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

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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

BOOK OF AUTHORITIES OF THE CANADIAN CANCER SOCIETY

MOTION FOR STAY EXTENSION RETURNABLE ON JUNE 26, 2019 IN
Court File No. CV-19-615862-00CL, *JTI-Macdonald Corp., Re*
Court File No. CV-19-616077-00CL, *Imperial Tobacco Canada Limited et al., Re*
Court File No. CV-19-616779-00CL, *Rothmans, Benson & Hedges Inc., Re*

June 24, 2019

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(COMMERCIAL LIST)

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
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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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

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CANADA LAW BOOK

DEBT RESTRUCTURING

Principles and Practice

Volume 1
(Chapters 1 to 12)

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THOMSON REUTERS®

February 2019

under the Act to give notice of a stay, it is always advisable that a copy of the order be served on all who are affected by it as the order could be considered to be in the nature of an injunction which, as a rule, can be enforced only against those who have notice of it.

NOTES

1. CCAA, s. 11.
2. *Ibid.*, s. 11.02(3)(*a*).
2a *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, 2010 CarswellBC 3419, at para. 70; *League Assets Corp., Re*, 2013 BCSC 2043, 2013 CarswellBC 3408, at para. 18.
3. Where an application is made by a group of creditors, the applicants should be able to submit an outline of a plan of compromise or arrangement. Without a plan, which would permit the continued operation of the debtor and its subsidiaries, the court will dismiss the application: *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.). In *Doman Industries Ltd. (Re)* (2003), 41 C.B.R. (4th) 29 (B.C.S.C.), the court refused to allow a class of secured creditors to file a plan restricted to its class only. Such a filing, the court held, could give the class a veto power in respect of the restructuring of the debtor company. However, in *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. (Comm. List)), affd on other grounds 34 C.B.R. (4th) 157, [2002] O.J. No. 2606 (C.A.), leave to appeal to S.C.C. refused 180 O.A.C. 399*n*, 310 N.R. 200*n*, and *Re 1078385 Ontario Ltd.* (2004), 16 C.B.R. (5th) 144 (Ont. S.C.J.), leave to appeal to Ont. C.A. refused 16 C.B.R. (5th) 152, 206 O.A.C. 17, the court approved a secured-creditor led plan that operated exclusively for the benefit of the secured creditors in a liquidation scenario.
4. CCAA, s. 10(2)(*c*).
5. *Jax Marine Pty. Ltd. and Companies Act (Re)*, [1967] 1 N.S.W.L.R. 145, at p. 146.
6. CCAA, s. 11.02(1). See **9:1406**, "Scope of Stay: Actions, Suits or Proceedings", *infra*.
7. *Cineplex Odeon Corp. (Re)* (2001), 26 C.B.R. (4th) 21 (Ont. S.C.J. (Comm. List)).
8. *Re Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291 (C.A.). See also *Air Canada (Re)* (2003), 121 A.C.W.S. (3d) 994 (Ont. S.C.J. (Comm. List)), where the court encouraged the parties involved to make appropriate use of the come-back clause to deal with any glitches in the initial order.
9. CCAA, s. 23 and see **9:15**, "Monitor", *infra*.

9:1403 Subsequent Applications

A court, on any application subsequent to an initial application, may extend an initial stay of proceedings.[1] However, an order may not be made unless the applicant satisfies the court that circumstances exist that make such an order appropriate and the applicant has acted and is acting in good faith[2] and with due diligence.[3] The applicant is usually the debtor but can be any person interested in the matter.[4]

Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, the court may make an order on such terms as it may impose: (1) 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 the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*; (2) restraining, until otherwise ordered by the court, further proceeding in any action, suit or proceeding[5] against the company; and (3) prohibiting, until otherwise ordered by the court, the

commencement of or proceeding with any other action, suit or proceeding against the company.[6]

The 1997 amendments to the Act recognize that stays of proceedings have been requested and ordered for increasingly longer periods than were contemplated when the Act was enacted. This has placed a greater responsibility upon the court and a greater onus upon an applicant. The court will require sufficient evidence to exercise its discretion pursuant to recognized and accepted principles.[7] The monitor's report on the state of the business of the debtor and its financial affairs will play an important function in this regard.[8]

NOTES

1. CCAA, s. 11.02(2). The extension of the stay of proceedings may apply to third parties: *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 57, 145 A.C.W.S. (3d) 759 (Ont. S.C.J. (Comm. List)).

