for a viable workout plan.[108]

On application for an extension of the stay, the court may, on an application in respect of a debtor company, make an order, on any terms that it may impose, 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; restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and prohibiting the commencement of any action, suit or proceeding against the company.[109] The court is not to make the stay order unless the applicant satisfies the court that circumstances exist that make the order appropriate; and in respect of an extension of the initial stay, the applicant must also satisfy the court that the applicant has acted, and is acting, in good faith and with due diligence.[110]

Thus, in applications for extension of the initial 30-day stay period, the court applies tests of good faith, due diligence and balancing of prejudice to creditors in determining whether to extend the stay period.[111] The applicant, usually the debtor company, must establish that circumstances exist that make the order

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106 *Ibid.* at para. 59.

107 *Ibid.* at para. 66.

108 Janis Sarra, "Judicial Exercise of Inherent Jurisdiction under the *CCAA*" (2004) 40 Canadian Business Law Journal 280.

109 Section 11.02(2), *CCAA*.

110 Section 11.02(3), *CCAA*.

111 *Re Royal Oak Mines Inc.*, 1999 CarswellOnt 625, [1999] O.J. No. 709 (Ont. Gen. Div. [Commercial List]), Blair J.; *Re Playdium Entertainment Corp.*, 2001 CarswellOnt 3893, [2001] O.J. No. 4252 (Ont. S.C.J. [Commercial List]), additional reasons 2001 CarswellOnt 4109 (Ont. S.C.J. [Commercial List]); *Re Simpson's Island Salmon Ltd.*, 2005 CarswellNB 781, [2005] N.B.J. No. 570 (N.B.Q.B.).

appropriate; and that the applicant has acted and continues to act in good faith and with due diligence.[112]

The British Columbia Supreme Court has held that the debtor corporation has an obligation to demonstrate measurable and substantive progress towards a plan if an extension is to be granted, and the court will also consider the economic impact on stakeholders and members of the surrounding community.[113] Thus, even where the exercise of authority to extend the stay period is not as constrained by express statutory requirements as it is in the sanctioning of the plan, there is a substantial degree of certainty in the tests applied to applications for an extension. As with the initial stay order, the extension of a stay is only a temporary suspension of creditors' rights.

Generally, the court wants assurance that corporate officers understand the reason for the firm's insolvency, so that they have a realistic sense of whether there is a potentially viable plan that can be devised. On granting an extension, the court will usually order the monitor to report on cash-flow projections on a regular basis to senior creditors and others so that they have timely notice of any further deterioration in the financial position of the debtor corporation.[114]

The courts have held that approval of the creditors is not a prerequisite for extension of a stay; rather, the extension is for the benefit of all the company's stakeholders, not just the creditors.[115] All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders and the public generally.[116] The Ontario Court of Appeal in *Re Stelco Inc.* held that it must be a matter of judgment for the supervising judge to determine whether a proposed plan is doomed to fail, and that where a plan is supported by the other stakeholders and the independent monitor, and is a product of the business judgment of the board, it is open to the supervising judge to conclude that the plan was not doomed to fail and that the process should continue.[117]

On an application for an extension of the stay pursuant to s. 11.02(2) of the *CCAA*, the applicants must establish that they have met the test set out in s. 11.02(3), specifically, whether circumstances exist that make the order appropriate in advancing the policy objectives of the *CCAA*, and whether the applicant has acted, and is acting, in good faith and with due diligence.[118] The *CCAA* debtor

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[112] Section 11.02(3), *CCAA*.

[113] *Re Skeena Cellulose Inc.*, 2001 CarswellBC 2226, 2001 BCSC 1423 (B.C.S.C.).

[114] *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C.S.C. [In Chambers]).

[115] *Taché Construction ltée c. Banque Lloyds du Canada* (1990), 5 C.B.R. (3d) 151 (Que. S.C.).

[116] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.).

[117] *Re Stelco Inc.*, 2005 CarswellOnt 6283 (Ont. C.A.) at para. 24, affirming 2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List]).

[118] *Re Worldspan Marine Inc.*, 2011 BCSC 1758, 2011 CarswellBC 3667 (B.C.S.C.) at para. 12.

in *Worldspan Marine Inc.* applied for and obtained an extension of time to work toward a plan of arrangement.[119] The extension was granted over the objections of a major creditor.[120] The Court held that an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.[121] In addition to good faith and due diligence, other factors to be considered on an application for an extension of the stay include the debtor's progress during the previous stay period toward a restructuring; whether the creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension.[122] The Court concluded that the extension would not materially prejudice any creditor or stakeholder and at this point, the *CCAA* restructuring offered the best option for all stakeholders.[123]

In *Rio Nevada Energy Inc.*, in considering whether to extend a stay under the *CCAA*, the Alberta Court of Queen's Bench held that:

> ¶32 As to whether circumstances exist that make the continuation of the stay appropriate, there are a number of factors that must be taken into account. The continuation of the stay in this case is supported by the basic purpose of the *CCAA*, to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court and to prevent manoeuvres for positioning among creditors in the interim; *Re Pacific National Lease Holding Corp.; Meridian Developments Inc. v. Toronto Dominion Bank*. Westcoast has not satisfied the Court that an attempt at an acceptable compromise or arrangement is doomed to failure at this point in time. Negotiations for restructuring a sale or refinancing are ongoing, and there has been a strengthening of the management team. Rio Nevada continues in business, and plans are underway to remediate its two major wells, which will significantly increase the company's rate of production. A monitor is in place, which provides comfort to the creditors that assets are not being dissipated and current operations are being supervised. The extension sought is not unduly long, and is supported by the secured creditors other than Westcoast. The costs of the *CCAA* proceedings are likely no less onerous than the costs of a receivership in these circumstances, and the relief sought under the *CCAA* less drastic to all constituencies than the order that would likely have to be made in a receivership.[124]

Where a company sought and received a stay under the *CCAA* as a means of achieving a global resolution of numerous product liability actions, and a complainant alleged bad faith as to activities of the debtor pre-filing of the *CCAA*

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[119] *Ibid.*
[120] *Ibid.* at para. 54.
[121] *Ibid.* at para. 21.
[122] *Ibid.* at para. 22.
[123] *Ibid.* at para. 44.
[124] *Re Rio Nevada Energy Inc.*, 2000 CarswellAlta 1584, [2000] A.J. No. 1596 (Alta. Q.B.).

application, the Ontario Superior Court held that the good faith test in considering an extension of the stay relates only to the debtor's conduct during the *CCAA* proceeding, not to prior conduct; and the Court was satisfied that the debtor was proceeding with due diligence and good faith and extended the stay.[125]

The Nova Scotia Supreme Court denied the debtor's motion for an extension of *CCAA* protection in *Re Scanwood Canada Ltd.*[126] The debtor had the support of an unsecured creditor, and the provincial and federal governments took no position; however, the motion was opposed by two banks.[127] The Court found that the debtor had met the statutory criteria of acting in good faith and with due diligence, but it failed to meet the onus of satisfying the court that the extension was appropriate in the circumstances.[128] The Court concluded that the debtor's revised manufacturing model was too late to satisfy it that within 30 days there could be a plan of arrangement.[129] The Court placed considerable importance on the position of the monitor, which did not support the request for the extension.[130]

The Newfoundland and Labrador Supreme Court granted an extension of a stay under the *CCAA* and extended interim financing to a resort corporation, notwithstanding that no plan or arrangement had been formulated.[131] The Court was satisfied that the efforts made by the debtor to liquidate some of its assets had been diligent and reasonable and done in good faith.[132] The Court held that, in balancing the various interests that the *CCAA* is designed to protect, stay periods cannot be justified where there was no real prospect of a successful restructuring. However, this situation was not at the point where a conclusion could be drawn that any restructuring was likely to be unsuccessful.[133] The Court was satisfied that normal commercial common sense would keep interim financing borrowing to the minimum amount necessary in order to carry out the development of a plan.[134]

Where an application for extending the initial stay was generally opposed by the secured creditors on the basis that performance by the debtor company, Federal Gypsum, did not generate confidence that it had turned the corner and was likely to survive and the creditors were concerned about prejudice to their security, the Nova Scotia Court held that in order to obtain an extension, the applicant debtor must establish three preconditions: that circumstances exist that make

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[125] *Re MuscleTech Research & Development Inc.*, 2006 CarswellOnt 720 (Ont. S.C.J. [Commercial List]).
[126] *Re Scanwood Canada Ltd.*, 2011 NSSC 306, 2011 CarswellNS 562 (N.S.S.C.).
[127] *Ibid.* at para. 1.
[128] *Ibid.* at para. 7.
[129] *Ibid.* at para. 18.
[130] *Ibid.* at para. 16.
[131] *Re Humber Valley Resort Corp.*, 2008 CarswellNfld 262 (N.L.T.D.).
[132] *Ibid.* at para. 10.
[133] *Ibid.* at para. 15.
[134] *Ibid.* at para. 21.

the order appropriate; that the applicant has acted and continues to act in good faith; and that the applicant has acted and continues to act with due diligence. The Court concluded that the statutory requirements had been satisfied and the continuation of the stay was supported by the overriding purpose of the *CCAA*, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court, and to prevent manoeuvres for positioning among creditors in the interim.[135] The Court relied on the monitor's assessment that the debtor, by its actions, was acting in good faith and with due diligence and moving forward towards the preparation of a plan.[136]

The Ontario Superior Court of Justice in *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* extended the stay provisions and interim financing over the objections of a secured creditor in a *CCAA* proceeding that involved a sales process.[137] The Court held that it should have regard to the number of employees who would be affected if the business were shut down and the nature of that impact on the community. However, by itself, that consideration would not be sufficient to decide the issue if the secured creditor were able to demonstrate a significant adverse impact on its security position likely to result if the interim financing were approved.[138] The quantum of the probable decline in the creditor's position, as calculated by an accounting firm, was neither large nor material in the context of the creditor's overall exposure. The substitution of a trustee to take carriage of the sales process under a bankruptcy proceeding would entail considerable additional costs and time, which had to be weighed against the estimated decline in security that would result if the interim financing was approved.[139] The monitor had given its opinion that it would expect the current sales process to yield an amount in excess of the amount likely realizable from a sales process conducted by a trustee in bankruptcy.[140] The evidence before the court was not conclusive that the position of the secured creditor would be adversely affected by an extension of the *CCAA* proceedings and approval of additional interim financing any more than an assignment into bankruptcy of the applicants.[141] As a result, the stay of proceedings under the *CCAA* was extended and interim financing in an amount not exceeding $1 million was approved.[142]

Notwithstanding objections raised by two secured creditors, the British Columbia Supreme Court in *Pacific Shores Resort & Spa Ltd.* granted an order extending the

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[135] *Re Federal Gypsum Co.*, 2007 CarswellNS 629 (N.S.S.C.) at para. 16.

[136] *Ibid.* at para. 14.

[137] *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.*, 2008 CarswellOnt 4046, 45 C.B.R. (5th) 87 (Ont. S.C.J.).

[138] *Ibid.* at para. 4.

[139] *Ibid.* at para. 6.

[140] *Ibid.* at para. 7.

[141] *Ibid.* at para. 8.

[142] *Ibid.* at para. 9.

stay in a *CCAA* proceeding.[143] Madam Justice Fitzpatrick found that there was no doubt that the applicants were insolvent and that they faced substantial challenges in a restructuring. However, for the purposes of the application for an extension of the stay, it was evident that there were substantial assets that would be a potential source of refinancing or sale with respect to both resort projects.[144] After reviewing concerns raised by the creditors, Fitzpatrick J. did not accept their submissions that there was any justification for their lack of faith in management.[145] Justice Fitzpatrick was satisfied that there was a *bona fide* intention to present a plan, and that although the secured creditors claimed they would not vote in favour of any plan, the actions of the creditors in the circumstances indicated that they were open to negotiations and that those negotiations could possibly result in a refinancing of the debt that would allow the debtors to go forward on some restructured basis.[146]

The Court in *Pacific Shores Resort & Spa Ltd.* distinguished the instant circumstance from cases in which there were undeveloped or partially completed real estate projects where the courts have drawn a distinction between such situations and one where there is an active business being carried on within a complicated corporate group.[147] In Fitzpatrick J.'s view, the debtors were a highly integrated group and the protections under the *CCAA* must be for the entire group in order that they can seek a solution to their financial problems as a whole. It may be that individual solutions will be found for particular assets or debts, but that could be accommodated within the *CCAA* proceedings as sought by the applicants for that integrated group.[148] Justice Fitzpatrick observed that there were a substantial number stakeholders involved: the applicants, the secured creditors, the unsecured creditors, the owner groups and strata corporations, the thousands of homeowners and the hundreds of employees.[149] The Court held that there could be no doubt that a receivership would result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. The prejudice to the other stakeholders was palpable in the event of a receivership.[150] In the result, the applicants had satisfied the onus of establishing that they were acting in good faith and with due diligence and that the making of a further order extending the stay was appropriate. The order was granted as sought, including an interim financing charge, an increased administration charge, and a directors'

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143 *Re Pacific Shores Resort & Spa Ltd.*, 2011 BCSC 1775, 2011 CarswellBC 3500 (B.C.S.C. [In Chambers]) at para. 59.

144 *Ibid.* at para. 24.

145 *Ibid.* at para. 33.

146 *Ibid.* at paras. 38, 43. Fitzpatrick J. considered the provisions of s. 11.2 of the *CCAA*, and in particular, the factors set forth in s. 11.2(4). She was satisfied that the requested interim financing order was appropriate. *Ibid.* at paras. 48-49.

147 *Ibid.* at paras. 51-52.

148 *Ibid.* at para. 56.

149 *Ibid.* at para. 57.

150 *Ibid.* at para. 58.

charge up to $700,000.[151] The creditor's application to appoint a receiver was dismissed.[152]

In *Hunters Trailer & Marine Ltd.*, an application for extension of the stay and increase in interim financing was dismissed by the Court, which held that the debtor had failed to provide evidence that the benefits of extending the stay and granting further financing clearly outweighed the potential prejudice to creditors.[153] It further held that there was insufficient evidence of a reasonable prospect of successfully restructuring and a lack of confidence in governance of the debtor.[154] The Court thus allowed the debtor to remain in the *CCAA* process for just under two months, and then terminated the proceeding when it found a lack of evidence of a potential successful restructuring.

In *Envision Engineering & Contracting Inc.*, the Ontario Superior Court of Justice dismissed the motion of a creditor to extend the *CCAA* stay period of a debtor on the basis that the debtor was not able to satisfy the statutory test of good faith and due diligence.[155] The motion was brought by Alberta Treasury Branches (ATB), a secured creditor of the debtor companies, and was opposed by two creditors that were surety bonding facilities for the debtors.[156] The monitor had been unable to obtain financial information due to the holiday season and summarized in its report that based on the information reviewed to date, the debtor would be unable to advance a plan of arrangement for the benefit of its creditors.[157] The monitor sought a short extension in order to establish an appropriate course of action so that it could get the additional information for the necessary analysis.[158] Justice Beaudoin noted that the debtors were not seeking the extension of the initial order.[159]

The issue in *Envision Engineering & Contracting Inc.* was whether or not ATB could seek the extension if there was no good faith or due diligence by or on behalf of

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[151] *Ibid.* at para. 59.

[152] *Ibid.* at para. 60.

[153] *Re Hunters Trailer & Marine Ltd.*, [2002] A.J. No. 603, 2002 CarswellAlta 611 (Alta. Q.B.) at paras. 10, 14. Subsequently, during the *Hunters Trailer & Marine Ltd.*, bankruptcy proceedings, an issue arose as to the costs incurred during the *CCAA* part of the process. The issue arose in the context of whether or not the trustee had acquired any priority in interests under an insurance policy by giving notice to the insurers. While the Alberta Court found that the interest of the trustee in bankruptcy in the insurance policy was subject to the rights of the assignees of the policies, it held that the trustee should not have to bear the costs of the *CCAA* process, the interim receivership or the bankruptcy. The Court held that notice was only relevant to determining priority among assignees, at para. 90. The Court thus directed the trustee to calculate the cost burden over all security. The only exception was insurance proceeds, if any, payable to one assignee, to the extent that Court had found these potential proceeds exempt from execution.

[154] *Ibid.*

[155] *Re Envision Engineering & Contracting Inc.*, 2011 CarswellOnt 371 (Ont. S.C.J.) at para. 21.

[156] *Ibid.* at para. 1.

[157] *Ibid.* at para. 7.

[158] *Ibid.* at para. 8.

[159] *Ibid.* at para. 9.

the original applicant debtors. Beaudoin J. noted that the mandatory language utilized in s. 11.02(3) sets out the conditions precedent before the court can exercise its discretion under the *CCAA*.[160] In this case, Beaudoin J. was satisfied, based on the affidavit evidence, that the debtors had not acted with due diligence or in good faith since the making of the initial order. The applicant ATB submitted that there was no evidence of a lack of good faith or due diligence on its part.[161] Beaudoin J. agreed, but was of the view that the reference to "applicant" in s. 11.02(3)(b) had to be read in the context of the entire section. The "applicant" in that section could only mean the original debtor company. The Court was not concerned with the conduct of any other interested creditor in considering an extension to stay. In this case, the lack of good faith and due diligence on the part of the debtors was fatal to the relief sought by ATB. In the result, the request for the extension was dismissed.[162] The judgment does raise the question of how this particular approach would be dealt with in circumstances where the secured creditor seeks the initial stay order in the aftermath of a failed good faith attempt by the debtor to restructure or where all directors may resign or be removed and a monitor assumes more of a governance role.

In *Cliffs Over Maple Bay Investments Ltd.*, the British Columbia Court of Appeal overturned an order of the chambers judge extending a stay of proceedings and granting interim financing under the *CCAA* proceeding for a development project.[163] The Court of Appeal held that the nature and state of a business are simply factors to be taken into account when considering whether it is appropriate to grant a stay under the *CCAA*.[164] The ability of the court to grant or continue a stay is not a free standing remedy, and a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating compromises and arrangements between companies and their creditors.[165] A stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to creditors. If it is not clear at the initial application hearing whether the debtor is proposing a true compromise or arrangement, a stay might be granted on an interim basis, with the debtor's intention scrutinized at a comeback hearing.[166] Here, in the absence of an expressed intention to propose a plan to creditors, it was not appropriate for the stay to have been granted or extended, and the chambers judge failed to take this important factor into account.[167] While the *CCAA* can apply to a business with a single development, the nature of the

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[160] *Ibid.* at para. 11.
[161] *Ibid.* at para. 12.
[162] *Ibid.* at para. 21.
[163] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 2008 CarswellBC 1758 (B.C.C.A.).
[164] *Ibid.* at para. 25.
[165] *Ibid.* at para. 26.
[166] *Ibid.* at para. 31.
[167] *Ibid.* at para. 35.

financing arrangements may mean that the debtor has difficulty proposing a plan that is more advantageous than the remedies already available to creditors.[168] It continued to be open to the debtor company to propose to its creditors a compromise or arrangement restructuring plan. However, the *CCAA* is not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve a compromise or arrangement on which creditors may vote.[169]

Hence, the courts will exercise their discretion not to extend the stay where they find no evidence of progress being made in the development of a plan acceptable to creditors, or where they conclude that there is concern that the stay and interim financing are being used as a means to delay inevitable liquidation, or where there is a lack of confidence in the governance of the debtor corporation. The courts have sometimes treated real estate cases differently, given that the stay may be sought to complete a development project rather than to help an active business develop a viable going-forward business plan. In such instances, the courts pay careful attention to the views of creditors and other stakeholders that may be directly affected by the decision. In some instances, the court determines that it is better not to extend the stay and allow receivership or other proceedings to resolve the situation.

In 2010, in *Dura Automotive Systems (Canada) Ltd.*, the debtor sought an order for an extension of the stay of proceedings.[170] The monitor did not support the extension as it did not believe the debtor was acting in good faith and with due diligence and because a creditor that had the ability to block a plan had made it clear it was unacceptable to it. Justice Morawetz held that he was not satisfied that the debtor had met the test required to obtain an extension of the stay period; the fundamental issue in the proceedings was the pension plan deficit of approximately $9 million and Morawetz J. held that in negotiating with the pension plan administrator and unions, the debtor had changed its tactics at the eleventh hour to present the plan to the retirees, when the debtor realized that negotiations with the original group were not going to be successful, the Court finding a lack of good faith. The debtor gave every appearance that it was negotiating with the appropriate representative groups and then "by questioning the representative status of the parties at the last possible moment", the debtor had demonstrated that it was not acting in good faith and with due diligence.

In summary, in considering motions for an extension of the stay, the courts consider a number of factors in addition to the statutory requirements of good faith and due diligence, including the balance of prejudice to multiple stakeholders,

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[168] *Ibid.* at para. 36.

[169] *Ibid.* at para. 38.

[170] *Re Dura Automotive Systems (Canada) Ltd.*, 2010 CarswellOnt 894, [2010] O.J. No. 654 (Ont. S.C.J.).

the nature and state of the business, the potential for a viable plan to be negotiated, and the support or lack thereof of material creditors.

## 8. The Problem of Overreach

The issue of whether stay orders overreach in terms of the scope of the order is sometimes hotly contested. Overreach in this context is that the order addresses many more issues than what is required in an initial stay order. The applicant under the *CCAA* drafts the order, which can be 20-40 pages or more, and the court is asked to endorse the order with few parties having received notice or the opportunity to make submissions to the court. The court is frequently faced with extensive orders, sought on a very short notice basis, such that the court does not have the appropriate time or submissions from parties regarding the extent or impact of the order.