2. While the "good faith" requirement in subsequent stay applications generally concerns the debtor's dealings with stakeholders, concern for the broader public interest requires that a stay not be granted if the result will be to condone wrongdoing: *Re San Francisco Gifts Ltd.* (2005), 10 C.B.R. (5th) 275 (Alta. Q.B.). However, the failure of debtor's management to comply with a monitor's timetable for the downsizing of its employees does not constitute lack of good faith or due diligence: *Re Skeena Cellulose Inc.* (2001), 29 C.B.R. (4th) 157 (B.C.S.C.). The court granted a further extension of the stay since a refusal to do so would have severe consequences for the community, employees, contractors and suppliers. In deciding whether the debtor company has acted with due diligence and in good faith since the initial order, the court will also consider whether there was full and fair disclosure of material facts during the initial and subsequent application: *Re Hayes Forest Services Ltd.* (2008), 46 C.B.R. (5th) 189, 2008 BCSC 1256. See also *Re Humber Valley Resort Corp.* (2008), 48 C.B.R. (5th) 128, 859 A.P.R. 87 (Nfld. & Lab. S.C.T.D.), where the stay was extended to permit a resort developer the opportunity to formulate a restructuring plan or arrangement. Similarly, in *Clayton Construction Co. (Re)* (2009), 59 C.B.R. (5th) 213, 187 A.C.W.S. (3d) 336 (Sask Q.B.), the stay was extended to allow the construction companies the opportunity to present a plan of arrangement to benefit their creditors. In *Dura Automotive Systems (Canada) Ltd. (Re)* (2010), 63 C.B.R. (5th) 66 (Ont. S.C.J. (Comm. List)), the stay was not extended by the court because the debtor's negotiations with the unions and the plan administrator of the pension plans were such that it was unrealistic to expect that any viable plan could be put forward and by questioning the representative status of these parties at the last possible moment, the debtor demonstrated that it was not acting in good faith and with due diligence. See also *U.S. Steel Canada Inc., Re*, 2016 CarswellOnt 7400, 2016 ONSC 3106, where the Court granted an extension of the stay of proceedings for several reasons including the fact that the sales process was underway and there was reason to believe that one or more offers for the applicant to continue on a going-concern basis would be received under the sales process. In *Re Canada North Group Inc*, 2017 CarswellAlta 1609, 2017 ABQB 508, the Court had some concerns with the debtor's conduct (i.e., the treatment of invoicing) after the initial application. Based on the evidence, however, the Court was not prepared to conclude that the debtor failed to act in good faith to the extent of disentitling the extension of the stay of proceedings sought by the debtor.

3. CCAA, s. 11.02(3). In *843504 Alberta Ltd. (Re)* (2003), 351 A.R. 222, 30 Alta. L.R. (4th) 91 (Q.B.), the court, under the initial order, directed a monitor to carry on the business of the