In *Royal Oak Mines*, the Court expressed concern about the growing complexity of initial orders being sought under the *CCAA* stay provisions.[171] The Court acknowledged the efficiency of bringing pre-packaged draft orders to the court in situations where the debtor corporation has first sought the input and approval of senior creditors. However, the Court expressed concern about the growing tendency to attempt to incorporate provisions to meet all eventualities that may arise during the *CCAA* proceedings. The Court held that given that stay applications are made on short or no notice, the extensive relief being sought at the initial order stage is beyond what could appropriately be accommodated within the bounds of procedural fairness. The Court held that it must balance the need to move quickly with the requirement that parties be given an opportunity to digest the information and advance their interests. The Court acknowledged the need for a certain degree of complexity in initial orders, but urged more readily understandable language in initial orders, suggesting that "they should not read like trust indentures".

This reasoning was subsequently endorsed by other courts, although it did little to curb the overreach. In *Re Big Sky Living Inc.*, in an order appointing an interim receiver, the Alberta Court of Queen's Bench struck out a number of provisions as not necessary for the protection of the estate, observing that the order sought to limit the rights of parties that had not received notice of the application.[172]

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[171] *Re Royal Oak Mines Inc.*, 1999 CarswellOnt 625, [1999] O.J. No. 709 (Ont. Gen. Div. [Commercial List]) at paras. 8, 9, 15, 17.

[172] *Re Big Sky Living Inc.* (2002), 37 C.B.R. (4th) 42 (Alta. Q.B.).

Citation: Re Redekop Properties Inc., 2001 BCSC 1892

Date: 20010302
Docket: L003294
Registry: Vancouver



# IN THE SUPREME COURT OF BRITISH COLUMBIA

**Oral Reasons for Judgment**
**Mr. Justice Sigurdson**
**Pronounced in Chambers**
**March 2, 2001**

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

-AND-

IN THE MATTER OF THE *COMPANY ACT*,
R.S.B.C. 1966, C.62

-AND-

IN THE MATTER OF REDEKOP PROPERTIES INC.,
535401 B.C. LTD., and 546837 B.C. LTD.

| | |
|---|---|
| Counsel for Co-creditors | D.K. Fitzpatrick |
| Counsel for SunLife | G. Thompson |
| Counsel for VanCity | J.Z. Ahmad |
| Counsel for the Monitor | M.I.A. Buttery |
| Counsel for Global | M.L. Palleson |

[1] **THE COURT:** The question before me is whether *ex parte* orders that I made granting a stay of proceedings under the ***Companies' Creditors Arrangement Act*** (the ***C.C.A.A.***) should continue. These orders were made in favour of three companies: 535401 B.C. Ltd. (the "numbered Middlegate company"); Redekop Properties Inc. ("R.P.I."); and 546837 B.C. Ltd. That last company, as to 80 percent, and R.P.I., as to 20 percent, are the shareholders in the numbered Middlegate company.

[2] R.P.I. is a real estate developer. It, alone or with other companies, owns the shares in seven companies that are involved in property development and the sale of commercial real estate. R.P.I. is a public company trading on the Toronto Stock Exchange.

***History of the Applications***

[3] I will start with a brief history of the orders that I have made. On December 4, 2000, I made an *ex parte* order on the application of the numbered Middlegate company for a stay of proceedings under the ***C.C.A.A.*** That company was the sole petitioner and the owner of the Middlegate Mall in Burnaby, which was subject to three mortgages totalling almost $20 million. Foreclosure proceedings had been threatened by the secured lenders, VanCity and SunLife. A comeback hearing, as

it is called, was set to consider whether to continue that order after notice was set. After some adjournments, the application to continue the original order made under the ***C.C.A.A.*** was set for early February 2001.

[4] Counsel for the numbered Middlegate company apparently came to the realization, while evaluating Middlegate's assets and considering the elements of a possible plan of arrangement, that the Middlegate numbered company could not be considered in isolation. There were, it appears, 103 condominiums in 4 developments held by separate numbered companies owned in whole or in part by R.P.I. By the time of the original comeback hearing, the first and second debenture holders of R.P.I. had given notice of default.

[5] An application was made by R.P.I. and 546837 B.C. Ltd. for an order that a stay of proceedings against them also be granted. Although I heard some argument on whether to set aside or continue the original order, I made an order to join those two new petitioners and extend ***C.C.A.A.*** protection to them as well. I considered that order to be essentially *ex parte*.

[6] After I made an initial order joining those parties, I adjourned until February 22 the applications whether to continue the ***C.C.A.A.*** protection in connection with the three

companies. Therefore, the applications before me on February 22 and 23 were the comeback hearings to determine whether any or all of the orders should continue after hearing submissions from interested parties.

***Background***

[7] Under the initial *ex parte* order and the subsequent *ex parte* orders, Ernst & Young Inc. were appointed monitor of the three companies. They have reported to me on the circumstances affecting all three companies. Through different entities, Peter Redekop has been a successful real estate developer in British Columbia. R.P.I. is the parent of seven companies in the Redekop Group, which are involved in the rental and sale of commercial real estate. The Middlegate numbered company is owned 20 percent by the petitioner, R.P.I., and 80 percent by the other petitioner, a numbered company beneficially owned by Peter Redekop.

[8] The Middlegate numbered company initially bought the property known as the Middlegate Shopping Centre in 1997, intending to redevelop the site. The company, the monitor points out, has of late been under-capitalized and is unable to complete its rezoning phase. However, it operates the shopping centre as landlord through an agent. The largest creditors of the Middlegate numbered company total $19.9

million and hold mortgage security. VanCity has a first and third mortgage and Sun Life has a second mortgage. Sun Life made its demand under the mortgage on November 22, 2000, shortly before the first order. R.P.I. has provided financial support to the numbered Middlegate company to help it meet the interest payments on the first, second, and third mortgages to the extent that the revenue from the shopping centre was deficient.

[9] I will briefly list the other companies in the Redekop Group and the name of the project that they are involved in: 549884 B.C. Ltd. (Blenheim Terrace); 543714 B.C. Ltd. (the Madison); 529901 B.C. Ltd. (the Citadel); 406751 B.C. Ltd. (Abbotsford Lane); Redekop Properties Hampton Place 3 Inc. (the Regency).

[10] Historically, R.P.I. has provided support to its subsidiaries on an ongoing basis amounting to about $64,000 per month. Recently and presently the majority of the funding has been going to Middlegate to meet its interest payments. As of January 31, 2001, R.P.I.’s cash balance was about $1.5 million, the main source being an advance on the equity that R.P.I. expects to receive in the Regency project.

[11] I will describe R.P.I.’s projects through its subsidiaries. The Madison is a 63-unit residential building

with 10 strata retail units. It is located on 4th Avenue in Vancouver and it presently holds the remaining 34 residential suites and eight retail suites. It is managed by a management company and R.P.I. supplements its debt service by about $6,500 each month.

[12] The Regency is a joint venture project in which R.P.I. has a 50 percent interest. It is a 123-unit condominium development near UBC with 19 units sold or subject to sale. R.P.I. does not receive any proceeds from the sales as its equity in each unit is being used to pay off a loan totalling about $1.5 million from its joint venture partner.

[13] The Middlegate Shopping Centre's only source of funding is the cash flow from the shopping centre. R.P.I. has been required to provide funding, estimated to average $44,000, to supplement the shopping centre's income to enable it to meet expenses and debt servicing.

[14] Blenheim Terrace is a multi-level, mixed use building on Blenheim and 4th Avenue. The 50 residential units were sold en bloc and of the eight commercial units, two are occupied by R.P.I., one is leased, and the remaining five are unoccupied. R.P.I. has been providing funding to the extent of $3,000 for ongoing costs and $9,500 for debt service. The company

expects an offer to lease on one unit and an offer for sale on three units shortly.

[15] The Citadel is a 33-unit apartment building in Surrey that is managed by Colliers. All suites are rented. R.P.I. supplements the cash on a monthly basis to the extent of about $1,000 for expenses and debt servicing.

[16] According to the Monitor, equity beyond the secured debt is assured in the Regency, Citadel, and Madison projects, but not in the Middlegate or Blenheim. In recent years, R.P.I.'s practice has been to incorporate a new entity for each project. Newer projects have yet to be launched.

[17] There are first and second debenture holders charging the assets of R.P.I. The first debenture holders are owed about $5.7 million and the second debenture holders are owed $10.25 million. They charge the various assets of R.P.I.

***The Plan***

[18] In the first Monitor's report of January 30, 2001, it described a plan. At that stage it was to salvage the numbered Middlegate company as that was the only company then seeking protection of the ***C.C.A.A.*** The plan was described as two strategies being pursued concurrently: (1) source a joint venture partner to finance the project and proceed with the

development of the shopping centre, and; (2) sell the shopping centre in its present state.

[19] By the recent hearing last week concerning the joinder of R.P.I. and the other numbered company, the plan had changed somewhat. It was described in the petitioner's brief that the company would sell each project in the ordinary course of business and pay its registered lenders in accordance with their priority. It would continue to seek a joint venture partner for Middlegate and develop same unless a sale was available. The company's "germ of a plan", as Mr. Fitzpatrick referred to it, was that it would pay a million dollars immediately upon approval of the plan, the company would appraise the value of its property on a liquidation basis and the company would issue shares. The shares would be the only prospect of recovery for the unsecured creditors and the common shareholders of R.P.I. would get nothing if there were no plan.

[20] The petitioner sought an order to extend the stay under the ***C.C.A.A.*** until April 30, 2001, to put a plan in place and to obtain the requisite approval of the creditors.

[21] The Monitor reported on the prospects of the plan by indicating that the primary stakeholders, in presenting any plan of arrangement to the creditors of R.P.I., would be the

holders of the first and second debentures. Both sets of debentures hold security against all the assets of R.P.I. The Monitor's view was that if there was no recovery on the inter-company loan made by R.P.I. to Middlegate, in the liquidation proceeding the amounts owing to the first series debentures would not be paid in full. This inter-company loan from R.P.I. to the numbered Middlegate company appears to be in the range of $6.3 million.

[22] There are a limited number of unsecured creditors. The Monitor thought that it appeared that there would only be partial recovery available to certain of the secured creditors and no recovery available to the unsecured creditors unless there was a successful restructuring plan. For the plan to be successful, the Monitor thought the proposal would have to be more attractive than any other alternative. This plan would also need to appeal to the unsecured creditors who, on the information currently available to the Monitor, would appear to be facing the prospect of receiving no recovery on their outstanding debt.

[23] The Monitor's view was that for a real estate company such as R.P.I. to execute a successful restructuring, the following elements would need to be available and attractive to these creditors most affected by a plan:

1. some level of currency to provide short term appeal to induce creditors to await the longer term benefits being offered in the plan;

2. prospective new profitable projects;

3. sufficient capital available to undertake and execute those projects.

[24] The Monitor pointed out that as a public company R.P.I. has available the currency of its publicly traded shares to offer to creditors as an inducement and a substantial cash position (it appears over one million or more) available as an initial payment available to secured creditors, but not subordinated creditors.

[25] The Monitor also pointed out that the petitioners have provided information as to the projects it advises are presently under consideration and the basis on which such projects could be financed, even in light of R.P.I.’s present substantial shortage of capital. At the last hearing, when the stay of proceedings was extended to the additional companies, I suggested that the adjournment date for this hearing gave the company an opportunity to provide more cogent evidence about their plan.

[26] The Monitor points out that the petitioners are contemplating a planned structure that would provide recovery to secured creditors of at least what would be realized in the

event of the liquidation of the group. The Monitor gave this rather guarded assessment in his second written report as follows:

> Based on the foregoing, it would appear that R.P.I. has available to it the necessary elements with which to construct a plan of arrangement for presentation to its creditors. **What is not in evidence at this time, however, is whether each of these elements is available in sufficient amounts that such a plan of arrangement would be acceptable to creditors. Until the petitioners have quantified the financial benefits of those future projects, and secured commitments with respect to financing of those projects, the future appeal of R.P.I. as a going concern will be uncertain. As the going concern future of R.P.I. will have a significant bearing on the value of any shares which it may propose to offer creditors in partial settlement of present liabilities, that element of the petitioner's plan also cannot be quantified at this time.**
>
> [emphasis added]

[27] In the concluding paragraph of the Monitor's report, it reported as follows:

> In the view of the Monitor, it is feasible that the petitioner can present to the creditors an appropriate plan of arrangement to effect a general restructuring of their affairs. The group has significant cash available, and the prospect of offering shares in the public company, to provide an early incentive for support by creditors. The group also has prospects for new development projects which would be a basis for continuing operations. **However, not all of the elements which, in the Monitor's view, would be required to formulate such a plan are known with sufficient certainty at this time to be able to assess whether that plan would be acceptable to the affected creditors.**
>
> [emphasis added]

***Positions on the application***

[28] Mr. Fitzpatrick, counsel for the petitioner companies, sought the continuation of the protection of the ***C.C.A.A.*** until April 30, 2001, in order to put a plan together that might be successful. Mr. Thompson, representing SunLife, and Ms. Ahmad, representing VanCity, opposed the stay, or alternatively took the position that the Middlegate property should be excluded from the ***C.C.A.A.*** proceeding and I should exercise my discretion to allow them to proceed with their planned foreclosure proceedings.

[29] Mr. Palleson appeared for the first debenture holders and opposed the order sought. No one appeared for the second debenture holders, although they were duly served, nor did anyone appear for any unsecured creditors. Mr. Knowles appeared for the Monitor.

[30] The relevant sections of the ***C.C.A.A.*** are as follows. Section 11(3) provides:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[31] Section 11(4) provides that on an application that is not an initial application, a court may make the following types of orders on such terms as it may impose:

> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[32] The ***Act*** in s. 11(6) sets out the burden of proof on the applicant companies, and it provides:

> (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is

> acting, in good faith and with due diligence.

[33] To summarize, the statute makes it clear that the burden on the applicant on this application is to satisfy the court that the circumstances exist that make such an order appropriate and the applicant has acted and is acting in good faith and with due diligence.

[34] The appropriateness of the order, I think, has to be considered with the purpose of the statute in mind, and I turn to some authority in that respect.

[35] In the leading case of ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 51 B.C.L.R. (2d) 84 (C.A.) at 88, the Court said:

> The purpose of the ***C.C.A.A.*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company or a loan company. When a company has recourse to the ***C.C.A.A.*** the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at

> bay, hence the powers vested in the court under s. 11.

[36] In dealing with the broad policy objectives of the ***Act***, the Court said at p. 91:

> Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the ***C.C.A.A.***, to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

[37] In ***Re Pacific National Lease Holding Corp.***, [1992] B.C.J. No. 3070 (Q.L.); (17 August 1992), Vancouver Registry, A922870 (B.C.S.C.), the principles to consider on an application under the ***Act*** were set out by Mr. Justice Brenner (as he then was) in a case where leave to appeal was denied by the Court of Appeal. He said the following:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.

(3) During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company.

(4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

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

[38] I pause here to observe that I do not think that the burden is on the creditors opposing this order to prove that it is doomed to fail. The position the creditors are taking is not framed that way. They are simply opposing the order that is sought by the petitioners to continue the ***C.C.A.A.*** protection after notice to them. This is an application to confirm or continue an original *ex parte* order. I think the burden rests on the company to show not only that they have acted with due diligence and in good faith, but that the continued protection of the ***Act*** is appropriate. This is not a case like ***Re Philip's Manufacturing Ltd.*** (1992), 67 B.C.L.R. (2d) 84 (C.A.), which involved an application to set aside an

order of another Chambers judge on the ground that the plan was doomed to fail.

[39] On an application of this sort, I must weigh the interests of all affected parties. I pause also to note this observation in ***Re Lehndorff General Partner Ltd.*** (1993), 17 C.B.R. (3d) 24 (Ont.Gen.Div. [Commercial List]), at 32:

> The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* the creditors …

[40] The applicants argue that an application of those considerations requires a stay to determine whether, prior to April 30, a plan, which they now concede is just a germ of a plan, can be formulated that would be approved and in the interest of everyone. The respondents, i.e., the secured creditors including the first debenture holders, all argue that there is really no plan, simply a hope and a prayer, and that there is no broad constituency or wide public interest or ongoing business that requires the support of a court order staying proceedings under the ***C.C.A.A.***

***The Middlegate Numbered Company***

[41] I will deal first with the Middlegate property. The secured creditors on this property argued that the order should not be extended or that this property at least should be exempted from the ***C.C.A.A.*** proceedings so that they can pursue their foreclosure remedy.

[42] The Middlegate property was bought by the Middlegate numbered company in 1997. The shopping centre is 120,000 square feet and was built in 1960 on a 9.78 acre site. It is on Kingsway in South Burnaby. The owner's intention was to redevelop the site. Since 1997, the company has operated the shopping centre as landlord using the services of Colliers Macaulay Nicolls to collect rents and manage the property. As the owner is undercapitalized, other than initial planning and the completion of rezoning applications, the redevelopment of the site has not commenced. It requires $2.27 million to proceed with the rezoning. The registered charges against the Middlegate property are: VanCity's first mortgage of $10 million; Sun Life's mortgage of $7.915 million; and VanCity's third mortgage of $2 million, for a total of $19.915 million, together with some accumulated interest over the last while. Under the order I made on February 5, 2001, those parties as of that date are not receiving interest payments.

[43] The Middlegate numbered company's arguments are as follows. They say that given time the Middlegate numbered company would find a joint venture partner or a sale sufficient to generate proceeds to pay out the mortgages and to pay money on its indebtedness to R.P.I. for the benefit of all R.P.I.'s creditors. They say that they have pursued the application for a stay in connection with Middlegate in good faith and with due diligence. The Middlegate numbered company submits there is sufficient equity in the property to satisfy the three mortgages and more.

[44] The parties have filed appraisal evidence. R.P.I. filed an appraisal dated October 2000 from Duncan Elliott Appraisers, which stated the estimated current market value under the present zoning was $22,100,000 and under the proposed rezoning was $28,480,000. On December 15, 2000, Sun Life obtained an appraisal from CB Richard Ellis indicating the market value as of December 15, 2000, was $14,200,000.

[45] The petitioner argues that the intended purpose of the Ellis appraisal, as I will refer to it, was a court ordered sale, whereas the Elliott appraisal was to estimate the proper value as a development site. The petitioner argues that the Ellis appraisal indicates the market has bottomed out. In a letter of January 31, 2001, Mr. Elliott indicated that the

fundamental difference between the value conclusions was based on terms of reference, his being based on a conventional definition of market value, and that at this time, “we are still clearly in the lower part of the cycle although there are some signs that some sectors of the real estate market are or have been already recovered significantly.” He says that at this time, in order to meet the criteria of a willing seller and buyer, a longer than normal market exposure period is required to effect a sale. He suggests that the Ellis appraisal appears to have been severely discounted to effect a forced sale. Mr. Elliott says in his opinion, “the conclusions drawn in the CB Richard Ellis valuation and expressed in a letter provided to us suggests that the value conclusions drawn are based on two different concepts of market value and that there are additional fundamental disagreements about methodology in arriving at a final conclusion.” In a more recent letter, Mr. Elliott challenges the approach that was taken by Ellis and says that it significantly understates the value, ignores its substantial size, and in essence double discounts the land by using low unit rates on land sales he challenges and then again discounting to reflect a long holding period.

[46] Mr. Luke Zych, a real estate investment officer for SunLife Assurance, deposed that based on his extensive experience in real estate and in reviewing the Ellis appraisal, he did not believe that the development of the shopping centre was feasible at this time and will not be for at least two years. He notes Ellis indicates as follows:

> Under current conditions it is highly questionable that redevelopment is viable. Housing starts in British Columbia have dropped from 25,210 in 1997 to 16,309 in 1999 reflecting the current recessionary housing environment. Specifically in Burnaby housing starts dropped from 1,058 units to 483 units during the same period. This situation has occurred due to the slow economic growth currently being experienced by British Columbia. As well, condominium sales have been negatively impacted by 'leaking condo' concerns … current new projects have experiencing slow absorption. Typical sale rates arranging from 1 to 4 units per month per project and averaging around 2-1/2 units per month. (See Addendum "K"). The proposed redevelopment of the subject will provide approximately 750 to 800 residential units. At a sales rate of 2.5 units per month this represents an absorption period of approximately 300 months or 25 years. This goes well beyond any reasonable time horizon for development. Accordingly, new development is not considered to be viable at this time.
>
> With this in mind, the highest and best use for the property is considered to be a holding property until marketing conditions improve substantially in order to allow for redevelopment to occur. Once the market is healthy, it is expected that the whole project will take four to five years to absorb.

[47] Mr. Zych contends that, taking into account poor market conditions, declining land values, and declining rental

income, the Ellis appraisal of $14,200,000 is more appropriate. He said neither appraisal provides any discount for sale, but given the ***C.C.A.A.*** proceedings, he thinks that a discount is appropriate. He indicates that the Ellis appraisal indicates a 25-year absorption rate for development, whereas in a healthy market a four to five-year absorption period is expected. He also notes that the Ellis appraisal indicates that net income from the mall has declined from $1,025,000 in 1997 to around $800,000 today, and this downward trend, he says, will probably continue. He indicates that the Ellis appraisal notes that land sales have been extremely slow, and sales have indicated the substantial drop in value. He also indicates that the Middlegate Mall was sold in a very heated market compared to the current market. In his opinion, an appraised value less than the original price of $20,700,000 is necessary.

[48] He contends it is difficult to accept the current value of the property as higher than it was in 1997 and that the sale of the property would not yield sufficient funds to satisfy VanCity’s third mortgage.

[49] I think that the view that Mr. Zych takes of the market is supported by the material attached to the affidavit of David Bowra. Mr. Bowra is a chartered accountant with

PricewaterhouseCoopers and was retained to assist the debenture holders, the first debenture holders, in their consideration of the proposed restructuring plan and in reviewing the equity positions in the various properties. He deposed that he reviewed the appraisals with Neil Acheson, a vice-president of his firm who has extensive experience in Canadian real estate development. He says that, given the market may be three to five years away from absorbing a project of this size and type and both appraisers agree that it would take two to three years to successfully redevelop the Middlegate property, even if one accepts the scenario of recovery of $20 million, it will be insufficient to pay the amounts under the mortgages of $19.9 million, costs, interest and incidental charges such as property taxes. Given that, he says, there will be insufficient money to pay out the mortgagees.

[50] The applicants argue in connection with the Middlegate property and the plan generally that it is too early to tell if the plan will come to fruition or not.

[51] The secured creditors opposed the stay of the Middlegate foreclosure for a number of reasons. They say that it is not appropriate to continue the order. They say that there is no reasonable chance of success given that it is unlikely there

will be sufficient monies to satisfy the secured creditors and delay to them in commencing and continuing foreclosure proceedings is to their prejudice. They argue that the authorities require that the interests of all creditors be considered and, given the circumstances surrounding the valuation, it is not reasonable to conclude there is any reasonable prospect of a plan succeeding, at least not one concerning Middlegate.

[52] I find, on the evidence, the Middlegate numbered company's position to be somewhat illogical. They argued that the value of the shopping centre is greater or equal to what they paid for it in 1997 when, by the weight of the evidence, it was a hot market. The evidence filed by the companies suggests that the market may now have just bottomed out. The evidence of Mr. Redekop and his appraiser indicates that the market has fallen since that time and indicates that the purchase was made in a hot market. It appears to me that when Mr. Bowra agreed on cross-examination that in time a greater amount may be recovered from this property, he was referring to a significant time to pass to be able to generate such value.

[53] The evidence of negotiations for the sale of Middlegate does not provide any cogent evidence that the market value

within a reasonable time might exceed the debt and taxes against the property. There is no evidence of a possible sale, other than an offer of February 5, 2001, from a numbered Saskatchewan company where an offer of $17 million has been countered by the Middlegate company at $22,600,000 on February 9th. I was shown the documents and was told there was no response for that counteroffer as of yet, and while I have reserved on this matter over the last week I have heard nothing further on that sale and assume that no reasonable counterproposal has been made.

[54] The secured creditors also argue that there is another factor that I should consider that is material to whether I should continue the ***C.C.A.A.*** protection. The secured creditors argue that ***C.C.A.A.*** protection should not be continued in connection with the Middlegate numbered company because, in essence, there is no ongoing business that is the subject of these proceedings. In particular, they say that the company that is the subject of the Middlegate application is not a going concern with employees and unsecured creditors that are impacted by the possible demise of the company. They say it is different - it is simply a holding company, holding a shopping centre managed by an agency firm.

[55] The respondents argue that the ***C.C.A.A.*** is essentially and generally designed for corporations involving a host of secured, preferred, and trade creditors, employees and shareholders. The evidence indicates that even when R.P.I. was brought under the umbrella of ***C.C.A.A.*** protection, there was essentially only a landholding and land sale operation run by management companies with few employees. The respondents argue that this is a factor that tends to indicate that this case is not an appropriate case for ***C.C.A.A.*** protection.

[56] I think that the following passage suggests that the existence or possible continuation of an ongoing business is at least a factor to consider when determining whether it is appropriate to make an order. This was as much as what was said by Mr. Justice Tysoe in ***Re United Used Auto & Truck Parts Ltd.*** (1999), 12 C.B.R. (4th) 144 (B.C.S.C.) at 150, where he said the following in the context of what was more clearly an ongoing operation with potentially affected creditors and employees:

> In the present case, the Petitioners have substantial land holdings and an operating business. (They employed 75 people.) It is their intention to reorganize their affairs in order to save the auto wrecking business. They have a legitimate concern that an en bloc sale of the land in the foreclosure proceedings could bring an end to the operating business. In my view, it is not an act of bad faith to seek the protection of the CCAA in order to save

> the operating business. **The arguments of the secured lenders in this regard would have been more persuasive if the only business of the Petitioners was land holdings, but the Petitioners do have an active business which must be considered.**
>
> [emphasis added]



[57] Finally, VanCity argues that it is the one most at risk concerning the Middlegate property. During the stay they are not receiving interest payments. They say there is no equity. The VanCity mortgage provides for an increase in interest upon default, which they claim is an enforceable provision.

[58] The secured creditors argue that there is no need, given the relief that the company is seeking, to continue under the protection of the ***C.C.A.A.*** The creditors argue that the relief that the Middlegate numbered company seeks can be provided by the court in the foreclosure proceeding during the course of a redemption period. If the court finds the circumstances are appropriate, the redemption period might be extended on a number of occasions. The petitioner responds that foreclosure proceedings cast the company and the property in a poor light, but I have difficulty seeing how that is really much different from the ***C.C.A.A.*** protection proceedings.

[59] In a moment I intend to consider the continuation of the *ex parte* order that is sought by the other two companies. I

think that the Middlegate company can be isolated. The applicants are essentially looking for the generation of cash, hopefully by sale or joint venture from the Middlegate property, to pay towards the debt to R.P.I.

[60] I think that in considering the fairness to all the parties, including the debtors and the creditors, I have discretion to make an order that the stay be lifted in order to allow the secured creditors to pursue their rights of foreclosure. I think that is the appropriate order in all the circumstances. The evidence persuades me that in all of the circumstances it is very unlikely that there is sufficient equity to satisfy the charge holders. Although I see some prejudice to the creditors in being delayed in realizing on their security, given that they are not receiving interest and given that the market conditions could turn against them, particularly in the case of VanCity, I think that it is appropriate to allow them to proceed to foreclose in the usual way.

[61] I do that for a number of reasons. Firstly, I am satisfied that the protection the company wishes to obtain is equally available in practical terms in a foreclosure proceeding, and the foreclosure proceeding allows the secured creditors to begin to enforce their security. The options of

seeking a joint venture partner or selling are just as available in a foreclosure as they are under the protection of a ***C.C.A.A.*** proceeding.

[62] The other arguments to which I have referred also have merit. Logic suggests that the value of the project in the existing market conditions is unlikely to exceed the original 1997 price. To not allow the secured creditors to attempt to enforce their security would be to allow the company to speculate with the risk of prejudice weighing too heavily against the secured creditors, particularly VanCity.

[63] It is also a factor that this type of company is not the classic ongoing business to which ***C.C.A.A.*** protection is often afforded. I do not say that protection might not, in appropriate circumstances, be extended to companies with few unsecured creditors and no real ongoing business, but I think that the relative absence of these things are factors to consider in determining whether to continue an order involving a company or to allow the secured creditors to foreclose.

[64] Accordingly, I would exercise my discretion and exempt the Middlegate numbered company from the ***C.C.A.A.*** proceedings and not continue to stay the order in that respect.

[65] I will now consider whether or not I will set aside or continue the order in connection with the other two companies. These other two companies argue that the order should be extended. Mr. Fitzpatrick argued that the burden on him was to show that the companies had acted in good faith and were proceeding diligently, and that there is a germ of a plan, the elements of which were described by the Monitor that I have set out. The petitioners argue that that is sufficient in the circumstances for an order that the stay continue.

[66] The petitioners stated in their brief that, “a stay will only be ordered where there is a reasonable chance the insolvent company can continue to operate its business as a going concern.” The petitioners also referred to the ***Lehndorff*** passage and stressed this argument in their submissions that, “… it is otherwise too early for the court to determine whether the debtor company will succeed.”

[67] They argue that the elements of the plan described above exist and that the affairs of the company should be regularized in the next two months to permit this. They rely on possible funds coming from the sale or joint venture development of the Middlegate property.

[68] They argue that the third mortgage is secured by a pledge of 500,000 shares of Wall Financial Corporation, currently

trading at about $3.05 a share. The company says that the cash outlay, given the restriction on the payment of interest expenses on Middlegate, will, according to the Monitor's report, mean that they will only expend about $270,000 over the next two months. This is the period of time for which they seek the stay to continue. They argue that the proposal, if completed, will benefit the shareholders, second debenture holders, and unsecured creditors. Mr. Redekop says that if there is a receivership of the company, he expects that the cost will substantially exceed the costs under ***C.C.A.A.*** proceedings because the proceedings under the ***C.C.A.A.*** are unified.

[69] The germ of the plan is that the company will pay a million dollars out of the available cash within 30 days and will pay the trustee on behalf of the debenture holders a distress amount, which is the estimate of the amount that the first debenture holders might recover anyway in a liquidation or bankruptcy, adjusted downward for the earlier cash payment and the value of the publicly traded securities they will receive. The second debenture holder, it will be proposed, would receive Class B non-voting common shares and some cash payment. The unsecured creditors would also receive some Class B non-voting participating shares.

[70] The first debenture holders oppose the ***C.C.A.A.*** order continuing in connection with R.P.I. and the other numbered company. They argue there would be no additional costs from the appointment of a receiver as there would be one receiver. They argue that a receivership or the plan that the petitioners want to advance is essentially a liquidation as there will be no assets or real operating business at the end of it other than the hope of future projects. Mr. Palleson says that there has been an erosion in the confidence of his client in the management of these companies.

[71] The debenture holders say the cash position of R.P.I. has eroded by a million dollars since the end of December. This was explained by the Monitor. The Monitor demonstrated that, after deducting the share of cash belonging to the joint venture, the consolidated cash on hand was $1.94 million as of December 31st, the cash position as of January 31st was $1.44 million, and that the balance of the cash flow, the petitioners say, will still be less than $300,000 that should be expended over the next two months. (I received a further addendum to the Monitor's second report, which I read this morning.)

[72] One of the factors that may be considered at this stage, in determining it is appropriate to continue an order, is

whether the company has demonstrated the possibility of a reasonable plan. I think that often it is too early in the scheme of things to tell, but here the original order concerning the numbered Middlegate company was made almost three months ago.

[73] Mr. Bowra is a person experienced in dealing with plans under the ***C.C.A.A.*** He said that R.P.I.'s intention to rely on joint venture partners and new public share offerings to survive as a going concern is simply not realistic. He was cross-examined, and his opinion which he based on these factors was not, in my view, seriously or successfully challenged. I found his evidence compelling. He said that the ***C.C.A.A.*** protection would be of little utility for several reasons: it has no prospect of restructuring its affairs to be profitable in the near future given current market conditions and the financial position of the properties; it has no current projects under development that appear to be profitable, and one potential development property is overburdened by debt and unlikely to provide any equity to RPI in the short term; and, the current real estate market is soft and there is no sign of improvement in the year ahead.

[74] I agree with Mr. Bowra's assessment that this proposal is better described as a wing and a prayer. Mr. Fitzpatrick

suggested that Skeena Cellulose presented an even more dire situation that came to fruition, but Mr. Bowra, who was involved in that proceeding, indicated that there was significant government support, including a guarantee and a payout of a secured charge and substantial long-term financing. Those elements are obviously not present here.

[75] I think it is also a factor that there are no employees to speak of, there are few unsecured creditors because there is really no going concern business, and the company's projects are built and managed by management companies. Mr. Fitzpatrick says I should look at the prospectus and ascertain that R.P.I. is a going concern, but I do not think that really rebuts this point. I point out this passage in ***Royal Bank of Canada v. Fracmaster Ltd.*** (1999), 11 C.B.R. (4th) 230 (Alta C.A.) at 238, that has some pertinence:

> Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the best interest of the creditors generally: ***Lehndorff General Partner Ltd., Re*** (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List], at 31. There must be an ongoing business entity that will survive the asset sale. See, for example, ***Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re***, (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]); ***Solv-Ex Corporation and Solv-Ex Canada Limited***, (November 19, 1997) Doc. Calgary 9701-10022 (Alta. Q.B.).

[76] Although on the one hand, the possible benefit to the companies, all of the creditors, and the shareholders of R.P.I. are factors that must be given heavy consideration, as I do, I do not think it is appropriate for the stay under the ***C.C.A.A.*** to continue.

[77] I reach that conclusion for these reasons. I think that given all the evidence before me, there is no reasonable prospect of success for this plan. I base that on a number of factors, including the apparent lack of equity in the Middlegate property and apparent absence of sufficient equity in the various projects to satisfy in full the debt to the first debenture holders. There are no monies for the second debenture holders. In the circumstances, I think that the companies are proposing a plan where they are seeking to liquidate their assets and hopefully interest the first debenture holders and others in taking shares in the development of presently unacquired and essentially unknown projects. I think that this plan, if not described as a wing and a prayer, might be accurately described as a gamble, particularly from the perspective of the first debenture holders. It appears extremely unlikely that they would approve it.

[78] I also think that the plan is essentially a liquidation plan, but it is one that contains a significant risk to the first debenture holders. It is significant that it is several months from the first order in December 2000, but the plan is still so tentatively formulated. That is a factor that I can give some consideration to, given the passage of time.

[79] I also think that I am entitled to give some consideration to the nature of the enterprise. I think that the more that the operation approaches a going concern, with employees potentially losing jobs and ongoing creditors losing customers, the more appropriate it may be to make orders for protection. Conversely, when those elements are absent, as is the case here, it seems less appropriate.

[80] Therefore, balancing all of the interests of all relevant parties, as best I can on the evidence before me, I exercise my discretion not to continue the orders under the ***C.C.A.A.*** because to do so would not be appropriate. Accordingly, the petitions are dismissed.

"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1376

Date: 20150709
Docket: S154746
Registry: Vancouver

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

**And**

**In the Matter of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, as amended**

**And**

**In the Matter of North American Tungsten Corporation Ltd.**

Petitioner

Before: The Honourable Mr. Justice Butler

## Oral Reasons for Judgment

In Chambers

| | |
|---|---|
| Counsel for the Petitioner: | John R. Sandrelli<br>Jordan D. Schultz |
| Counsel for the Monitor, Alvarex & Marsal Canada Inc.: | Kibben M. Jackson |
| Counsel for Callidus Capital Corporation: | William E.J. Skelly |
| Counsel for Government of Northwest Territories: | Mary Buttery<br>H. Lance Williams |
| Counsel for Wolfram Bergbau and Hütten AG: | Jonathan McLean<br>Angela L. Crimeni |
| Agent for Counsel for Global Tungsten & Powders Corp.: | Jonathan McLean<br>Angela L. Crimeni |
| Place and Date of Hearing: | Vancouver, B.C.<br>July 8, 2015 |
| Place and Date of Judgment: | Vancouver, B.C.<br>July 9, 2015 |

[1] **THE COURT:** This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to s. 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[2] I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.



## Background

[3] The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

[4] The Company sought protection under the *CCAA* as a result of circumstances mostly beyond its control, including a severely depressed world market for tungsten. At the reduced price the Company has been receiving for its tungsten, the Cantung Mine was generating sufficient cash flow to pay the majority of its operational and administrative costs but was unable to meet its financing costs. At the time of the Initial Order, the Company was experiencing significant cash flow problems.

[5] Alvarez & Marsal Canada Inc. was appointed Monitor under the Initial Order. A summary of the amounts claimed as owing by secured creditors and their respective security interests as at July 7, 2015 is set out in the Monitor's Fourth

report. I will refer to that summary because an understanding of the security interests held by the principal creditors is necessary to consider the issues raised on this application.

[6] Callidus Capital Corporation is owed approximately $13.33 million. This is secured by all present and after-acquired property not related to Mactung. That includes more than 200 pieces of mining equipment used at the Cantung Mine. The Monitor has opined that there is sufficient value in the equipment to satisfy that debt.

[7] The Government of Northwest Territories ("GNWT") is owed $24.67 million. This is secured by all present and after-acquired property related to Mactung. While there is some issue and ongoing negotiation about the actual amount of debt which arises from the Company's reclamation obligations, it is significant.

[8] Global Tungsten & Powders Corp. ("GTP") and Wolfram Bergbau and Hütten AG ("WBH") are the Company's only two customers for all of the tungsten produced from the Cantung Mine. The total indebtedness to the customers is approximately $8.16 million. They also hold security over all present and after-acquired property related to Mactung.

[9] Debenture holders are owed $13.58 million, which is secured by all present and after-acquired property of the Company.

[10] Queenwood Capital Partners II LLC ("Queenwood II") is owed approximately $18.51 million, secured by all present and after-acquired property of the Company. The principals of Queenwood II are related to Company insiders.

[11] The total amount of the secured debt is in the range of $80 million. There is also approximately $14 million in unsecured liabilities. The reported book value of the assets at the time of the Initial Order was approximately $64 million, which included a value of $20 million for the Mactung property. The fair market value or realizable value has not been determined by the Monitor.

[12] The somewhat unique situation here is that Callidus does not have security over the Mactung property and the GNWT and the customers do not have security over the Cantung property.

[13] The stay granted by the Initial Order expired yesterday, but I extended it until July 10, 2015 to allow me to consider the arguments advanced on this application. Since the Initial Order, management of the Company has been working in good faith to develop a plan of arrangement. Management has developed an operating plan to manage cash flow through the next several months. I will not refer to the projected cash flow except to say that it anticipates receipt of the interim financing and continued revenues of more than $22 million from operations.

[14] The Company has been involved in extensive discussions with the Monitor and stakeholders to put in place a potential Sale and Investment Solicitation Process ("SISP"). To date the plan has involved re-focusing on surface mining and milling ore stockpiles rather than underground mining. Employees have been terminated. If the interim financing is obtained, the Company plans to continue operations at the mine until the end of October 2015, including management of environmental care. It plans to conduct an orderly wind down of underground mining activities, including a staged sale of equipment used in the underground work. It plans to reconfigure the mill facilities to facilitate tailings reprocessing so that it can use existing tailings stores as well as the surface extraction as a revenue source. It also plans to undertake limited expenditures on Cantung reclamation and Mactung environmental work with a view to increasing asset values. It hopes to seek court approval of a SISP in the next couple of weeks.

[15] As a result of difficulties arising from timing of receipt of payments from GTP, one of the customers, the cash flow problems for the Company became critical within the last ten days. The Company sought interim financing and received an offer from a third party. Callidus was opposed to that offer of financing and the Company eventually obtained a $500,000 loan from Callidus on June 29, 2015 on a short-term basis (the "Gap Advance"). They continued to negotiate and arrived at an agreement

for interim financing (the "Interim Facility") and a forbearance agreement (the "Forbearance Agreement"). These form the basis for the application before this court. Terms of these agreements which are relevant to the application include:

a) the $500,000 Gap Advance would be deemed to be an advance under the Interim Facility;

b) Callidus will advance an additional $2.5 million, which along with the Gap Advance would be secured over all of the property of the Company and have priority over the secured creditors; and

c) the Company will have to make repayments to Callidus by certain dates and those payments include payments of interest and principal on the existing loan facility (the "Post-Filing Payments").

[16] At the hearing of the application, one of the more contentious issues was the Company's request that the court make the order in relation to the Gap Advance *nunc pro tunc*. This term was sought because s. 11.2(1) of the *CCAA* allows a court to make an order for interim financing but "The security or charge may not secure an obligation that exists before the order is made."

[17] Of course the Gap Advance was an obligation which existed before the making of any order for interim financing. During the course of argument yesterday, the Company withdrew the application for a *nunc pro tunc* order in relation to the Gap Advance. This occurred because Callidus agreed to modify the terms of the Interim Facility such that the Gap Advance will be treated as an advance under its existing facility. In other words, the proposed Interim Facility is now for a $2.5 million loan facility and not $3.0 million, as set out in the application.

**Position of the Company**

[18] The Company says that in all of the circumstances, proceeding with the Forbearance Agreement and the Interim Facility is better for the petitioner's restructuring efforts and necessary given the urgent need for funding. It stresses that

without access to the interim financing, it will be unable to meet its ongoing payroll obligations or its negotiated payment terms for the post-filing obligations. It will be unable to continue restructuring and will likely face liquidation by its secured creditors. It also says there is greater value for all stakeholders if the Company is permitted to continue operating as a going concern. It says there would likely be no recovery for creditors other than the senior secured creditors without access to the Interim Facility. The local community of Watson Lake and local businesses would suffer significantly, as 100 employees would be out of work. Further, the Company says there is little prejudice to the secured creditors. In addition, it says if the mine site is abandoned, there would be a larger reclamation obligation, which would be to the detriment of the GNWT and other creditors with claims against an interest in the Mactung property.



**Position of the Customers**

[19] The customers oppose the Interim Facility and the extension of the stay. They argue that the financing of $2.5 million at interest rates of 21% will not help the Company emerge from this process with a workable plan. They argue that putting the Cantung Mine into care and maintenance as of November and hoping that tungsten prices rise in the future is not a workable plan.

[20] The customers say the result of approval of the Interim Facility is that the security interests of WBH and GTP would be prejudiced because those interests would be subordinated to Callidus as well as the GNWT. Finally, they argue that the bankruptcy of the Company and sale of its assets is inevitable no matter what happens.

**Position of the GNWT**

[21] The GNWT does not oppose the extension of the stay nor the granting of the Interim Facility. However, it opposes the Forbearance Agreement which would grant the Interim Facility priority over the GNWT Mactung security, which it holds to secure the environmental and reclamation obligations of the Company. It says that it would be prejudiced as a result of the granting of that priority and that in the circumstances

here there is no reason to do so. It says that Callidus would effectively receive approximately $1.5 million in Post-Filing Payments in very short order, which essentially allows it an unfair priority.

**The Monitor**

[22] The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.

- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.

- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.

- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.

- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

[23] The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISP

being undertaken by the Company. Overall… the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application…"

**Extension of the Stay**

[24] I turn now to the reasons for granting the extension of the stay. Subsection 11.02(2) of the *CCAA* provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. Subsection 11.02(3) provides:

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[25] A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the *CCAA*. Justice Deschamps stated at para. 70:

> … Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

[26] When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corporation (Re)*, 2012 BCSC 781.

[27] It is also appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.).

[28] When *CCAA* proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met. See, for example, *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775.

[29] The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process.

[30] I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

[31] It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

**The Interim Facility**

[32] I turn to my reasons for approving the interim financing. Subsection 11.2(4) of the *CCAA* sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> …
>
> (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… if any.

[33] While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Limited (Re)*, 2012 ONCA 552 at para. 6, and I am paraphrasing:

> a) without interim financing would the petitioner be forced to stop operating;
>
> b) whether bankruptcy would be in the interests of the stakeholders; and
>
> c) would the interim lender have provided financing without a super priority charge…

[34] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

> a) the applicants needed additional financing to support operations during the period of the going concern restructuring;
>
> b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;

c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

[35] When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

- The cash flow projections show that the $2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.

- I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.

- I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.

- The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.

- Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.

- It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover Post-Filing Payments, those will likely

be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.

- I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.

- Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

[36] Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the Post-Filing Payments to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the Post-Filing Payments may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

[37] In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of $2.5 million, and as previously indicated, the Gap Advance is not included in that.

[38] What about the date for an extension of the stay?

[39] MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISP. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

[40] THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

[41] MR. SCHULTZ: Okay.

[42] THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

[43] MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

[44] THE COURT: All right. The stay is extended to July 17, 2015.

"Butler J."

# Court of Queen's Bench of Alberta

Citation: Re 843504 Alberta Ltd. (Bankruptcy and Insolvency Act ), 2003 ABQB 1015



Date: 20031209
Docket: 0303 19663
Registry: Edmonton

IN THE MATTER of the *Bankruptcy and Insolvency Act* R.S.C. 1985, C. B-3, As Amended; and the *Companies' Creditors Arrangement Act* R.S.C. 1985, C. C-36, As Amended

AND IN THE MATTER of a Plan of Compromise or Arrangement of 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

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Memorandum of Case Management Decision
of the
Honourable Madam Justice J.E. Topolniski

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## Introduction

[1] EdgeStone Capital Mezzanine Fund II Ltd., (EdgeStone) a creditor of 84305 Alberta LTD., more commonly known as Skyreach Equipment, and the Monitor of Skyreach, appointed under an Initial Order pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), seek an extension of the stay of proceedings. With the exception of GE Commercial Distribution Finance Canada Inc. (GE), Skyreach's other creditors oppose the extension of the stay. These reasons further expand upon my oral decision on the reasons given on November 10, 2003.

### Facts

[2] Skyreach Equipment, is a well-known name in Alberta. The company specializes in renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. The Skyreach name, up until a short time ago, graced the arena that is home to the Edmonton Oilers, and continues to be the name of

another arena, home to the Kelowna Rockets. It has 142 employees, and operates 12 branches – 19 in Alberta and 3 in British Columbia.

[3] Since this spring Skyreach has operated under the threat of enforcement proceedings by its two general secured creditors, G.E. and EdgeStone. It tried to negotiate a going concern sale.

[4] On September 19 2003, days after making an arrangement with EdgeStone to seek protection under the CCAA, Skyreach filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (BIA). EdgeStone then chose to apply instead for the CCAA stay of proceedings, and after a contested motion on October 9, 2003, Skyreach was placed under the protective umbrella of the CCAA for 30 days (Initial Order). PriceWaterhouseCoopers was appointed Monitor, with power to operate the business.

[5] EdgeStone and the Monitor apply to have the stay extended. The PIMSI and mortgage creditors oppose the extension application. It is common ground that the onus in applications of this nature is on the applicant to satisfy the test in section 11(6) of the CCAA that:

a) circumstances exist to make the extension order appropriate and
b) the applicant is acting in good faith and diligently.

The test is not whether the plan of arrangement is doomed to failure – That is the test for terminating, not extending, a stay of proceedings (***Re Rio Nevada Energy Inc***. (2000), 283 A.R. 146 (Q.B.).

[6] The PIMSI and mortgage creditors argue that EdgeStone has not discharged the onus, asserting that the proceeding has been, and continues to be, an impermissible receivership under the guise of a CCAA restructuring. Further, they object to the Monitor's application on the basis that it is inappropriate for it to take a position in opposition to one of the parties.

[7] EdgeStone and the Monitor rely on the Monitor's *Third Report to the Court* and an excerpt from an *Information Circular.* as the necessary evidence of good faith and due diligence in pursuing a plan of arrangement. EdgeStone's officer's affidavit says that, based upon his review of the Monitor's reports, the Monitor is acting diligently, in good faith, and that circumstances exist to warrant the extension.

## 1. The Initial Order

[8] On October 9th, EdgeStone applied to vacate the Notice of Intention and to obtain a CCAA stay of proceedings. GE supported the application. Skyreach took no position. A number of creditors holding PIMSI and mortgage security opposed the initial application on the ground that the CCAA process would benefit only EdgeStone, and therefore was really a receivership for EdgeStone's benefit at the expense of others and an abuse of the CCAA.

[9] Appreciating the PIMSI creditors' concerns, I granted the Initial Order with conditions designed to protect the interests of all stakeholders. It provided for the usual 30-day moratorium to permit the

development of, at least, a germ of a plan of arrangement, and further required court approval of any sale of assets for more than $100,000 and, in the case of assets subject to PIMSI's, $20,000. It gave the power to carry on business and to solicit invitations from prospective purchasers to the Monitor, and created an expedited process for proving claims for creditors holding PIMSI and mortgage security.



[10] The CCAA contemplates a monitor having powers beyond those required to fulfil the traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and the court. Section 11.7(3) of the CCAA leaves discretion in the court to authorize functions other then those specifically enumerated by Parliament. Further support for this proposition is the explicit recognition of a monitor carrying on the debtor's business in section 11.8. (*Syndicat national de l'amiante d'Asbestos Inc. v. Jeffrey Mines Inc*. (2003) 40 C.B.R. (4th) 95; [2003] R.J.Q. 420 (C.A.). The Monitor's ability to carry on business, at least during the Initial Order phase, was considered necessary given the undisputed evidence of corporate interference and allegations of conflict of interest by Skyreach's Director and CEO, and the imminent resignation of the debtor's directors.

## 2. Subsequent Motions

[11] The minutes of the initial order were settled. In the course of that hearing the Monitor's powers were reviewed to ensure that it had the powers necessary to carry on the business and to establish a process for soliciting offers to purchase assets. The intention was to provide sufficient, but not overreaching powers, given the unusual situation of the Monitor, rather than the company, operating the business.

[12] GE also sought an order amending an earlier order granted by another judge which permitted funding for Skyreach by GE on specific terms. Notice had not been given to most other creditors. The amending order was refused, with the ability to reapply on notice to affected parties.

## 3. This Application

[13] The CCAA is intended to provide a structured, court supervised environment for the negotiation of compromises between a debtor and its creditors for the benefit of not only those parties, but also other stakeholders such as employees and shareholders. At the end of day, the objective is to enable the debtor to continue in business so that all stakeholders benefit (*United Auto and Truck Parts Ltd.* v. *Aziz* (2000), 135 B.C.A.C. 96, 2000 BCCA 146 at paras. 10 and 11). The CCAA is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders position at the expense of others - there should be no confiscation of legal rights. This requires a balancing of interests, rights and prejudices to "see if rights are compromised ... and have the pain of the compromise equitably shared." (*Sammi Atlas Inc. (Re),* [1998] O.J. No. 1089 (Ont. Gen. Div.) citing *Re Campeau Corp*., [1992] O.J. No. 237, 10 CBR (3rd) 104 (Ont. Gen. Div.)at 109).

[14] As acknowledged by LoVecchio J. in *Blue Range Resources Corp.,* (1999) 245 A.R. 154,1999 ABQB 1038, reorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organizational and management restructuring, downsizing, refinancing, or debt to equity conversion – the solutions

are generally limited only by the creativity of those structuring the plan of arrangement. That said, the solutions in Alberta generally expect the corporate entity to continue in some form or another and do not allow for a liquidation proposal unless exceptional circumstances exist to justify it, notwithstanding that the CCAA seems to allow it (*Royal Bank of Canada v. Fracmaster Ltd.* (1999), 244 A.R. 93, 11 C.B.R. (4th) 230 (C.A.)). Simply put, in this province the corporate entity is expected to continue in some form or another unless there are exceptional circumstances. Liquidation proceedings are typically reserved for receiverships, windings up or bankruptcy.

[15] This is quite different than in Ontario where apparently debtors can use the benefits of the legislation when there is no prospect of corporate survival or no plan of arrangement is proposed: *Anvil Range Mining Corp.* (2002), 25 C.B.R. (4th) 1 (Ont. Sup. Ct. Just.), aff'd (2002) 34 C.B.R. (4th) 157 *; Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at p. 32; *Re Olympia & York Developments* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.) at p. 104; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 46.

## EdgeStone's Application and Evidence

[16] As noted previously, EdgeStone's affidavit is based upon the deponent's review of the Monitor's reports and merely asserts that the Monitor is acting diligently and in good faith, and that circumstances exist to warrant the extension. This offers nothing more than a conclusion about the very determinations that the court is required to make in deciding whether the test has been satisfied. It is of very little assistance, and this form of conclusory affidavit is not acceptable: *Alberta (Human Rights Commission) v. Alberta Blue Cross Plan* (1983), 48 A.R. 192 (C.A.) at para. 8; *Allen v. Alberta*, [2001] A.J. No. 863, 2001 ABCA 171 at para. 8; *Hovsepian v. Westfair Foods Ltd.*, [2003] A.J. No. 1133, 2003 ABQB 641. I note that the Monitor's report is filed with the court for information purposes and is available to me.

[17] GE supports EdgeStone's application, acknowledging that it expects to be paid out in full through an asset sale, and that it continues to be paid full interest at a rate of $15,000 per day on its loan under the terms of a funding order granted earlier by another judge.

## The Monitor's Duties, Application, and Evidence

[18] The appropriateness of the Monitor's application to extend the stay of proceedings was questioned on the basis that by its actions, the Monitor was favouring the debtor and EdgeStone.

[19] As an officer of the court, the Monitor owes a duty to treat all creditors reasonably and fairly. Like a court-appointed receiver or liquidator, its duties are those of a fiduciary.

[20] Because of the special circumstances that existed at the date of the Initial Hearing, the Monitor was given the power to carry on Skyreach's business. With that power comes a risk, be it perceived or real, of conflict of interest, and where the Monitor advocates a position or a plan of arrangement that risk may be exacerbated. In making its application for the extension the Monitor presumed that it was reasonable for it to do so since it was operating the business and there were no directors in place. Although motivated by good intentions this gave rise to a perception of conflict of interest, something that must be jealously guarded against. The appointment of a Chief Restructuring Officer or the appointment of new or returning directors can easily avoid perceptions of bias.

[21] The Monitor relies on an affidavit that attaches its Third Report to the Court and two pages from an Information Circular. The report indicates that since the Initial Order, the Monitor has taken control of the business, working closely with management. The report indicates that the Monitor has identified excess equipment and undertaken an extensive process to solicit offers for:

a) all or part of the debtor's assets business and undertakings,
b) refinancing,
c) acquisition of the shares of Skyreach (subject to the approval of EdgeStone which holds and may exercise the shares under its security), or
d) any combination thereof.

[22] The Monitor has advertised in newspapers, posted information on its national electronic bulletin board and web site, delivered some 300 Information Circulars to prospective purchasers, and set up a data room. Negotiations have begun with prospective purchasers, one of whom has expressed an interest in buying Skyreach's significant tax losses. Counsel for the Monitor, EdgeStone, and GE argued that only a sale of the tax losses will result in some payment to the unsecured creditors at the end of the day. Whether this is likely given voting structures under the CCAA is, of course, yet to be seen.

## The proposed restructuring process

[23] The Monitor proposes the following restructuring process and time line. The Monitor will:

1. will solicit offers until November 28;
2. report the results of the solicitations to the Court by December 19
3. close transactions after obtaining court approval by January 30 2004, and
4. finally, formulate a plan of arrangement for presentation to the creditors by February 28, 2004.

~~[24]~~ Clearly, this process contemplates the sale of Skyreach's assets, either hard assets or shares, well before a plan is developed and presented to the creditors.

[25] The Monitor, EdgeStone and GE urge that this process will maximize recoveries for the stakeholders, contending that the marketplace can best determine value of the debtor's assets. EdgeStone relies on *Re Consumers Packaging Inc.* (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197 (Ont. CA) and *Re Canadian Red Cross Society* (1998), 72 O.T.C. 99, 5 C.B.R. (4th) 299 (Ont. Gen. Div.) in support of the proposition that this is an acceptable practice.

[26] Once again, the opposing creditors say that this is simply more evidence that this proceeding is nothing more than a receivership in disguise for EdgeStone's benefit.

[27] In *Consumers Packaging* the court approved a going concern sale before the plan of arrangement was presented because the sale would preserve the business, albeit under new ownership, and because of uncertainty over whether the debtor could continue operations given its financiers' demands.

[28] In *Canadian Red Cross Society* provincial and territorial governments decided to transfer responsibility for the Canadian blood supply to a new national agency. The court held that the CCAA was flexible enough that it could be interpreted to convert the company's assets into a cash fund, crystalizing the highest value recovery pool possible. This-was advantageous to unsecured creditors, but did not affect creditors with security interests. The Court ruled that it had jurisdiction to grant the order, noting that the proper question was whether the process was appropriate in all of the circumstances.

[29] I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors. (*Re PSI Net Ltd* (2001), 28 C.B.R. (4th) 95, [2001] O.J. 3829 (Ont. S.C.J.), *Canadian Red Cross* and *Consumer's Packaging*). Obviously, each case must be assessed on its own unique facts, but in this case there is no evidence that it is either necessary or in the stakeholders' best interests. Accordingly, at this stage the proposed process is unacceptable. In deciding this, I make no finding as to EdgeStone's *bona fides* nor rule out the prospect of evidence being adduced to establish that it would be appropriate.

[30] EdgeStone argues that there is Alberta authority for the sale of all or substantially all of the debtor's assets (*Blue Range Resource Corp, Gauntlet Energy Corp* action 0301-09612, *Liberty Oil & Gas Ltd.* action 0201-03299, and *Mirant Canada Energy Marketing Ltd.* action 0301-11094. *Blue Range* and *Liberty Oil & Gas Ltd.* obtained court sanctioning for liquidation-style plans. *Gauntlet* obtained creditor approval for a liquidation-type plan, but the sanctioning hearing has not yet been held. *Mirant's* creditors have not yet approved a liquidation-style plan, although a plan has been circulated to the creditors.

## The Extension should be granted

[31] Applying the three arms of the test in s. 11.7, I find that the Monitor has acted diligently in moving the process along towards the development of a plan. The fact that the on the evidence before me, I disagree with the proposed timing for steps in the restructuring to occur does not detract from that.

[32] Although suspicions are raised by the opposing creditors' arguments, I cannot find on the materials before me that EdgeStone is acting in bad faith. The Monitor is certainly acting in good faith, but that is not an appropriate ingredient in applying the s. 11.7 test.

[33] In considering whether circumstances exist for the extension, the following factors assist the applicant:

1. An extension gives the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation;

2. With sufficient controls in place, an extension will prevent creditors from maneuvering for a better position (*Rio Nevada*, and cases cited at para. 36)

3. There is no evidence about whether the anticipated costs of these proceedings will be similar to costs anticipated in a receivership. What is known is that Skyreach is expected to suffer a $337,000 deficit by the end of January 2004. PIMSI and mortgage creditors want EdgeStone to pay all of CCAA costs. However, it would be inappropriate to allocate costs now since there is no certainty about what benefits will accrue to any given party. That can be done later.

4. The extension Order is only until December 19th. At that time a further assessment of good faith, due diligence, and the appropriateness of the circumstances can be made.

5. I cannot conclude that a liquidation sale is inevitable or the most likely outcome at this stage of the proceedings. The Monitor is offering shares for sale.

6. The prospect of a tax loss sale may have value for unsecured creditors. A tax loss sale is apparently easier to facilitate in CCAA proceedings than other insolvency proceedings;

## Order

1. The stay of proceedings under the CCAA is extended to December 19th

2. The Monitor is to hire and hand over possession and operational control of Skyreach to a Chief Restructuring Officer within 14 days;

3. The Monitor is to fulfil its traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and court and play a supportive role in developing the plan and presenting it to the creditors;

4. The proposed sale of all or substantially all of the assets before a plan of arrangement is presented to the creditors is not approved.

5. A further stay extension should be supported by evidence demonstrating significant progress towards a plan of arrangement.

6. If the company is unable to present a viable plan of arrangement before a sale of all or substantially all of the assets, the sale documents should be prepared as though for a receivership sale. However, if the company or another applicant proposes a sale before the presentation of a plan, the appropriate application may be made.

7. Assets subject to PIMSI interests used in the company's daily operations are to be paid for in accordance with the terms of the governing agreement.

8. A cost allocation hearing is to be scheduled to follow an application to sanction the plan of arrangement.

Heard on the 10th day of November, 2003.
**Dated** at the City of Edmonton, Alberta this 9th day of December, 2003.

J.E. Topolniski
J.C.Q.B.A.

**Appearances:**

A. Robert Anderson
Blake, Cassels & Graydon LLP
for EdgeStone Capital Mezzanine Fund II Nominee, Inc.

Emi R. Bossio
Peacock Linder & Halt
for Ingersoll-Rand Canada Inc.

Michael McCabe
Reynolds Mirth Richards & Farmer LLP
for Proposal Trustee, PricewaterhouseCoopers LLP

Kent Rowan
Ogilvie LLP
for GE Commercial Distribution Finance Canada Inc.

Michael Penny
Stuart Weatherill
Emery Jamieson LLP
for Unknown Purchaser; John Deere Credit Inc.

Darren Bieganek
Duncan & Craig LLP
for Transportation Lease Systems Inc.

David Stratton
Davis & Company
for CNH Canada Ltd. (New Holland Construction) and
New Holland (Canada) Credit Company

Jerry Hockin
Parlee McLaws
for JLG Industries Ltd. and CAFO Inc.

Rick Reeson
Witten LLP
for Alberta Treasury Branches

James MacLean
Witten LLP
for Bancorp Financial Services Inc.
Bancorp First Mortgage Fund Inc.
Bancorp Investments (Fund 2) Ltd. et al.

Steven Livingstone
McLennan Ross
for Citicapital Commercial Corp. and Capital City

**Hunters Trailer & Marine Ltd., 2000 ABQB 952**

Date: 20001201
Action No. 0003 19315

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF Hunters Trailer & Marine Ltd.

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MEMORANDUM OF DECISION
OF THE HONOURABLE ALLAN H. WACHOWICH
ASSOCIATE CHIEF JUSTICE

---

APPEARANCES:

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Darcy G. Readman
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Jeremy Hockin
Parlee McLaws

**Background**

[1] Hunters Trailer & Marine Ltd. ("Hunters") applied for and was granted a stay of proceedings, *ex parte*, on October 11, 2000, pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"). The order permitted Hunters to carry on business in a manner consistent with the preservation of Hunters' business and property for 30

days, under the supervision of a court-appointed Monitor, and within the terms of the order. The order authorized "debtor in possession" ("DIP") financing up to $1.5 Million which would have "super-priority" status over any other claims. An Administration Charge of up to $1 Million was also granted, and was given priority over every other security except for the DIP financing.

[2] A short-term extension of the stay, to November 17, 2000, was granted by the Honourable Mr. Justice W.E. Wilson on November 8, 2000. His amendments to the original order included a reduction in the maximum amount available for DIP financing to $800,000.00, and a reduction in the maximum Administration Charge to $350,000.00.



**Current Application**

[3] Hunters seeks to extend the stay of proceedings to at least February 28, 2001. They also seek an increase in the maximum amount of DIP financing and Administrative Charge available. Three of Hunters' major creditors (the "Objecting Creditors"), who are floor plan financiers, oppose the applications. The Objecting Creditors are Deutsche Financial Services, the Bank of America Specialty Group Ltd. and C.I.T. Financial Ltd. Hunters owes them in excess of $2,000,000.00, $3,085,728.80, and $4,567,239.00 respectively. All three are first charge creditors, but it is not yet clear how they rank in terms of priority. Two other major creditors support Hunters' application for an extension. One is Canada Western Bank, whom Hunters owes $1,061,000.00 on a line of credit, and who is currently providing DIP financing. The other is U.M.C. Financial Management Inc., whom Hunters owes $3,400,000.00, principally secured by a real estate mortgage.

[4] The onus in a stay application under the *CCAA* is dictated by s. 11(6) of the *CCAA*:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[5] In this case, it will be unnecessary to deal with subsection (b). In light of the evidence before me, I find that the applicant, Hunters, has not satisfied its onus of showing that a stay would be appropriate in the circumstances. In arriving at this conclusion, I considered two issues - first, whether DIP financing should continue, and second, whether the purpose of the *CCAA* would be achieved by granting an extension of the stay.

**DIP Financing**

[6] In *Re United Used Auto & Truck Parts Ltd*. (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), Tysoe J. articulated the test for when DIP financing should be permitted: there must be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated: p. 153, para. 28. In that case, Tysoe J. found that DIP financing

would benefit the business, but was not critical for the operation or restructuring of the business. As well, he did not have sufficient confidence in the cash flow projections and appraised value of the realty to conclude that the benefit clearly outweighed the potential prejudice to the secured lenders: p. 153, para. 29.