(*The next page is* 9-63)

debtor under the CCAA. The monitor and one creditor subsequently sought an extension of the stay of proceedings, however, the other creditors opposed an extension of the stay of proceedings. The opposing creditors argued that the monitor was not acting in good faith and that the proceeding was really a receivership under the guise of a CCAA restructuring. The court rejected the monitor's proposed restructuring process because it was not necessary or in the stakeholders' best interests. Nevertheless, after reviewing the monitor's actions, the court held that the monitor had acted in good faith by diligently moving the restructuring process towards the development of a plan of arrangement. The court also considered other facts to rule that circumstances did exist to warrant a limited extension of the stay of proceedings. In *SLMsoft Inc. (Re)* (2003), 4 C.B.R. (5th) 102 (Ont. S.C.J.), at p. 103, the court refused to order a continuance or extension of the CCAA proceedings. The court held that, in order for a continuance to be granted, there must be "evidence of some tangible progress towards the development of a plan of restructuring". In this case, the debtor had failed to develop a plan, obtain DIP financing and generate revenues from its operations. The court also held that the debtor's management had shown a lack of good faith. Therefore, the court refused to approve a continuance of the CCAA proceedings and appointed an interim receiver under s. 46(1) of the *Bankruptcy and Insolvency Act*. In *Re San Francisco Gifts Ltd., supra*, the debtor pled guilty and was fined under the *Copyright Act*, R.S.C. 1985, c. C-42. Notwithstanding, the court allowed a continuation of the stay. The debtor was punished already for the copyright offence and based on a balancing of interests under the CCAA, particularly those of the unsecured creditors, an extension of the stay of proceedings was appropriate in the circumstances. In *Re Simpson's Island Salmon Ltd.* (2006), 24 C.B.R. (5th) 17, 302 N.B.R. (2d) 10 (Q.B.), the court extended the stay order where there was a reasonable prospect of the debtor company being able to file a plan of reorganization under the CCAA. Where there is generally no such prospect, the courts have refused to extend the stay: *Re Hunters Trailer & Marine Ltd.* (2000), 5 C.B.R. (5th) 64, 2000 ABQB 952; *Re Hemosol Corp.* (2007), 27 C.B.R. (5th) 311, 26 B.L.R. (4th) 144 (Ont. S.C.J.), leave to appeal to Ont. C.A. refused 31 C.B.R. (5th) 83, 2007 ONCA 124 (Memorandum of Agreement under the CCAA not extended). In *Re ScoZinc Ltd.* (2009), 52 C.B.R. (5th) 200, 276 N.S.R. (2d) 1 (S.C.), the court granted an extension of the stay where the debtor company demonstrated a commitment to continue operations and secure financing. In *Tepper Holdings Inc. (Re)*, 2011 NBQB 211, 205 A.C.W.S. (3d) 624, at paras. 39-52, additional reasons 2011 CarswellNB 592, 2011 NBQB 311 (N.B. T.D.), the court ordered an extension of the stay based on several factors including the following:

(1) the extension sought was not unduly long;
(2) the security of the secured creditors was not being dissipated;
(3) the extension was supported by the monitor and the shareholders;
(4) the prospective plan was not doomed to fail at this point in time;
(5) the CCAA proceeding was not being used to delay inevitable liquidation;
(6) the extension would benefit the different stakeholders including customers and employees and society in general;
(7) the extension of the stay and the granting of certain charges (*i.e.*, DIP financing) would permit the debtor to continue operations and enable the debtor to negotiate a compromise or arrangement with its creditors;
(8) the extension of the stay was essential to keep creditors at bay while the debtor attempted to carry on business as a going concern and negotiate an acceptable restructuring arrangement with its creditors;
(9) the objecting creditors would not be unduly prejudiced by the extension of the stay; and
(10) a restructured debtor had greater value as part of an integrated or whole system than individually or piece-meal being sold off or liquidated in the circumstances. The court therefore concluded that the debtor was acting and continued to act in good faith and with due diligence.

See also *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 CarswellAlta 1496,

2013 ABQB 432, at para. 13; *Alexis Paragon Limited Partnership, Re*, 2014 CarswellAlta 165, 2014 ABQB 65, at paras. 15-42; *U.S. Steel Canada Inc., Re*, 2014 CarswellOnt 16465, 2014 ONSC 6145, at paras. 43-48.