[7] This reasoning was not objected to on appeal: *Re United Used Auto & Truck Parts Ltd.* (2000), 16 C.B.R. (4th) 141 (B.C.C.A.). The issue in the appeal was whether the court has jurisdiction to grant priority to a monitor's fees and expenses. Mackenzie J.A., speaking for the Court, held that the court's jurisdiction is found in equity, as is its jurisdiction to order super-priority for DIP financing: p. 152, paras. 30-31. On the issue of when this priority should be granted, Mackenzie J.A. stated, at para. 30:

> It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring.

[8] Determining whether DIP financing is appropriate requires a careful balancing of interests.

[9] In *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div.), Blair J. made the following comments at pp. 321-322, para. 24:

> It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances - as opposed, for instance. to a receivership or bankruptcy - and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

[10] In my view, the evidence provided by Hunters does not show that the benefits of DIP financing will clearly outweigh potential prejudice to the Objecting Creditors. While DIP financing is the only means for Hunters to continue operating, it is impossible to conclude that this short-term benefit will culminate in Hunters' financial recovery, due to a number of deficiencies in the evidence. First, there are no appraisals of the real estate or rolling stock in evidence to support Hunters' financial projections. Second, because Hunters' computer services provider shut down Hunters' computer based accounting system, Hunters and the Monitor have

had extremely limited access to Hunters' books and records. As a result, final financial statements for the year ended February 29, 2000 are unavailable, and current, reliable balance sheets cannot be provided. The Monitor cannot verify Hunters' financial situation because reliable data cannot be accessed.

[11] Third, the value of a major asset is uncertain. According to Hunters, the insurance policies on the life of Mr. Bondar's father are worth $2,300,000.00, and security is held against them by the mortgagee of the lands to the extent of $1,800,000.00. However, the policies are not in evidence, so the value and terms are uncertain. Also, apparently Mr. Bondar's wife is a beneficiary, but the percentage of her interest is not in evidence.

[12] Fourth, Hunters' cashflow projections are not supported by evidence from the Monitor or any other independent third party, which would verify their reasonableness or accuracy. Already, it appears that the Monitor's fees will be $100,000.00 greater than the cashflow projections anticipated. In light of all of the above deficiencies in Hunters' evidence, Hunters has not satisfied its onus of showing that DIP financing would be beneficial, or indeed, that a stay would be appropriate in the circumstances.

[13] Another consideration in assessing the benefit of DIP financing is that even if Hunters' projected cashflows are accurate, they show a continuing net deficit, suggesting that the benefit of DIP financing is merely prolonging the inevitable. Even as of September 2001, following the months when the volume of Recreational Vehicle ("RV") sales is highest, Hunters expects a cash flow deficit. After September, the RV sales will slow down significantly as Hunters enters the low season, so cash flow is not likely to increase after September. Hunters can expect continuing difficulties in meeting operating expenses well into the foreseeable future. The sources of Hunters' cash flow problems, as identified by Blair Bondar, the company president, will likely continue to exist. Mr. Bondar states that RV sales have decreased as a result of, in part, increasing gas prices, a weak Canadian dollar, and increased competition. Hunters has no control over these systemic problems, and there is no evidence or reason to believe that they will be resolved in the foreseeable future. As a result, I am not convinced that the cash flow projections themselves are accurate. The Monitor does not verify the accuracy or reasonableness of the projections. Therefore, it is impossible to conclude that the DIP financing will benefit Hunters and its creditors in the long run.

[14] The prejudice caused by DIP financing to the Objecting Creditors could be significant. The Objecting Creditors hold Purchase Money Security Interests and therefore their claims rank ahead of all other creditors', but their ability to realize on this statute-granted priority will be reduced further every time increases in DIP financing and Administrative Charges are approved to fund Hunters' operating costs. Extending the stay until February, 2001 would place the Objecting Creditors at risk during a period when RV sales are very slow and minimal cash flow will be generated. In order for Hunters to carry on its business, further increases in DIP financing are inevitable. This financing, which has now exceeded $800,000.00 in order to cover payroll for November, and the Administrative Charges of $350,000, are eroding the security of the Creditors while the financial position of Hunters is precarious and uncertain. Given these circumstances, and the principle from *Re Royal Oak Mines Inc.*, *supra.* that DIP financing and its super-priority should not be granted lightly, DIP financing is not appropriate. The potential prejudice of DIP financing to the Objecting Creditors is not outweighed by the benefit to Hunters, and there is insufficient evidence of a reasonable possibility of a successful restructuring.

**Purpose of the *CCAA***

[15] I described the purpose of the *CCAA* in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.) as follows, at p. 114:

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

[16] In this case, an extension of the stay will not maintain the status quo for the Objecting Creditors. Their priority status and ability to recover their losses will be jeopardized. At least two of the Objecting Creditors have buy-back agreements with manufacturers that will be impaired or disappear with the passage of time. These Creditors could then only recover their costs if Hunters is able to sell all of this inventory at cost or higher, a prospect that appears to be unrealistic. The *CCAA* should not be used where, as in this case, it will put the financial well-being of the majority of the creditors at risk.

[17] Another factor influencing my decision is the possibility that the inventory that is not subject to buy-back agreements will decline in value over the period of the stay. The other creditors will not face a decline in their interests in real estate and DIP financing, and it would be unfair to maintain the status quo for these creditors while the interest of the Objecting Creditors deteriorates. Another circumstance that could result in prejudice to the Objecting Creditors is the requirement in the Order that 10% of the proceeds from the sale of the Creditors' collateral shall be paid to Hunters for operating costs. This reduces the security available to the Objecting Creditors, who are inventory suppliers, while Hunter endures the slow season in RV sales.

[18] A stay of proceedings should not be granted under the *CCAA* where it would only prolong the inevitable, or where the position of the objecting respondents would be unduly jeopardized: *Timber Lodge Ltd. v. All Creditors of Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 244 (P.E.I. S.C.T. D.) at p. 252, para. 21; p. 253, para. 24. The B.C. Court of Appeal said that *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring: *Re United Used Auto & Truck Parts Ltd., supra*. at p. 152, para. 30. Given my conclusion that further DIP financing should not be permitted, it is clear that Hunters will be unable to finance its operating costs, and therefore the business is doomed to failure. But even if DIP financing continued, the problems with cashflow, discussed above, suggest that Hunters has no reasonable prospect of becoming viable again.

[19] The jurisprudence makes it clear that the objection of a few recalcitrant creditors should not prevent the petitioner from proceeding to attempt to work out a plan under the *CCAA*: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 (Q.B.) at p. 164, para. 21. The court should consider the interests of all affected constituencies in deciding whether a stay is appropriate, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally: *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 7 O.R. (3d) 362 (Ont. Ct. G.D.) at p. 369.

[20] However, in *Bargain Harold's Discount*, *supra.*, Austin J. also stated that where no plan will be acceptable to the required percentage of creditors, the *CCAA* application should be

refused: p. 369. Put another way, one factor to be considered in the context of s. 11(6) is whether the attempt to reach a compromise is doomed to failure, or is a realistic ambition: *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C.S.C.) at p. 184, para. 22. I am satisfied that in this case, no compromise will be reached between the Objecting Creditors and the other major secured creditors, nor between the Objecting Creditors and Hunters.

[21] For all of these reasons, Hunters' application for an extension of the stay of proceedings is denied. However, in order to allow creditors time to prepare, the effect of my dismissal of Hunters' application will be suspended for one week. Therefore, I order a short-term extension of the stay of proceedings to December 8, 2000.

HEARD on the 17th day of November, 2000.
**DATED** at Edmonton, Alberta this 1st day of December, 2000.

_____

**A.C.J.C.Q.B.A.**

# BAIRD'S PRACTICAL GUIDE TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

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**DAVID E. BAIRD Q.C.**

LL.B (Osgoode Hall Law School)

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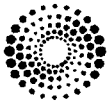

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CHAPTER FIFTEEN

# EXTENSION OF CCAA STAY ORDER

## 1. GENERAL

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, unless 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 the BIA or the *Winding-up and Restructuring Act*;
>
> b) restraining until otherwise ordered by the court further proceedings and 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.[1]

The important key words in this section are "on any terms that it may impose". These words give to the court extensive powers that are only restricted by the express provisions of other sections in the CCAA. In order to obtain an order extending protection under the CCAA, the onus of proof is on the applicant to show,

> (a) circumstances exist that make the order appropriate, and
>
> (b) the applicant has acted and is acting in good faith and with due diligence.[2]

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[1] Subsection 11.02(2), CCAA.

[2] Subsection 11.02(3), CCAA; *Re Skydome Corp.* (2000), 16 C.B.R. (4th) 125 (Ont. S.C.J. [Commercial List], Blair J.).

On an extension application, the court is granted powers identical to those set out in section 11.02(1) dealing with the initial order, except there is no limit on the time period during which a section 11.02(2) order may remain in effect, and there is the additional requirement to show that the applicant has acted and is acting in good faith and with due diligence in the CCAA process.[3] The failure of the debtor's management to comply with the timetable recommended by the monitor with respect to lay-offs did not in itself constitute a lack of good faith or due diligence and an extension of the initial order may be granted even when any extension will be effectively financed by secured creditors.[4] When an application for an extension of a stay of proceedings is made, one of the most common issues is whether or not the existing management should be allowed to continue to have a major role in the restructuring, or whether the time has come to pass the responsibility to the creditors to exercise their legal rights.[5] In determining whether to grant an extension of proceedings, the courts have held that the statutory restructuring scheme of the CCAA contemplates that the rights and remedies of various creditors may be temporarily sacrificed in an effort to serve a greater good by delaying the collection of debts and allowing a plan of arrangement to proceed.[6]

When there was no realistic prospect of the debtor ever being able to put forward a viable plan of restructuring, no assurance that the balance of the debtor-in-possession financing would be advanced, and no evidence of any source of funds, the court may extend the stay of proceedings for a limited period of time to permit the parties an opportunity to present to the court evidence as to what process for realizing on the assets should be conducted and by whom. In order for the court to order the continuance of CCAA proceedings, there must be evidence of some tangible progress towards the development of a plan of restructuring. In the alternative, when an application is made to continue CCAA proceedings, a court may appoint an interim receiver and authorize the interim receiver to realize upon the assets of the debtor for the benefit of the stakeholders.[7]

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[3] *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. [Commercial List]).

[4] *Re Skeena Cellulose Inc.* (2002), 29 C.B.R. (4th) 157 (B.C. S.C., Brenner C.J.S.C.).

[5] *Re Mega Bleu Inc./Mega Blue Inc.* (2003), 39 C.B.R. (4th) 80 (N.B. Q.B., McLellan J.).

[6] *Milner Greenhouses Ltd. v. Saskatchewan* (2004), 50 C.B.R. (4th) 214 (Sask. Q.B., Ryan-Froslie J.).

[7] *Re SLMSoft Inc.* (2004), 4 C.B.R. (5th) 102 (Ont. S.C.J., Ground J.).

In considering whether the circumstances exist for the extension of a CCAA order, the following factors may be considered:

a) an extension may give the monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation;

b) with sufficient controls in place, an extension may prevent creditors from manoeuvring for a better position;

c) the anticipated costs of the proceedings would be similar to the costs anticipated in a receivership;

d) the extension order may be for a limited time in order that a further assessment of good faith, due diligence and the appropriateness of the circumstances can be made;

e) there may be no certainty that a liquidation sale is inevitable or the most likely outcome at the stage of the proceedings; and

f) the prospect of a tax loss sale may have value for unsecured creditors and a tax loss sale may be easier to facilitate in CCAA proceedings than other insolvency proceedings.[8]

A stay of proceedings should not be granted or extended under the CCAA where it would only prolong the inevitable or where the position of objecting creditors may be unduly prejudiced. However, the objections of a few recalcitrant creditors should not prevent the debtor from attempting to work out a plan under the CCAA, but the court must consider the interests of all affected constituents in deciding whether the extension of a stay of proceedings is appropriate, including preferred, secured and unsecured creditors, employees, landlords, shareholders and the public generally.[9]

An extension of a stay may be granted in order to permit all stakeholders to co-operate to every reasonable degree and to see how the debtor company can be improved. An extension of a stay may also allow all concerned the opportunity to consider how best to deal with the termination of the CCAA proceedings if the matter does not proceed to the consideration of a formal plan of restructuring under the CCAA. An ex-

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[8] *Re 843504 Alberta Ltd.* (2003), 4 C.B.R. (5th) 306 (Alta. Q.B., Topolinski, J.).

[9] *Re Hunters Trailer & Marine Ltd.* (2000), 5 C.B.R. (5th) 64 (Alta. Q.B., Wachowich A.C.J.Q.B.).

tension may also allow the opportunity for the stakeholders to consider whether or not it is in the debtor's interest and their own interest to request a continuation of the stay if meaningful progress continues to be made.[10]

In determining whether or not to grant an extension of the stay of proceedings under the CCAA, the court must consider how the actions of the debtor affect the stakeholders in the proceedings, maintain the institutional integrity of the CCAA process, preserve public esteem and do equity. A court cannot turn a blind eye to corporate conduct that could affect the public's confidence in the CCAA process and must be alive to the concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceedings must yield to those of the public at large. The debtor company's business practices may be so offensive as to warrant refusal of the stay extension on public policy grounds.[11]

Where a draft plan of restructuring was, in the view of the senior lenders, the monitor and the court, based upon blatantly over-optimistic assumptions and doomed to failure, the court may appoint an interim receiver and continue the CCAA stay of proceedings. Such a stay of proceedings may be continued in order to specifically continue a contract, the termination of which was stayed by virtue of the initial CCAA order.[12]

An extension of the CCAA stay order will be granted when the court is satisfied that the CCAA proceedings constitute a viable restructuring and will facilitate an ongoing operation where the assets have a greater value as part of an integrated system than individually. There also must be a good faith effort by the debtor company to put forth a plan of arrangement.[13]

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[10] *Re Stelco Inc. [Stay extension]* (2004), 6 C.B.R. (5th) 315 (Ont. S.C.J. [Commercial List], Farley J.).

[11] *Re San Francisco Gifts Ltd.* (2005), 10 C.B.R. (5th) 275 (Alta. Q.B., Topolinski J.).

[12] *Re Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 75 (Sask. Q.B., Kyle J.).

[13] *Re Simpson's Island Salmon Ltd.* (2006), 24 C.B.R. (5th) 17 (N.B. Q.B., P.S. Glennie J.).

## 2. LENGTH OF STAY

When granting an extension, there is no standard or normal length of time for the period of the extension, which should be governed by the facts of the applicable case. In determining the appropriate length of time, the following factors should be considered:

a) The extension period should be long enough to permit reasonable progress to be made in the preparation and negotiation of the plan of arrangement.

b) The extension period should be short enough to keep the pressure on the debtor company and prevent complacency.

c) Each application for an extension involves the expenditure of significant time on the part of the debtor company's management and advisors, which might be spent more productively in developing the plan, particularly when the management team is small.[14]

d) With respect to industrial and commercial concerns as distinguished from "bricks and mortar" corporations, it is important to maintain the goodwill attributable to employee experience and customer and supplier loyalty, which may erode very quickly with uncertainty.[15]

e) In British Columbia, the standard extension order is for something considerably longer than 30 to 60 days. While each business will have its own financing possibilities, generally large loans, significant equity injections or large sales required to rescue a corporation in debt for more than $5 million, will take time to develop to the point of agreement.[16]

## 3. EXTENSION FEES

Success fees that the debtor agreed to pay to three secured creditors for consenting to a 90-day extension of a CCAA order have been disal-

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[14] *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]).

[15] *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]).

[16] *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]).

lowed.[17] The legislative scheme of the CCAA is designed to allow a company to continue its business activities in as normal a manner as possible while reorganizing, and the legislation must be taken as giving hope that a reorganization rather than a bankruptcy will eventually benefit all interested parties. The CCAA is designed to prevent any manoeuvres for positioning among creditors during the interim period that would give the aggressive creditor an advantage to the prejudice of others who were less aggressive. The courts must guard against allowing secured creditors to run the process; however, secured creditors must have their positions recognized since secured creditors may be the ones who make the financial means available so that a debtor company can operate. Where parties have entered into commercial contracts that contemplated insolvency and litigation, and that contemplation becomes reality, caution must be exercised in bettering the deal for specific creditors or class of creditors. To do so alters commercial reality and might frustrate the legislative intent of maintaining the status quo. It is important to deter granting special treatment to a class of creditors. Future competitors for favoured positions must know that the court is going to be most reluctant to move the goal posts.

[17] *Re Agro Pacific Industries Ltd.* (2000), 18 C.B.R. (4th) 6 (B.C. S.C., Thackray J.).

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 1413

Date: 20160624
Docket: S-1510120
Registry: Vancouver



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

**And**

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

**And**

**In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"**

Before: The Honourable Madam Justice Fitzpatrick

## Oral Reasons for Judgment

## In Chambers

| | |
|---|---|
| Counsel for the Petitioner Walter Energy Canada Holdings, Inc.: | Mary I.A. Buttery<br>P. Riesterer |
| Counsel for United Mine Workers of America 1974 Pension Plan and Trust: | John Sandrelli<br>Tevia Jeffries |
| Counsel for the United States Steel Workers, Local 1-424: | Craig D. Bavis |
| Counsel for the Attorney General of British Columbia: | Heather Wellman |
| Counsel for Morgan Stanley Senior Funding, Inc.: | Kathryn Esaw |

| | |
|---|---|
| Counsel for KPMG, Monitor: | Peter J. Reardon |
| Place and Date of Hearing: | Vancouver, B.C.<br>June 24, 2016 |
| Place and Date of Judgment: | Vancouver, B.C.<br>June 24, 2016 |

[1] **THE COURT:** These are proceedings brought by the petitioners pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The initial order was granted by me on December 7, 2015.

[2] There are two matters before me. Firstly, there is an application by the petitioners for an extension of the stay of the proceedings which expires today. Secondly, although not specifically brought as an application, there is an issue as to whether one particular stakeholder should be exempted from any continuation of the stay and, if so, on what terms.

[3] I will briefly address the background.

[4] The petitioners own various mines in British Columbia. In January 2016, I approved a sales and investment solicitation process ("SISP") and appointed William Aziz as the chief restructuring officer. Finally, I approved the retainer of PJT Partners LP to facilitate the sales process. See reasons indexed as *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107 (the "Reasons").

[5] In conjunction with the SISP, parallel efforts are being made to explore liquidation scenarios. The idea is to conclude either one of those solutions as soon as possible.

[6] The petitioners are in a fairly strong financial position at this time, largely by reason of having entered these proceedings with a significant amount of cash resources to fund limited operations and the cost of this restructuring. The beginning balance was approximately $20 million but, needless to say, with no income being received, those cash resources are being quickly depleted. It is therefore critical that the petitioners proceed to a resolution as soon as possible so as to monetize the assets and maximize the cash resources for the benefit of the creditors entitled to share in those amounts.

[7] Initially, the petitioners' application was for an order to extend the stay to a date in October 2016. This proposed date arose from discussions with various parties and KPMG Inc., the Monitor. Despite the long extension, the petitioners

anticipated that there would be an application by July 206 to bring forward an offer for consideration by the Court. Alternatively, if no offer had materialized by that time, the petitioners anticipated that the Court would then consider how to proceed in respect of any liquidation.

[8] At the hearing, I expressed some concern about the length of the proposed stay, even with the possible July hearing in mind. I suggested to petitioners' counsel that the extension might be for a shorter period of time so as to make clear that the court's oversight continues even during this interim period of time. In addition, I considered that an earlier deadline would, of necessity, require that the parties focus on getting the matter resolved as soon as possible to avoid any further erosion of the cash resources.

[9] Materials filed in support of the stay application include Mr. Aziz's affidavit #2 sworn June 17, 2016. In addition, as is usual, I have the benefit of the Monitor's report #3 dated June 22, 2016. Both the affidavit and the report confirm the substantial progress made by the petitioners since January 2016. Both Mr. Aziz and the Monitor also confirm the unchallenged view that the petitioners are acting in good faith and with due diligence.

[10] Accordingly, I am satisfied that an extension of the stay is appropriate at this time. However, in my view, a long extension is not appropriate; again, the extension of the stay to an earlier date is more appropriate and will aid in focussing the parties toward bringing a court application for an overall resolution as quickly as possible. Accordingly, there will be an order extending the stay of proceedings to August 19, 2016.

[11] The second matter is more controversial and concerns a position taken by the United States Steel Workers, Local 1-424 (the "Union").

[12] The Union has been participating in these proceedings for some time. In December 2015, the Union filed a response to the petitioners' application for an extension of the stay of proceedings. The Union took the position that it did not

object to the extension so long as the stay did not apply to various labour grievance procedures and judicial review proceedings between the petitioners and the Union that were outstanding at the time of the *CCAA* filing.

[13] Randy Gatzka filed his affidavit dated December 24, 2015, in support of the Union's position. I considered that position at the January 2016 application and addressed them in the Reasons at para. 72 and following. At that time, I concluded that the Union had not met the heavy onus imposed on it in terms of proving that it was appropriate to exempt the Union from the effect of the stay provisions. At para. 74, I listed various reasons supporting my decision that it was not appropriate to require the petitioners to participate in those ongoing labour issues at that time.

[14] Turning to today's application, the Union has filed a similar response seeking to be exempted from the stay. There is no application brought by the Union, per se, although no stakeholder stands on a procedural issue in terms of requiring the proper filing of a notice of application. Accordingly, I intend to address the Union's position on its merits.