4. *Ibid.*, s. 11.
5. See **9:1406**, "Scope of Stay: Actions, Suits or Proceedings", *infra*.
6. CCAA, s. 11.02(2).
7. See **9:1405**, "Discretion of the Court", *infra*. In *Tepper Holdings Inc. (Re)*, *supra*, endnote 3, at para. 54, the court acknowledged that there is no standard length of time provided in the CCAA for an extension of the stay and therefore it depends on the facts of each case. Notwithstanding, the court listed the following factors or guidelines that may be considered by the court in determining the extension period:
   (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 the preparation and finalization of the plan, especially when the management team is small;
   (d) It is important to maintain the goodwill of employees and the loyalty of customers and suppliers, which may erode very quickly with uncertainty; and
   (e) In some provinces, the standard extension order is in the range of 30 to 60 days.
8. CCAA, s. 23.

9:1404 Inherent Jurisdiction to Stay Proceedings[1]

A court, in addition to its statutory jurisdiction to stay proceedings pursuant to s. 11 of the Act, has a general or inherent power exercisable on its own initiative or on motion by any person to stay or dismiss proceedings without proof on such terms as are considered just. It may stay or dismiss proceedings which it holds to be vexatious[2] or may make such order whenever it is just and reasonable to do so.[3] This broad, inherent jurisdiction, often re-enforced by statutes giving general jurisdiction to courts,[4] may be invoked to impose stays of proceedings against third parties[5] and to supplement the jurisdiction of the court under the Act when it is just and reasonable to do so.[6] *Quaere* whether a court might order on an emergency basis when appropriate a broad stay of proceedings for a short period of a day or two for the benefit of a debtor who was unable to prepare quickly an initial application under the Act for a stay of proceedings.

NOTES

1. See **13:0801[1]**, "Stays of proceedings", *infra*.
2. *Haggard v. Pélicier Frres*, [1892] A.C. 61 (P.C.), at pp. 67-68.
3. *McCordic v. Bosanquet (Township)* (1974), 5 O.R. (2d) 53 (H.C.J.).
4. See, for example, Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 106.
5. *Woodwards Ltd. (Re)* (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. 257 (S.C.).
6. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Ct. (Gen. Div.)); *T. Eaton Co. (Re)* (1997), 46 C.B.R. (3d) 293 (Ont. Ct. (Gen. Div.)); *Scaffold Connection Corp. (Re)*, (2000), 15 C.B.R. (4th) 289, [2000] 7 W.W.R. 516 (Alta. Q.B.); *Skydome Corp. (Re)* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.* (2000), 19 C.B.R. (4th) 299, 48 O.R. (3d) 746 (S.C.J.). In *Canadian Airlines Corp. (Re)* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.), the court

tab 2

Court of Queen's Bench of Alberta

Citation: Re San Francisco Gifts Ltd. (*Companies' Creditors Arrangement Act*), 2005 ABQB 91

Date: 20050209
Docket: 0403 00170
Registry: Edmonton

Between:

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

- and -

And In the Matter of a Plan of Compromise or Arrangement of San Francisco Gifts Ltd., San Francisco Retail Gifts Incorporated (Previously Called San Francisco Gifts Incorporated), San Francisco Gift Stores Limited, San Francisco Gifts (Atlantic) Limited, San Francisco Stores Ltd., San Francisco Gifts & Novelties Inc., San Francisco Gifts & Novelty Merchandising Corporation (Previously Called San Francisco Gifts and Novelty Corporation), San Francisco (The Rock) Ltd. (Previously Called San Francisco Newfoundland Ltd.) And San Francisco Retail Gifts & Novelties Limited (Previously Called San Francisco Gifts & Novelties Limited)

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

INTRODUCTION

[1] The San Francisco group of companies (San Francisco) obtained *Companies' Creditors Arrangement Act*[1] (*CCAA*) protection on January 7, 2000 (Initial Order). Key to that protection was the requisite stay of proceedings that gives a debtor company breathing room to formulate a plan of arrangement. The stay was extended three times thereafter with the expectation that the

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[1] R.S.A. 1985, c. C-36, as am.

entire *CCAA* process would be completed by February 7th, 2005. That date was not met. Accordingly, San Francisco now applies to have the stay extended to June 30, 2005.