[15] The Union's application response was filed June 23, 2016. Daniel Will's affidavit #1 sworn June 22, 2016, has been filed in support. The matters addressed in Mr. Will's affidavit are new matters beyond those that were raised in the earlier materials filed by the Union. Mr. Will confirms that most of the Union employees at the Wolverine Mine site were laid off in April 2014. Under the collective bargaining agreement, if the petitioners did not recall the employees within a two-year period, that had the effect of terminating those employees. No recall took place and accordingly, effective April 16, 2016, the terminations happened.

[16] Indeed, earlier in February 2016, the Union was advised that the petitioners had no intention of recalling the employees at the Wolverine Mine site. On March 10, 2016, confirmation was again received by the Union that there were no plans to reopen the mine. Further, on this date, the petitioners also provided notice of group termination under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*ESA*") for some 275 employees who had worked at the Wolverine Mine.

[17] The Union's counsel points out that the failure to recall the Wolverine employees, and the ensuing terminations, had two consequences.

[18] Firstly, the Union says that group termination became payable to the employees under the *ESA* since no working notice was provided. The Union estimates that the amount owing is approximately $5 million. Secondly, the collective bargaining agreement also provides for consequences arising from the failure to recall the employees. This is called the collective agreement severance pay, which the Union estimates is also approximately $5 million. As can be seen, the combination of the two claims is quite substantial, being approximately $10 million.

[19] On April 14, 2016, the Union filed grievances in respect of both the group termination pay and the severance pay under the collective bargaining agreement. Neither of those grievances has proceeded since, given the stay of proceedings in place under the initial order, as extended by my January 2016 order.

[20] In its response, the Union seeks to be excused from the stay altogether, to the point of seeking not only a conclusion of the grievance procedures, but also payment. In the alternative, the Union takes the position that the stay should be lifted to allow for these two claims to be calculated for the purpose of these proceedings within a grievance proceeding.

[21] On a preliminary point, there is no suggestion, even from the Union, that this Court does not have the jurisdiction to stay the continuation of grievance procedures under a collective bargaining agreement pursuant to its statutory jurisdiction under the *CCAA*. For a recent discussion of that issue, see *Essar Steel Algoma Inc.*, 2016 ONCA 274 at para. 33.

[22] The first issue is whether the Union should be allowed to proceed with the grievance procedures to a conclusion and also, if successful, obtain payment from the petitioners. That issue is, in my view, easily disposed of.

[23] As I said, the Union's counsel's estimate of the petitioners' liability arising from these two claims is $10 million. I alluded to the significant cash resources of the

petitioners earlier in these reasons. The Monitor's report indicates that if this proceeding is still afoot in October 2016, the estimated cash on hand will be approximately $11.7 million. Even assuming an earlier resolution of the matter, say by the summer, there would be a slight increase, although I would estimate that it will not be more than $15 million.

[24] The Union's claim is a large one and, if proven, will continue to be a large one advanced against the cash resources of the petitioners. These claims are, however, unsecured claims and not entitled to any priority.

[25] Other claims are also being advanced against the cash on hand. An extremely large claim has been filed against the petitioners by the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan"). That claim is approximately US$936 million, which I am told converts to CDN$1.4 billion. The validity of the 1974 Pension Plan claim is anything but certain. Negotiations or discussions at least between the parties are underway. However, taken on its face, which I must at this stage, the 1974 Pension Plan claim may also be a large claim advanced against the cash resources of the petitioners at the end of the day.

[26] It is by no means certain that there will be anything near $10 million to be paid to the Union members once all claims are resolved. In that event, it is entirely inappropriate that this Court exercise its jurisdiction at this time to allow the Union members to continue the grievance procedures to the point of being paid.

[27] The alternate claim, as I said, is to allow the grievances to continue within the purview of the collective bargaining agreement to provide for a calculation of the severance pay.

[28] The parties have referred to me various authorities on the issues in addition to the Ontario Court of Appeal's decision in *Essar Steel Algoma.* These include *Canwest Global Communications Corp.*, 2010 ONSC 1746; *Canwest Global Communications Corp.*, 2011 ONSC 2215; and Justice Gascon's decision (as he then was) in *AbitibiBowater Inc.*, 2000 QCCS 6463.

[29] Finally, I am aware, of course, of my own decisions on this point, including *Yukon Zinc Corporation*, 2015 BCSC 1961. I referred to *Yukon Zinc* in the Reasons at para. 73 and cited para. 26 of *Yukon Zinc*, which included a listing of the principles by which a court will consider lifting a stay of proceedings. *Yukon Zinc* did not involve a union and grievance claims, but the principles still are relevant here.

[30] In sum, it is a discretionary matter as to whether the Court will allow the stay to be lifted to allow a parallel proceeding to be undertaken. That proceeding could be completely outside of the *CCAA* process, as proposed by the Union here. Alternatively, *Essar Steel Algoma* is a prime example of a parallel and separate claims procedure being allowed to proceed within the *CCAA* proceedings to allow for a determination of grievances that had been filed, given the unique nature of the claims being asserted. Here, no similar application has been brought by the Union for such a claims procedure in relation to its claims.

[31] The general view remains that there will be a substantial amount of cash to distribute at the end of the day. The petitioners' counsel has indicated an intention to bring forward the matter of a claims process very soon. The terms of that claims process are, of course, as yet unclear. It is also uncertain whether any particular terms are to be proposed to address the Union's grievances filed to date and which are outstanding, including the two severance pay obligations discussed above.

[32] Having all of the above circumstances in mind leads me to the conclusion that the application or position of the Union is premature. I am quite cognizant of the other prime consideration here, namely that allowing either a separate grievance procedure to continue or even one within the *CCAA* is going to take some time and resources. As the petitioners argue, their energy is better spent, for all concerned, including the Union, in focussing on obtaining a resolution of the asset sale or liquidation. That effort will greatly assist in preserving the cash on hand and maximizing the pot of funds against which the stakeholders will ultimately claim.

[33] I think it is quite possible and even likely in this case, that there will be some fruitful discussions between the petitioners and the Union concerning how best to

resolve the Union's claims, including the two severance pay claims. Some creativity in creating or fashioning a claims process can address concerns as raised by the Union's counsel. Given the large number of these claims, some global process may be in order. However, those discussions are yet to come, and I have no doubt that the petitioners, with the assistance of the Monitor, will be quite sensitive to the matter and deal with it as best they can. If the parties cannot come to an agreement, then I will address it in terms of approving any claims process.

[34] The final matter to be addressed is the Union's claim of hardship. Mr. Will's affidavit does raise that issue. He claims that delay in dealing with these claims is causing the ex-employees hardship. Both the petitioners and the 1974 Pension Plan argue that this was insufficient evidence of hardship. Those objections might be well-taken, but I do not propose to proceed to deal with it on that basis.

[35] It strikes me as likely that at least some of the laid off employees would have been unable to find work for some or all of the time since the layoff in April 2014. It seems a matter of common sense that any delay in payment to those employees would cause some level of hardship. I would note that the employees have already been laid off for over two years. Either they have found new jobs or they have been living with that hardship for a substantial period of time. The latter does not, of course, alleviate, I am sure, the ongoing financial pressures faced by these people. Any *CCAA* judge is going to be quite sensitive to these types of personal circumstances but, unfortunately, those are circumstances that are typically found in any insolvency proceedings.

[36] If nothing else, the hardship asserted by the Union highlights the overarching issue which has been mentioned by the Court and the parties a number of times; namely, that all concerned have to move as quickly as possible to monetize the assets, preserve cash and get the claims resolved such that the stakeholders can obtain whatever recovery is validly owed to them.

[37] In conclusion, I would not accede to the Union's position. Since there is no application by the Union, per se, that simply results a confirmation of my earlier order that the stay will be extended to August 19, 2016.

"Fitzpatrick J."

# SUPERIOR COURT

**Commercial Division**



CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : November 20, 2012

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**PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.**

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

**AVEOS FLEET PERFORMANCE INC. /**
**AVEOS FLEET PERFORMANCE AÉRONAUTIQUE INC.**
Insolvent Debtor/Petitioner

**and**

**AERO TECHNICAL US, INC.**
Insolvent Debtor

**and**

**FTI CONSULTING CANADA INC.**
Monitor

**and**

**NORTHGATEARINSO CANADA INC.**
Petitioner

**and**

**CREDIT SUISSE AG CAYMAN ISLANDS BRANCH**
Secured creditor

JS 1319

**JUDGMENT**



## INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") is subject to an order under the *Companies' Creditors Arrangement Act* ("C.C.A.A.')[1] It has sold or seeks to sell all of its assets and is not operating its business. Can it invoke Section 32 C.C.A.A. to cancel an executory contract? This is the principal issue before this Court.

## FACTS

[2] Aveos and its related entity, Aero Technical US, Inc. (collectively, the "debtors") applied for and this Court issued an initial order under the C.C.A.A. on March 19, 2012. A stay was issued until April 5, 2012, at that time and has subsequently been extended. F.T.I. Consulting Canada Inc. was named monitor. The record of the Court and particularly the orders and reasons of the undersigned indicate that in the hours following the initial order, the entire board of directors (but one) of Aveos resigned. Most of the remaining employees (i.e. those who had not been laid off prior to the C.C.A.A. filing) were laid off immediately following the initial order and the day-to-day operations of Aveos were shut down.

[3] The remaining director signed the affidavit in support of a Motion Seeking the Appointment of a Chief Restructuring Officer ("C.R.O."), in virtue of which Mr. Jonathan Solursh of the firm R.e.I. Consulting Group, an independent consultant, was named C.R.O. and has acted in such capacity since then. The remaining director resigned following such appointment.

[4] Much time and effort were spent in the month following the filing with the emergency situations of a company not having sufficient cash to operate in the normal course, being in possession of property claimed by third parties and having 2800 former or present employees owed millions of dollars in the aggregate. Nevertheless, the C.R.O. quickly concluded with the support of the Monitor that Aveos had to be sold.

[1] R.S.C. 1985, c. C-25

[5] On April 29, 2012, this Court issued an order approving the "Divestiture Process" put forward by the C.R.O. in virtue of which Aveos was offered for sale. The C.R.O. determined that Aveos' three (3) divisions (i.e. engines, components and air frames) should be marketed with a view to separate sales as it was unlikely that anyone would purchase all three (3) divisions. The C.R.O. believed that the value could be maximized by seeking to split Aveos into three (3) enterprises although there was no impediment to any one person acquiring all three (3) divisions. It was certainly hoped that all three (3) divisions would be sold on a going concern basis and would recommence operations and this in the interest of all stakeholders.

[6] As the Court record indicates, at no time did any party bring a motion to end the stay period with a view to petitioning Aveos into bankruptcy.

[7] The C.R.O. and Monitor have reported on an ongoing basis and also gave evidence in the present matter before the undersigned. The Divestiture Process has given rise to over 10 transactions. Unfortunately, only one sale (for the components division) has been made on a going concern basis where approximately 200 jobs should be conserved. However, and significantly, although the process of seeking bids has ended, the C.R.O. and the Monitor testified before the undersigned that a "latecomer" has appeared, and is performing a due diligence investigation with a view to making an offer to acquire the engine maintenance division of Aveos. The engine maintenance equipment remains in the hands of a liquidator but the scheduled auction has now been postponed. The interested party is in the same type of business, so that the tax losses of Aveos may have value as part of the transaction and this could potentially lead to the filing of a plan of arrangement with some benefit for unsecured creditors. Though the engine maintenance contract with Air Canada was sold as part of the Divestiture Process, it represented approximately 55 % of the engine maintenance business. Accordingly, there is a potential value in the business enterprise beyond the liquidation value of the tangible assets.

[8] Against this status update of the C.C.A.A. file is the dispute between Aveos and the present Petitioner, Northgatearinso Canada Inc. ("N.G.A.").

[9] Aveos was created as a result of the C.C.A.A. restructuring of Air Canada. It was the former maintenance department of Air Canada. Initially, it depended on Air Canada's support for payroll and human resources. As part of the process of separating Aveos from Air Canada, Aveos sought to outsource its human resources and payroll departments. To this end, a process to select a service provider was put in place. The goal of Aveos

was to have a completely outsourced human resources and payroll system that would include computer access for employees through a portal where they could access their files and view their status (e.g. benefit accruals) and even input information (e.g. change beneficiaries in insurance plans). The service would include a call center to handle employee questions.

[10] The establishment of the system had many challenges and complicating factors, such as the fact that some Aveos' personnel were Air Canada's employees that had been seconded to Aveos.

[11] Originally, an operating system completely independent from Air Canada and its services providers was targeted for autumn 2010. This date was extended due to extraneous considerations to July 14, 2011, which was fortunate given all of the developmental problems experienced as will be addressed below.

[12] The "Global Master Services Agreement" ("G.M.S.A.") with N.G.A. was signed between Aveos and N.G.A. in January 2011. By the time of the C.C.A.A. filing in March 2012 not all outstanding operational issues had been resolved. The relationship was fraught with frustration on both sides. Aveos felt that N.G.A. took too long to install systems and was unable to provide certain services altogether. Costs ran over those stipulated in the G.M.S.A. for services not covered under the agreement. All of this caused Aveos to lose confidence in N.G.A.

[13] N.G.A. was frustrated by the ongoing changes in Aveos management personnel charged with the implementation of the system, so that from N.G.A.'s point of view, once it finally "educated" one member of the Aveos team he she was replaced so that Aveos throughout did not fully understand what the system was designed to do, and by extension, what the system could not do.

[14] Aveos felt that N.G.A. as the expert should tell it not merely what was needed, but what was missing in the system to address Aveos' needs. Instead, the Aveos' personnel in charge learned piecemeal that features that they wanted or needed were not available or at least not included in the contract price. This situation was severe enough to cause Aveos to engage the services of Deloitte at the beginning of 2012 as a consultant to help Aveos resolve the continuing issues arising during implementation of the services to be provided by N.G.A. under the G.M.S.A.

[15] N.G.A. felt not only did Aveos fail to understand the system, but it provided incomplete or incorrect data to N.G.A. for input and thus further complicated matters.

[16] The problems with N.G.A. were such that Aveos has sought cancellation of the G.M.S.A. not only under Section 32 C.C.A.A. but also Aveos seeks resiliation for cause pursuant to the law of contracts generally based on N.G.A.'s alleged faulty execution of its obligations.

[17] The level of frustration existing between N.G.A. and Aveos continued after the C.C.A.A. filing. The lay-offs and the shut down of day-to-day operations required services not contemplated by the G.M.S.A. Obtaining such services in a timely manner from N.G.A. was the subject of ongoing extensive and tense negotiations over a period of approximately one month. Aveos was now represented by the C.R.O. and his staff with the support of the Monitor.

[18] Before the undersigned, the representative of the Monitor diplomatically described the situation between N.G.A. and Aveos prior to the C.C.A.A. filing as a "failed business relationship". Unfortunately, the situation did not improve during the post-filing period.

[19] Upon learning of the initial filing under the C.C.A.A., N.G.A. communicated with Aveos. The thrust of N.G.A.'s written and verbal communications were either a refusal to continue services under the existing contract and seeking assurance of payment going forward (according to Aveos) or a request as to what would be required given the change of operations and personnel as described above (according to N.G.A). There followed a series of exchanges including numerous conference calls which gave rise, in succession, to three Memoranda of Understanding dated March 26, April 10 and April 13, 2012 which outlined the services to be provided by N.G.A. to Aveos and the pricing in respect thereof.

[20] Aveos had payroll needs because 120 employees had been recalled. Also payroll periods which fell on both sides of the C.C.A.A. filing date required special attention. Certain "claw-back" amounts previously set off against amounts due to employees had to be paid post-filing. Records of employment had to be issued in order for employees to be able to claim benefits from the government unemployment insurance program.

[21] Other ongoing services under the G.M.S.A. were obviously not required as Aveos' operations were not continuing as had been the case prior to the C.C.A.A. filing.

[22] From N.G.A.'s point of view, the demands being made by Aveos were exorbitant mainly because the time delays were extremely aggressive. Many of the services requested were not what the system was designed to do. For example, records of employment resulting from mass layoffs were

not designed into the system, nor were reversing deductions from past pay periods and ledgering these reversals in the former pay period already closed for purposes of data entry. The system had to be (re-)designed to accommodate these needs.

[23] From the C.R.O's point of view, N.G.A.'s performance failures experienced by Aveos pre-filing now continued into the post-filing period. N.G.A.'s difficulty to meet tight time deadlines imposed by the C.C.A.A. circumstances and the exorbitant pricing made it such that Aveos, through the C.R.O., sought and engaged an alternate payroll service provider as of May 1st, 2012. The price for a one-year contract albeit encompassing far less extensive services than those under the G.M.S.A., is one-half of N.G.A.'s monthly fee. Indeed, the representative of the C.R.O. testified that the exorbitant pricing under the three (3) Memoranda of Agreement was only accepted because there was no alternative at that time. As such, $240,000.00 was paid by Aveos to N.G.A. for the 4-week period between the end of March and the end of April 2012.

[24] In one instance, where the payroll included the reversal of amounts previously set off, N.G.A. could not produce the work product at all or at least on time such that the C.R.O. organized staff to produce 800 pay cheques manually. Moreover, the data in question was entered into the database by N.G.A. in the current as opposed to the old, pre-filing period in consideration of which the payments were being made. This caused Services Canada to question whether the employees were indeed eligible for Unemployment Insurance ("UIC") benefits. Apparently, much energy was expended in order to correct this situation and the results were additional delays for employees to receive their UIC benefits.

[25] Effective May 1st, 2012, Aveos gave notice to N.G.A. that it was cancelling the G.M.S.A. and the three (3) Memoranda of Agreement for faulty performances both pre and post-filing. Alternatively, Aveos took the position that it was cancelling and repudiating the agreements pursuant to its rights to do so under Section 32 C.C.A.A. N.G.A. claims $501,381.00 which is the indemnity provided by the G.M.S.A. where cancellation is for "convenience", i.e. without cause. N.G.A. also claims the sum of $91,377.00 for unpaid services rendered under the three (3) Memoranda of Agreement.

[26] Crédit Suisse, the secured creditor, has taken the position that whatever sums might be due to N.G.A., they fall within the definition of "claim" in Sections 2 and 19 C.C.A.A. and are not post-filing claims as postulated by N.G.A. Thus, any payment would be subordinate to the rights of Crédit Suisse.

## ISSUES

[27] Is Section 32 C.C.A.A. available to Aveos as a means to resiliate or cancel the G.M.S.A.?

[28] Aside from Section 32 C.C.A.A., does Aveos have the right to resiliate the G.M.S.A. because of the alleged faulty execution by N.G.A. of its obligations there under?

[29] Does N.G.A. have the right to claim the cancellation indemnity of $501,381.00 foreseen by the G.M.S.A.? If so, is the amount due immediately by Aveos as a claim arising after the C.C.A.A. filing, and as such not subject to the stay of proceedings? In the alternative, is the amount due but subject to be treated as a (pre-filing) ordinary or unsecured claim to be dealt with under an arrangement, if any, or a bankruptcy?

[30] Is the sum of $91,377.00 due immediately for services rendered by N.G.A. to Aveos after the C.C.A.A. filing?

## POSITION OF N.G.A.

[31] N.G.A. contends that Section 32 C.C.A.A. does not apply in the circumstances where Aveos ceased to carry on business, is being liquidated and as such will not propose an arrangement to its creditors. N.G.A. argues that Section 32(1)(b) C.C.A.A. does not apply to such a scenario. The purpose of Section 32 C.C.A.A. is to allow a debtor company to rid itself of contractual obligations which are an impediment to an arrangement. Where no arrangement will be filed, Section 32 C.C.A.A. should not apply according to N.G.A.

[32] Moreover, since the G.M.S.A. contains a provision allowing for cancellation without cause, such recourse must be used before reverting to a statutory mechanism to seek cancellation of the contract. In other words, according to N.G.A., Aveos must pay the stipulated cancellation penalty of $501,381.00 to achieve cancellation in such manner rather than having recourse to Section 32 C.C.A.A.

[33] The resiliation of the G.M.S.A. for faulty execution is not available to Aveos because on the facts of the case, N.G.A. is not at fault having fulfilled its contractual obligations at all relevant times.

[34] The $501,381.00 cancellation penalty is not a claim provable within the meaning of the C.C.A.A., but rather is a post-filing claim. This claim arises from the unilateral cancellation of the G.M.S.A. by Aveos after the

C.C.A.A. filing. N.G.A. continued to render services after the filing albeit in a modified manner, at Aveos' request and in order to respond to Aveos' needs in the situation as it unfolded after the C.C.A.A. filing. On or about May 1st, 2012, approximately five (5) weeks after the C.C.A.A. filing, Aveos cancelled the G.M.S.A. and as such the obligation of Aveos to pay the penalty of $501,381.00.00 arose after the filing. Consequently, it is not a provable claim, but rather an amount arising and payable after the C.C.A.A. filing.

[35] Similarly, the $91,377.00 representing charges for services rendered after the filing, and at the request of and as agreed with Aveos, are currently due. This is not a claim provable to be dealt with under an arrangement, according to N.G.A. As such, it should be paid by Aveos immediately, as were the other amounts for services rendered after the C.C.A.A. filing, the whole as pleaded by N.G.A.

## DISCUSSION

[36] Section 32 C.C.A.A. provides a mechanism for a debtor company to "disclaim or resiliate" agreements to which it is a party at the time of the initial C.C.A.A. filing. This disclaimer is achieved by notice given by the debtor to the co-contracting party.

[37] The debtor company's notice to disclaim may be contested by the other party to the contract as N.G.A. has done in the present case. It then falls upon the Court to make (or not) an order of disclaimer :

[38] Section 32(4) C.C.A.A. provides as follows :

> "Factors to be considered
>
> In deciding whether to make the order, the court is to consider, among other things,
>
> a) whether the monitor approved the proposed disclaimer or resiliation;
>
> b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement."

[39] On the face of the drafting of Section 32(4) C.C.A.A., the matters listed are not an exhaustive enumeration of the matters that this Court may consider in deciding whether to approve the cancellation of a contract where the notice is contested.

[40] Section 37(4)(c) C.C.A.A. is not in issue in these proceedings because N.G.A. did not allege nor prove any financial hardship arising from the G.M.S.A. There is the obvious lack of revenue stream when the contract is cancelled (approximately $80,000.00 per month), but it was not contended that the loss of this, *per se* constituted, in this particular case, the "financial hardship" to which subparagraph (c) refers.

[41] Section 32(4)(b) C.C.A.A. addresses the issue of whether the cancellation of the contract would "enhance the prospects of a viable" arrangement being made.

[42] The Monitor filed a report and its representative, Ms. Toni Vanderlaan, testified before the undersigned.

[43] The Monitor confirmed that it had approved the proposed cancellation of the G.M.S.A. as foreseen by Section 32(4)(a) C.C.A.A. In so doing, the Monitor considered the cost of continuing the G.M.S.A., which as indicated above represents approximately $80,000.00 per month prior to the C.C.A.A. filing. The alternate provider engaged by Aveos after May 1st (Ceridian), was considerably cheaper at $40,000.00 per year albeit that the scope of the service under the G.M.S.A. provided by N.G.A. was much broader than those provided by Ceridian. In any event, the Monitor determined that the G.M.S.A. was far too expensive given the cash position of Aveos and its payroll and human resources needs in any scenario post C.C.A.A. filing.

[44] In addition to cost, the Monitor concluded that cancelling the G.M.S.A. would enhance the prospect of filing an arrangement. The Monitor underlined that not merely was the G.M.S.A. expensive, but it was undesirable. As stated above, Ms. Vanderlaan summarized the relations between N.G.A. and Aveos at the time of the C.C.A.A. filing as a "failed business relationship". It is clear to the Court that the systems provided by N.G.A. either did not do what they were supposed to do or if they did do what they were supposed to do, then there was a breakdown in communication between N.G.A. as service provider and Aveos as consumer as to what the requirements of Aveos were.

[45] The representative of N.G.A., Mr. Latulippe, referred on a number of occasions to the fact that the representatives of Aveos responsible for the negotiation and implementation of the G.M.S.A. with N.G.A. did not properly

understand what the system was designed to do. This may have been so, but it became evident during the hearing before the undersigned that N.G.A. was lacking in its ability both before and after the C.C.A.A. filing to understand its client's needs and to address them adequately or where that was not possible to explain such inability in a timely and comprehensible fashion. It was therefore not conceivable that Aveos could use the G.M.S.A. going forward because of all of the problems associated with it.

[46] Moreover, the system described in the G.M.S.A. was designed for a company with approximately 3,000 employees. After the C.C.A.A. filing, Aveos only had a fraction of that number on a descending basis. Since the Divestiture Process was based on the premise that no one acquirerer would seek to purchase all three (3) divisions of Aveos, then any possible purchasers would not want the contract based purely on the number of employees. Aside from such consideration, the system did not work very well and the likelihood was that any acquirerer would be an operator in the industry and already have its own payroll and human resources systems in place. The sale or assignment of the G.M.S.A. as part of a sale of assets was not an alternative in the view of the Monitor even absent all the problems experienced by Aveos with the system. Thus, in any possible scenario, the G.M.S.A. was of no use to Aveos and could not enhance, in any scenario, the making of an arrangement.

[47] However, and as stated above, N.G.A. contends that cancellation under Section 32 C.C.A.A. is not available because Section 32(4)(b) C.C.A.A. does not apply. According to N.G.A., there is no discussion to be had about the prospect of an arrangement since early on in the C.C.A.A. process, Aveos shut down its normal operations and went into liquidation mode. Thus, no plan of arrangement will be made, so that an essential element for the application of Section 32 C.C.A.A. is not met according to N.G.A.

[48] The text of Section 32(4)(b) C.C.A.A. does not impose as a condition for resiliation that there be a plan of arrangement or even the certainty that there will be a plan of arrangement filed. Rather 32(4)(b) C.C.A.A. requires that the cancellation of the G.M.S.A. enhance the prospects of a viable arrangement. It is clear from the Monitor's analysis referred to above that the cancellation would rid Aveos of an expensive contract for a system which never functioned in a completely satisfactory manner, and that under the best of circumstances was inappropriate for a company with less than 2,800 employees, and where the relationship with the service provider (both pre and post C.C.A.A. filing) had failed. Viewed in this way, the disclaimer could only enhance the possibility of an arrangement.

[49] It is accepted by the case law that the disclaimer need not be essential but merely advantageous to a plan [2]. There need not be any certainty that there will be a plan of arrangement but just that cancellation of the contract in question would be beneficial to the making of a plan.

[50] Section 32 C.C.A.A. applies even where there is a sales process in place as is the situation with Aveos [3]. Prior to Section 36 C.C.A.A. coming into force in 2009, it was broadly accepted that liquidating while under C.C.A.A. protection was not contrary to the Act.[4] Now, Section 36 C.C.A.A. explicitly provides for sales out of the ordinary course of business, with Court approval.

[51] A sales process, particularly when assets are offered on a going concern basis together with intangible property (e.g. customer contracts) can lead to a result where one or several operating business entities similar to those operated by the debtor pre C.C.A.A. filing, continues after the C.C.A.A. process is completed. The ability to file an arrangement can largely be a function of the sales proceeds received and the amounts available to different stakeholders, particularly secured creditors. The point is that the existence of a sales process or "liquidation" does not *per se* mean that an arrangement is not a possibility. The fact that Aveos ceased operations was a function of cash (or the lack thereof), but the sales process was specifically designed to enhance the possibility of going-concern sales. Indeed, the timetable was short, specifically so as to limit the deterioration of critical mass of such things as customer base and labour pool. Despite the fact that only one division (components) of Aveos was sold on a going concern basis through the process, the C.R.O. testified at the hearing that a new prospective purchaser had come forward to possibly purchase the engine maintenance center together with tax losses arising from Aveos' operations. This could result in a plan of arrangement being filed with benefit for unsecured creditors.

[52] Accordingly, in the view of this Court, the shutdown of Aveos' normal operations and the implementation of a sales process does not in itself, eliminate the application of Section 32 C.C.A.A. as argued by N.G.A.

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[2] *Timminco Limited (Re)*, 2012 ONSC 4471 at par. 52 to 57; *Boutique Jacob inc. (Arrangement relatif à),* 2011 QCCS 276 at par. 38 to 41 and 46; *Homburg Invest inc. (Re)*, 2011 QCCS 6376 at par. 103-106; *9145-7978 Québec inc. (arrangement relatif à*), 2007 QCCA 768 at par. 26 to 29.

[3] *Timminco Limited* (Re), op.cit, at par. 52-27

[4] *Sproule vs. Nortel Networks Corporation 2009 ONCA 833; First Leaside Wealth Management Inc. (Re),* 2012 ONSC 1299; *PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 3367; *Brainhunter Inc. (Re),* (2009) 62 C.B.R. (5th) 41 (ONSC); *Anvil Range Mining Corp. (Re)*, (2002) 34 C.B.R. (4th) (ONCA)

[53] As indicated above, the undersigned has considered the evidence of the C.R.O. with respect to the late bidder. C.C.A.A. issues generally must be decided in "real time" if for no other reason so as to achieve the broad remedial purpose of the legislation[5] of providing a means for financially-strapped enterprises to correct problems and continue in business. This is all the more so in a process such as the Aveos Divestiture Process where the parties' business judgment dictates that the debtor be offered for sale but the parties do not know ahead of time what the outcome of such process will be. The situation evolves constantly and rapidly. The Court's decisions along the way cannot be frozen in time lest those decisions be unrealistic and unhelpful to the process. In any event, even if the undersigned only considered the facts as they were at the date of the notice to disclaim the G.M.S.A. as urged by N.G.A., the undersigned would still be of the opinion that Section 32 C.C.A.A. is available to Aveos for the reasons given above pertaining to the interpretation of Section 32 C.C.A.A.

[54] N.G.A. also submitted that since the G.M.S.A. contains a mechanism to cancel where cancellation for cause under the common law of contracts is not available, then Section 32 C.C.A.A. cannot apply. The argument put forward by N.G.A. is based on the decision in the matter of Hart Stores [6] where Mongeon, J.S.C. held that Section 32 C.C.A.A. did not apply to the cancellation or termination of verbal contracts of employment having no fixed term.

[55] The reasoning in that case was that the mechanism in Section 32 C.C.A.A. was inappropriate to cancel a verbal contract of indeterminate term where the law (Article 2091 of the Civil Code of Québec) provided a mechanism for unilateral cancellation. In this Court's opinion that reasoning does not apply to a written service agreement of determinate term such as the G.M.S.A.

[56] Moreover taken to its logical conclusion, the argument is not really of any help to N.G.A. for the following reason. If Aveos could not rely on Section 32 C.C.A.A. and was obliged to rely on the cancellation for convenience clause in the G.M.S.A., the penalty of $501,381.00 would nonetheless constitute a provable claim payable under an eventual plan of arrangement or bankruptcy.

[57] "Claim" is defined in Section 2 of the C.C.A.A. by reference to the *Bankruptcy and Insolvency Act* ("B.I.A.") [7]. Section 19 C.C.A.A. introduced

[5] *Century Services Inc. vs. Canada (Attorney General),* [2010] 3 S.C.R. 379
[6] Re *Hart Stores Inc*., 2012 QCCS 1094
[7] R.S.C. *c*. B.-3

in the 2007 amendments which came into force in 2009, includes in claims that can be dealt with under a plan of arrangement the following:

> "19.(1)(*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii)."

This is precisely the situation with the cancellation indemnity claimed by N.G.A. in this case. Though Aveos may have triggered the cancellation penalty after the C.C.A.A. filing, the obligation stems from a contract to which it was bound pre-C.C.A.A. filing.

[58] The claim for the cancellation penalty would also be a claim provable in a bankruptcy (see Section 2 and Section 121 of the *B.I.A.* which are substantially similar to Section 19 C.C.A.A.).

[59] Accordingly, in any and all scenarios, the $501,381.00 claimed by N.G.A. for the cancellation indemnity would be a claim provable and would not have the status of a "post-filing claim" payable immediately, i.e. prior to the claims of other creditors.

[60] The Courts have said on numerous occasions that pre-filing creditors cannot under the guise of making a post-filing claim, obtain a preference over other creditors. [8] This applies even to employees for severance claims arising from termination of employment after the C.C.A.A. filing [9]. The equitable treatment of creditors' demands that claims for contractual damages arising from the termination of contracts after filing under the C.C.A.A. be treated on a par with other provable claims [10].

[61] Consequently, N.G.A.'s argument based on the cancellation of the G.M.S.A. without cause after the C.C.A.A. filing date is not helpful to N.G.A., since even if correct, the argument would give rise to a claim provable only.

[62] Moreover, the parties cannot write out part of the C.C.A.A. from contracts. [11] This is against public policy. Parties to a contract cannot exclude in advance the application of the C.C.A.A. It would be offensive to the wording of Section 32 and the C.C.A.A. in general if Section 32 C.C.A.A. could not achieve its purpose as a result of the drafting of the contract which

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[8] *Pine Valley Mining Corporation (Re),* 2008 B.C.S.C. 368 para. 37-42; *Canwest Global Communications Corp. (Re),* 2010 O.N.S.C. 1746, para. 29-31, 33-35

[9] *Canwest Global Communications Corp. (Re),* op.cit.

[10] *Timminco Limited (Re*), op.cit., para. 44

[11] Section 8 C.C.A.A.

the debtor sought to cancel. This would defeat the rehabilitative purpose of the C.C.A.A. and thus would be contrary to the public policy of the C.C.A.A.

[63] Consequently, Section 32 C.C.A.A. is available to Aveos in order to cancel the G.M.S.A. The appropriate order will issue.

[64] Because of the manner in which the Court has answered the first issue set forth hereinabove (i.e. the application of Section 32 C.C.A.A.) it is not necessary to analyse whether Aveos could cancel the G.M.S.A. for cause because of alleged faulty execution by N.G.A. in virtue of the law of contracts generally.

[65] Regarding the $501,381.00 cancellation indemnity, the following should be added. Section 32(7) C.C.A.A. provides that any loss suffered in relation to the disclaimer is a provable claim. The Court renders no judgment on whether the amount of any such claim is $501,381.00 or any other amount in the circumstances. That will have to be determined at a later date, if necessary.

[66] The final issue requiring determination is the matter of N.G.A.'s claim for $91,377.00 for system maintenance. This amount represents the fee of $10,153.00 per week stipulated in the memorandum of understanding of April 13th. Such an amount was paid for the period up to the end of April 2012. The $91,377.00 represents $10,153.00 per week for the 9-week period commencing April 30, 2012, i.e. the expiry of the term of the last memorandum of understanding.

[67] N.G.A. needed the data maintained in the system to complete the records of employment ("R.O.E.") for each of the employees. It had contracted to make "best efforts" to complete those R.O.E.s by April 28, 2012. Mr. Latulippe, N.G.A.'s representative, testified that N.G.A. completed all of the R.O.Es by April 28th, except for 50 which were problematic and could not be completed until the end of June. Accordingly, N.G.A. required the data to be maintained until that time. He conceded that there was no explicit agreement in place after April 30, 2012 for Aveos to pay such weekly system maintenance fee.

[68] Even though N.G.A. only contracted to make best efforts to complete the R.O.E.s before April 28th, if N.G.A. needed to maintain the data in the system after April 28th, it was not justified, without Aveos' consent, to charge the $10,153.00 per week to maintain the data in the system. The "best efforts" clause may have attenuated N.G.A.'S obligation to complete by April 28th but did not impose an obligation on Aveos after that date without its consent. It had been agreed after the C.C.A.A. filing that the services to be provided by N.G.A. and paid for by Aveos were set

forth in the memoranda of understanding. There was no obligation to pay for system maintenance after April 28th.

[69] The Court adds that the fact that the cancellation of the G.M.S.A. takes effect according to Section 32(5) C.C.A.A. on the 30th day following Aveos' notice of May 7, 2012 does not entitle N.G.A. to charge for services under the M.G.S.A. not provided nor for services not agreed to under the memoranda of understanding. Accordingly, the claim for $91,377.00 will be denied.

**FOR ALL OF THE FOREGOING REASONS, THE COURT :**

[70] **DISMISSES** Northgatearinso Canada Inc.'s "Amended Motion to Strike *De Bene Esse* Notice by Debtor Company to Disclaim or Resiliate an Agreement and for Payment of Post-filing Obligations", dated July 9, 2012;

[71] **DECLARES** and **ORDERS** resiliated as of June 6, 2012 the following agreement, namely: "Global Master Services Agreement" between Aveos Fleet Performance Inc. and Northgatearinso Canada Inc. dated June 30, 2010 as amended from time to time including, *inter alia*, by subsequent Memoranda of Agreement".

[72] THE WHOLE with costs against Northgatearinso Canada Inc.

**Montreal, November 20, 2012**

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Dates of Hearings: September 28, October 18, 19 and 30, 2012

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Pine Valley Mining Corporation (Re),*** 2008 BCSC 368

Date: 20080327
Docket: S066791
Registry: Vancouver

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

And

**In the Matter of *The Business Corporations Act*, S.C.C. 2002, c. 57, as amended**

**In the Matter of Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation**

Petitioners

**In Respect to the Claim of a Creditor, Neptune Bulk Terminals (Canada) Ltd.**

Before: The Honourable Mr. Justice Masuhara

## Reasons for Judgment

## In Chambers

| | |
|---|---|
| Counsel for the Applicant Neptune Bulk Terminals (Canada Ltd.): | J.G. Shatford |
| Counsel for Petitioners: | M. Buttery |
| Date and Place of Hearing: | February 27, 2008<br>Vancouver, B.C. |

**Introduction**

[1] Falls Mountain Coal Inc. ("Falls Mountain") is under protection, along with the other petitioners, from creditors pursuant to the ***Companies' Creditors Arrangement Act*** ("CCAA"). On October 20, 2006 an initial CCAA order was granted by Madam Justice Garson (the "Initial Order"). Ernst & Young Inc. was appointed Monitor under her order. Subsequently, a Plan of Compromise and Arrangement (the "Plan") was filed on May 24, 2007, approved by creditors on June 19, 2007 by ninety-eight percent and sanctioned by Garson J. on June 25, 2007.

[2] Neptune Bulk Terminals (Canada) Ltd. ("Neptune") is a creditor and applies for the following:

1. A declaration that the claim of Neptune for payment of the 2006 "Take or Pay" liability of Falls Mountain pursuant to a five-year Spot Contract, effective July 1, 2004 between Falls Mountain and Neptune in the amount of $629,083 is a post filing claim as defined under the Plan;

2. An order that the petitioners pay to Neptune the sum of $629,083 from the initial net sale proceeds received by the Petitioner Pine Valley Mining Corporation ("Pine Valley") under the terms of the Agreement between Pine Valley, Falls Mountain and Cambrian Mining PLC ("Cambrian"); and

3. A declaration that the claim of Neptune for damages in the amount of $4,452,281 arising from the termination Falls Mountain of the Spot Contract be admitted as a Claim under the Plan.

[3] The petitioners oppose the application and seek an order upholding the Monitor's revision of Neptune's claim, namely, that:

1. Neptune is a general creditor in respect of the Take or Pay Claim under the Plan; and

2. the correct amount of Neptune's damages arising from the termination of the Spot Contract is $2,528,298.

**Background**

[4] Falls Mountain operated the Willow Creek coal mine in north eastern B.C. It was a wholly-owned subsidiary of Pine Valley Mining Corporation.

[5] Neptune operates a terminal facility in North Vancouver and provides services for unloading, storage and re-loading of bulk commodities from rail cars to ships.

[6] Under the Spot Contract, Falls Mountain agreed to deliver a minimum tonnage of coal each year (500,000 tonnes) to Neptune over the term of the contract. In the event that the minimum tonnage was not delivered in a given year, Falls Mountain was required to pay the difference between the amount actually delivered and the minimum required tonnage for that year multiplied by a rate set in the contract. This is called a "Take or Pay" obligation.

[7] Coal has not been delivered to Neptune under the Spot Contract since the commencement of these CCAA proceedings October 20, 2006.

[8] As at December 2006, Falls Mountain had failed to ship the minimum contracted tonnage to Neptune for the 2006 contract year. As a result of the shortfall in tonnage, a Take or Pay obligation became due and payable. The amount as at the end of December 2006 was $629,083 (the "2006 Take or Pay Obligation"). Falls Mountain does not take issue with this figure, but agrees with the Monitor that this amount is compromised by the Plan.

[9] Significant to Neptune's position are the negotiations regarding the payment of the 2006 Take or Pay Obligation that ensued in early January 2007 between Mr. Bell the president of Falls Mountain and Mr. Benitez, vice-president finance and administration of Neptune. An agreement was reached under which Falls Mountain would immediately pay ten percent of the Take or Pay Component to Neptune with the balance being deferred over the term of the Spot Contract. The agreement is dated December 21, 2006 (the "Deferred Payment Agreement").

[10] This agreement required 90 days written notice prior to Falls Mountain recommencing coal deliveries to Neptune.

[11] Mr. Benitez deposes that at the time of the Deferred Payment Agreement he requested and received confirmation from Mr. Bell that the 2006 Take or Pay obligation was a post-filing claim and that steps would not be taken to converted it to a pre-filing claim. The emails evidencing this discussion are set out below:

> From Benitez, Gonzalo
> Sent: January 2, 2007 2:32 PM
> To: bbell@pinevalleycoal.com; Martin Rip
> Cc: Belsheim, Jim
> Subject: Take or Pay Neptune Settlement Agreement
>
> Bob;
>
> I have reviewed the revised draft agreement and I have made one single change to it; in Clause 6 (formerly clause 7). As agreed during our conversations last Friday, I have changed the notice period to 90 days from 120 days. Neptune will execute it once you confirm your agreement to this change.
>
> Neptune values it relationship with Falls Mountain Coal (FMC) and it is for this reason that we proposed the payment/postponement mechanism with respect to FMC's 2006 take-or-pay obligation. We did so on the understanding both FMC and Neptune acknowledge that the 2006 take-or-pay obligation is a post filing obligation of FMC. Further, that once this agreement is executed, FMC will not seek to repudiate the Spot Contract and thereby convert the take-or-pay component into the equivalent of a pre-filing claim under any Plan of Arrangement which is subsequently filed. To this end Neptune would like a formal acknowledgement from FMC and the CCAA monitor that the 2006 take-or-pay is post filing obligation of FMC.
>
> From: Bob Bell
> Sent: Wednesday, January 03, 2007 10:52 AM
> To: Benitez, Gonzalo
> Subject: RE: Take or Pay Neptune Settlement Agreement
>
> Gonzalo,
>
> I have attached the executed copy of the final revision that you sent, including the change to 90 days. This also acknowledges that any claim arising from Neptune regarding this 2006 take or pay agreement is a post-filing obligation and that FMC will take no steps to attempt to change the status. Regarding the Monitor, I suggest you talk to Mr. Craig Munro of

> EY (604-891-8264), who has been kept up to date regarding these discussions, and who will confirm the post-filing status although we cannot compel him to do so in writing.

[12] On June 1, 2007, Falls Mountain issued a notice of termination to Neptune formally terminating the Spot Contract and the Deferred Payment Agreement as part of the restructuring of the petitioners. This date is between the May 24, 2007 filing date of the plan of compromise and arrangement and the June 19, 2007 creditor's approval of the plan as amended.

[13] In a letter dated June 4, 2007, counsel for Pine Valley wrote to counsel for Neptune confirming that Neptune did not have a Post Filing Claim in respect of its Take or Pay claim under the CCAA Plan, and was to be treated as a General Creditor.

[14] On June 11, 2007 Neptune submitted a Revised Proof of Claim and broke its claim down between what it viewed as general creditor claims and post-filing claims in the following way:

| | | | |
|---|---|---|---|
| (a) | General Creditor Claim for pre-filing liabilities | $ | 220,296.13 |
| (b) | Post-Filing Claim for 2006 "Take or Pay" | | 629,083.00 |
| (c) | General Creditor Claim for Termination of Spot Contract | | 4,452,281.00 |
| | Total | $ | 5,301,660.13 |

[15] Neptune attended the creditors meeting on June 19, 2007, and voted in favour of the Plan. The Plan was sanctioned by the Court on June 25, 2007.

[16] On June 29, 2007, as contemplated under the Plan, Pine Valley sold its interest in Falls Mountain to Cambrian. The consideration included some $15 million in cash, $11 million (face value) in debentures of Western Canadian Coal Corp, and future payment of up to $26 million based on future volumes processed through the Falls Mountain facilities, which could exceed over ten years.

[17] On July 4, 2007, Mr. Shatford, on behalf of Neptune, wrote to Ms. Milton, counsel for the petitioner, and demanded payment in full of the 2006 Take or Pay Obligation.

[18] On July 5, 2007, Ms. Buttery, independent counsel for the petitioners, responded to Mr. Shatford and referred to her office's June 4, 2007 letter to Mr. Shatford that advised that the 2006 Take or Pay Obligation was not a post-filing claim.

[19] On July 25, 2007, the Monitor, Ernst & Young Inc., issued a Notice of Revision or Disallowance of Claim to Neptune. With respect to the claim for termination of the Spot Contract, the Monitor stated that Neptune had a duty to mitigate its claim. The Monitor recognized the difficulty in finding a replacement in the short term but was of the view that Neptune could find a long term customer if it could offer a long term contract to "potential replacement customers". The Monitor believed that this could be achieved within twelve months of the termination by Falls Mountain and as a consequence, Falls Mountain "should not be held accountable for the lack of mitigation opportunities arising from Neptune's business decision to make available the FMC capacity for only a limited period of time." As a result, the Monitor reduced Neptune's claim of $4,452,281 with respect to the contractual minimum quantity to be processed through the Neptune facility in 2007, 2008, and 2009 to $2,528,298.

**The Initial Order**

[20] The Initial Order of October 20, 2006 included the following standard term:

> the Petitioners shall remain in possession of the Property and Business, provided that:
>
> ***
>
> (b) they shall have the right, subject to the consent of the Monitor, to proceed with an orderly downsizing of the Business and operations, including without limitation, the right to:
>
> ***
>
> (vi) terminate or repudiate such of its arrangements or agreements of any nature whatsoever as the Petitioners deem appropriate, on such terms as may be agreed upon between the Petitioners and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan.

**The Plan**

[21] The following are the definitions contained in the Plan that are relevant to the applications before me:

> "Claim" means any right of any Person against the Petitioners, or any of them, in connection with any indebtedness, liability or obligation of any kind owed by the Petitioners or any of them and any interest accrued thereon or costs payable in respect thereof, whether liquidated, unliquidated, fixed, contingent, matured, not matured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability or any Person to advance a claim of contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts existing prior to October 20, 2006, and any indebtedness, liability or obligation of any kind arising out of the repudiation, restructuring or termination of any contract, lease, employment agreement or other agreement after October 20, 2006. Without limiting the foregoing and for greater certainty, "Claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the BIA, as set out in section 12(1) of the CCAA and shall also include the claim of PVM against FMC.
>
> "Filing Date" means October 20, 2006.
>
> "Post Filing Claim" means the amount due to a Person for any goods or services supplied to the Petitioners subsequent to the Filing Date and/or for any sales or excise taxes, source deductions or assessments and premiums due from the Petitioners and arising subsequent to the Filing Date but does not include any person having a Claim as a result of the Petitioners repudiating or terminating any contractual relationship, including without limitation any employment or leasehold relationship.
>
> "Post Filing Creditor" means a person with a Post Filing Claim…
>
> "Unaffected Creditors" means the Post filing Creditors and the CCAA Creditors.
>
> "Initial Net Sale Proceeds" means the aggregate net cash consideration to be received by PVM (Pine Valley Mining Corporation) as a result of the completion of the Agreement including the net sale proceeds from the sale of the WCC Debenture but excluding the royalty proceeds.

> "Agreement" means the agreement between PVM (Pine Valley Mining Corporation), FMV (Falls Mountain Coal Limited) and Cambrian dated April 26, 2007 pursuant to which Cambrian is to purchase the purchase shares and the debt for the consideration set forth in the Agreement…

[22] Article 2 Purpose and Effect of the Plan reads as follows:

> 2.2 Summary of Plan
>
> The proceeds generated from the Agreement will be used: (i) to pay the Agreement transaction costs, the Holdback under the Agreement and the KERP amounts; (ii) to satisfy in full the obligations of the Petitioners to the Unaffected Creditors; (iii) to satisfy in full the Petitioners' obligations to the Secured Creditors; and (iv) the balance shall be received by PVM which shall continue under the CCAA against which the Replacement Claims of General Creditors, including PVM, shall continue and be enforceable.
>
> 2.4 Persons Not Compromised by the Plan
>
> The Unaffected Creditors will not be compromised by this Plan on the basis that their Claims, if any, will be paid in full pursuant to this Plan from the Initial Net Sales Proceeds.

**Position of the Parties**

[23] The position of Neptune is that since the 2006 Take or Pay obligation arises after October 20, 2006 it is not a Claim as defined in the Plan. The Neptune position is reliant upon the calculation date for the annual take or pay amount under the Spot Contract; namely, December 31, 2006. Neptune submits that since this date is after October 20, 2006, its 2006 Take or Pay Obligation is a Post Filing Claim as defined in the Plan. Neptune refers to the provision that states that such claims are amounts due to persons for goods or services supplied subsequent to the filing date and specifically excludes person having claims as a result of the repudiation or termination of any contractual relationship. Since a Post Filing Creditor (a person holding a Post Filing Claim) is included in the definition of Unaffected Creditors, and that the Plan calls for Unaffected Creditors to be paid in full from the Initial Net Sales Proceeds from the sale of the shares to Cambrian; Neptune argues that it is entitled to be paid out of these proceeds.

[24] Neptune also submits that Falls Mountain is estopped from taking the position that the claim of Neptune was compromised under the Plan when notice of termination was given. Neptune points to the negotiations that took place between Neptune and Falls Mountain at the time the 2006 Take or Pay Obligation arose in December 2006. Those negotiations took place in circumstance under which Falls Mountain agreed that the claim of Neptune was a Post Filing Obligation and was not to be negatively affected by the Plan. Neptune relied upon that representation by Falls Mountain in entering into the agreement to defer payment. Neptune relies upon two cases to support its estoppel argument: ***Re: Air Canada*** [2004] O.J. No. 576 (Sup. C.J.); and ***Re: Stelco Inc.*** [2005] O.J. No. 4310 (Sup. C.J.).

[25] With respect to mitigation, Neptune submits that no evidence has been adduced to support the assertion that the loss from the termination of the Spot Contract could have been mitigated. Further, Neptune points to its evidence that shows there is an over capacity/supply in the three coal terminals located in British Columbia. It states that all of the existing coal suppliers in the marketplace have entered into contractual arrangements to ship coal through competitors of Neptune and that the likelihood of Neptune finding either a short or long term replacement for Falls Mountain prior to expiry of the Spot contract on July 1, 2009 is unlikely.

[26] The petitioners submit that the application of Neptune is an attempt to gain an advantage over the general body of creditors. They note that if Neptune's position is accepted, it will receive 100 cents per dollar of its take or pay claim and will have leaped ahead of other similar creditors. The petitioners refer to the caution of Newbury J.A. in ***Re Skeena Cellulose Inc.*** (2003), 13 B.C.L.R. (4th) 236 (C.A.) at ¶ 20:

> In these circumstances, the Chief Justice correctly recognized that, as stated by Rowles J.A. for the Court in ***Cam-Net Communications v. Vancouver Telephone Co.*** (1999), 71 B.C.L.R. (3d) 226 (C.A.), a supervising court under the CCAA must be alert to the incentive for creditors to 'avoid the reorganization compromise' and must 'scrutinize carefully any action by a creditor which would have the effect of giving in an advantage over the general body of creditors'.

[27] The petitioners submit that by virtue of the Initial Order, Neptune was stayed from pursuing Falls Mountain for payment of any amount owing to it under the Spot Contract or otherwise.

[28] The petitioners reject the assertion that Neptune's claim is a Post Filing Claim under the Plan. They point to the explicit language of the Plan that provides that any Claim resulting from the repudiation or termination of a contract by the petitioners will not be a Post Filing Claim. They note that Neptune voted in favour of the Plan with full knowledge of how it would be treated under the Plan. They further note that at the sanction hearing Neptune did not argue that the classification of creditors was incorrect, nor that creditors with claims that arose after the filing date should be considered Unaffected Creditors.

[29] The petitioners argue that the email exchange between Mr. Benitez and Mr. Bell in early January 2007 is more properly characterized as an agreement to agree on how Neptune's claim would be treated under the then yet to be drafted plan of arrangement. It is further submitted that Mr. Benitez's request that the Monitor also agree to the treatment of the Take or Pay Claim, indicates that it was a condition precedent to any ultimate agreement that the Monitor consent to the proposed treatment of Neptune's claim. There is no evidence of such agreement from the Monitor or that such agreement was even sought. They note, as well, that the Deferred Payment Agreement does not include any terms referencing the treatment of the 2006 Take or Pay Obligation in this proceeding; and that while Mr. Bell acknowledged that the Take or Pay amount was a post-filing obligation, he did not offer any assurance that Neptune would not repudiate the Spot Contract. The petitioners add that Mr. Bell indicated in his email that he could not speak for the Monitor and suggested Mr. Benitez to contact the Monitor directly.

[30] Alternatively, the petitioners argue that even if there was a binding agreement regarding Neptune's claim, that nonetheless Neptune accepted the repudiation of the Spot Contract and has included in its Revised Proof of Claim a General Creditor Claim for damages arising from the repudiation.

[31] The petitioners note that the 2006 Take or Pay Obligation was said by Neptune to have been deferred to future years. The petitioners argue that Neptune's assertion is akin to seeking a claim for specific performance, that such relief should not be available indirectly in a CCAA proceeding and that it should only be available when the non-repudiating party cannot be adequately compensated in damages for the breach. The petitioners point to the absence of evidence that a damages claim as provided under the Plan would be inadequate in the circumstances. Further, it is argued that equitable relief is not appropriate where it causes an injustice to other unsecured creditors, by permitting one unsecured creditor to elevate its claim above the claims of all other unsecured creditors.

[32] The petitioners counter Neptune's estoppel argument by noting the obvious – that a restructuring is a fluid process. An assurance by a representative of a company under CCAA protection that a creditor's claim will not be compromised by a plan of arrangement does not necessarily prohibit the company from later filing a plan of arrangement that compromises that creditor's claim. This reality was recognized in the petitioner's view when Mr. Benitez in his email exchange with Mr. Bell, expressly pointed out that repudiation of the Spot Contract would convert the Take or Pay Claim into the equivalent of a pre-filing claim under any plan of arrangement which might be subsequently filed.

[33] The petitioners also note that Neptune does not dispute that Falls Mountain was permitted to terminate the Spot Contract within these CCAA proceedings.

[34] The petitioners submit that a party relying on the doctrine of estoppel must establish that the other party has, by words or conduct, made a promise or assurance which was to affect their legal relationship and to be acted on; and, that the representee acted on it or in some way changed his or her position: ***Synik Capital Corp. v. Faris*** 2007 BCSC 527 at 114; and ***Re Westar Mining Ltd.*** (1997) 25 B.C.L.R. (3d) 297 at ¶ 49.

[35] In regard to mitigation, the petitioners submit that Neptune took no steps in this regard. It took no steps to ascertain if there was ability for any of the province's coal producers to ship more coal through their terminal. Neptune did not advertise, make

calls, or make specific requests. The petitioners argue that the general conversations that Neptune had about the availability of more coal do not amount to taking reasonable steps to mitigate damages. Further, the failure to seek an alternative commodity producer to take terminal capacity is another fact the petitioners argue demonstrates the lack of mitigation effort.

[36] As a result of the lack of evidence of mitigation efforts, the petitioners submit that the court is entitled to rely upon the findings of the Monitor.

**Discussion**

[37] Two key features of the CCAA is that all proceedings by creditors against the debtor company can be stayed and that contracts can be terminated, either before or after the initial CCAA filing, provided the creditor's right to assert a damage claim arising from the repudiation is permitted under the plan of arrangement. In this case, the Plan permits creditors to make a "Claim" for such damage.

[38] In this regard, I note the comments of Cumming J. in ***Re Ivanco Inc.*** 2007 CarswellOnt 7527 (Ont. S.C.J.) at ¶ 27 and 28:

> First, the CCAA does not limit its embrace in respect of creditors to pre-filing creditors. Section 2 of the CCAA provides that an "unsecured creditor [like Heico] means any creditor who is not a secured creditor without any suggestion of a temporal limitation. Likewise, section 4 speaks to a compromise between a debtor company and its unsecured creditors or any class of them without any suggestion of temporal limitation. In providing for compromises to be sanctioned by the Court section 6 refers to approval by "a majority in number representing two-thirds in value of the creditors, or class of creditors present and voting…" without qualification by way of a temporal limitation as to when the person became a creditor.
>
> Second, I infer from a public policy standpoint that there is not any a priori reason for excluding post-filing creditors from the reach of the CCAA.

[39] The Initial Order permits termination and repudiation of arrangements or agreements of any nature whatsoever. There is no temporal limitation.

[40] The Plan explicitly provides that any Claim resulting from the repudiation or termination of a contract by the petitioners will not be a Post Filing Claim. I note that the

definition of Claim in the Plan is expansive and includes: “any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts existing prior to October 20, 2006, and any indebtedness, liability or obligation of any kind arising out of the repudiation, restructuring or termination of any contract, lease, employment agreement or other agreement after October 20, 2006.” [emphasis added]

[41] Based on the language of the Plan, the fact that the 2006 Take or Pay amount was determined, or that the Deferred Payment Agreement came into being after October 20, 2006 does not assist Neptune in its application. What is determinative, in my view, is that the 2006 Take or Pay Obligation arose out of a contract that was in effect prior to the Initial Order and was as such subject to compromise.

[42] In my view, the 2006 Take or Pay Obligation falls under this above referenced provision of the Plan and accordingly, the claimed amount is not a Post Filing Claim.

[43] In any event, though it would not be determinative, there is no language in the contract that specifies that it is to be considered a Post Filing Claim or that Neptune is an Unaffected Creditor. It does not refer to an anticipated plan of compromise and arrangement. It does not restrict Falls Mountain’s ability to repudiate. The agreement contemplates the continuation of the Spot Contract. Further, the comments of Mr. Benitez in his email indicate that the understanding was subject to the approval of the Monitor. There is no evidence that such approval was sought or obtained.

[44] The contract was agreed after the CCAA process had been initiated. Neptune had full knowledge of the consequences that arise from a CCAA process. The subject matter of Deferred Payment Agreement is payment of the 2006 Take or Payment obligation. It arises out of the Spot Contract that was clearly subject to compromise. As mentioned earlier, the restructuring process is fluid and is one of considerable flux. In this case, Neptune sought out a solution in its best interest to obtain payment of a claim in full. However, it did not obtain the approval of the Monitor nor did it raise the matter in the Plan approval or sanctioning process when it was known that a clear dispute regarding the 2006 Take or Pay existed. I am unable to discern from the submissions of Neptune how it is that the matter was not raised during the Plan approval and

sanctioning process. It is in the sanctioning process where the court evaluates the reasonableness and fairness in a plan of compromises and arrangement. The fairness includes whether the plan adequately balances the interests of all creditors.

[45] In terms of estoppel, the cases relied upon by Neptune: ***Re Air Canada*** and ***Re Stelco Inc.*** are distinguishable. In the former case, the focal point of the case was the lease of an aircraft and the payments to be made under it. The aircraft in that case was central to the company's ongoing operations, had been in use by the airline, had remained available to the company and in fact was in possession of the aircraft. In the latter case, the petitioner's own written submissions to the court in earlier proceedings stated that the creditor had a post-filing claim and as a result was found to have opted not to compromise the creditor's claim. Further, the court noted that this creditor was the only creditor that had a history of involvement with Stelco which did not commence until after Stelco had filed for CCAA protection. I do not find these elements present in this case. More particularly, no services were provided by Neptune or required by Falls Mountain.

[46] Further, it is not apparent that Neptune altered its position in reliance of the agreement. The evidence of Neptune indicates that no opportunity was lost as a result of its agreement. Certainly, no alternative customers were turned away as a result of the agreement. In this regard, s. 11 of the CCAA provides that:

> No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of a leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

[47] Had an alternate avenue of business been open to Neptune, the above provision could have been invoked. The considerable evidence of Neptune as to limitations of the market in which it operates does not assist it case. Further, as a result of the stay established under the Initial Order, Neptune did not forgo any immediate right to collect on its take or pay claim. The equities of the case do not support the contention of Neptune.

**Conclusions**

[48] In the circumstances of this case, given the knowledge of Neptune regarding the CCAA proceedings and the potential outcome from the restructuring process; the flexibility and broad scope of the Initial Order and the Plan; the absence of the matter being raised at the creditors meeting or before the sanctioning judge when it was clear that the petitioners and Monitor believed the Spot Contract and Deferred Payment Agreement were compromised under the Plan; the absence in the language of the Deferred Payment Agreement as to its treatment; the focus of this agreement being an amount that arose during the 2006 year of the contract; the absence of a lack of change in position on the part of Neptune as a result of the agreement; the declaration sought by Neptune regarding the 2006 Take or Pay Obligation being a Post Filing Claim is denied.

[49] As a consequence, it follows that Neptune's application for payment of the 2006 Take or Pay Obligation out of the Initial Net Proceeds is denied.

[50] With respect to mitigation, the onus is on the party asserting the failure to mitigate to establish this fact. The petitioners point to the Monitor's Notice of Revision or Disallowance of Claim dated July 25, 2007 and the Monitor's 10th Report dated August 22, 2007.

[51] The petitioners submit that Neptune took no steps to ascertain if there was ability for any of the province's coal producers to ship more coal through their terminal. They point out that Neptune did not advertise, make calls, or make specific requests. They say that Neptune did not seek an alternative commodity producer to take the terminal capacity that arose as a result of Fall Mountain's termination of the Spot Contract. It did not offer long term contracts. They submit that Neptune's reliance on the assertion of excess capacity is not sufficient.

[52] Neptune points to its evidence that there is an over capacity in the three coal terminals located in B.C. All of the existing coal suppliers in the marketplace have entered into multi-year contractual arrangements to ship coal through competitors of Neptune. As a result, they submit the likelihood of Neptune finding either a short or long term replacement for Falls Mountain prior to the expiry of the Spot Contract on July 1,

2009 is unlikely. I note that Neptune provided responses to the petitioner regarding discussions with other prospective customers. The responses indicate ongoing communications. The community of coal producers and service providers is relatively tightly knit. Given the lack of prospective customers for the use of its terminal facilities, Neptune submits that there is no basis upon which its claim should be reduced. I note that Mr. Benitez provided a significant review of the capacities and contractual arrangements of the terminals and coal producers in the Neptune market. He was further cross-examined on his affidavit. Further, information was provided by Mr. Nardi, vice-president of marketing, to the petitioners arising from the cross-examination of Mr. Benitez regarding discussions with prospective customers.



[53] There was no direct evidence from the petitioners to contradict the evidence of Neptune. The petitioners relied upon was that of the Monitor and the critique of Neptune's evidence via counsel's submissions.

[54] The Monitor is an officer of the court and the duty of the Monitor is to act independently and to act in the interests of all stakeholders in the proceedings. The courts have approached the opinion of monitors with significant deference.

[55] However, the evidence relied upon by the petitioners is found in a brief summary in the Monitor's claim revision and 10th report, wherein a discussion between the Monitor and Neptune representatives is referenced which is the basis of the Monitor's opinion. In my view, in the absence of further details as to the content of the discussions, as well as facts upon which the Monitor's opinion is based, I cannot conclude on balance that Neptune has failed to mitigate its loss when the direct evidence adduced by Neptune is considered. In my view, Neptune has taken reasonable steps in the context of the prevailing conditions.

[56] As result, the petitioners' application to have Neptune's damages assessed at $2,528,298 is denied and Neptune's application for an order that its claim for damages from the termination of the Spot Contract is $4,452,281 is granted.

***"The Honourable Mr. Justice Masuhara"***

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:

| | |
|---|---|
| **JTI-MACDONALD CORP.** | **Court File No. CV-19-615862-00CL** |
| **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED** | **Court File No. CV-19-616077-00CL** |
| **ROTHMANS, BENSON & HEDGES INC.** | **Court File No. CV-19-616779-00CL** |

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceeding commenced at Toronto

# BOOK OF AUTHORITIES OF THE QUEBEC CLASS ACTION PLAINTIFFS


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