[2] A small group of landlords opposes the motion on the basis of San Francisco's recent guilty plea to *Copyright Act* offenses and the sentencing judge's description of San Francisco's conduct as: "...a despicable fraud on the public. Not only not insignificant but bordering on a massive scale..." The landlords suggest that this precludes any possibility of the company having acted in "good faith" and therefore having met the statutory prerequisite to an extension. Further, they contend that extending the stay would bring the administration of justice into disrepute.

[3] San Francisco acknowledges that its conduct was stupid, offensive and dangerous. That said, it contends that it already has been sanctioned and that it has "paid its debt to society." It argues that subjecting it to another consequence in this proceeding would be akin to double jeopardy. Apart from the obvious consequential harm to the company itself, San Francisco expresses concern that its creditors might be disadvantaged if it is forced into bankruptcy.

[4] While there has been some delay in moving this matter forward towards the creditor vote, this delay is primarily attributable to the time it took San Francisco to deal with leave to appeal my classification decision of September 28, 2004. Despite the opposing landlords' mild protestations to the contrary, it is evident that the company has acted with due diligence. The real focus of this application is on the meaning and scope of the term "good faith" as that term is used in s. 11(6) of the *CCAA*, and on whether San Francisco's conduct renders it unworthy of the protective umbrella of the Act in its restructuring efforts. It also raises questions about the role of a supervising court in *CCAA* proceedings.

BACKGROUND

[5] San Francisco operates a national chain of novelty goods stores from its head office in Edmonton, Alberta. It currently has 62 locations and approximately 400 employees.

[6] The group of companies is comprised of the operating company, San Francisco Gifts Ltd., and a number of hollow nominee companies. The operating company holds all of the group's assets. It is 100 percent owned by Laurier Investments Corp., which in turn is 100 percent owned by Barry Slawsky (Slawsky), the driving force behind the companies.

[7] Apart from typical priority challenges in insolvency matters, this proceeding has been punctuated by a series of challenges to the process and its continuation, led primarily by a group of landlords that includes the opposing landlords.

[8] On December 30, 2004, San Francisco pleaded guilty to nine charges under s. 42 of the *Copyright Act*,[2] which creates offences for a variety of conduct constituting wilful copyright infringement. The evidence in that proceeding established that:

> (a) An investigation by the St. John's, Newfoundland, Fire Marshall, arising from a complaint about a faulty lamp sold by San Francisco, led to the discovery that the lamp bore a counterfeit safety certification label commonly called a "UL" label.[3] The R.C.M.P. conducted searches of San Francisco stores across the country, its head office, and a warehouse, which turned up other counterfeit electrical UL labels as well as counterfeit products bearing the symbols of trademark holders of Playboy, Marvel Comics and others.
>
> (b) Counterfeit UL labels were found in the offices of Slawsky and San Francisco's Head of Sales. There was also a fax from "a Chinese location" found in Slawsky's office that threatened that a report to Canadian authorities about the counterfeit safety labels would be made if payment was not forthcoming.
>
> (c) *Copyright Act* charges against Slawsky were withdrawn when San Francisco entered a plea of guilty to the charges;
>
> (d) The sentencing judge accepted counsels' joint submission that a $150,000.00 fine would be appropriate. In passing sentence, he condemned the company's conduct, particularly as it related to the counterfeit labels, expressing grave concern for the safety of unknowing consumers.[4]

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[2] R.S.C. 1985, c. C-42.

[3] Underwriters' Laboratories (UL) operates facilities globally for the testing, certification and quality assessment of products, systems and services. Products are tested to Canadian standards and, if the product complies with those standards, UL issues an identification or listing mark confirming certification (Transcript of the proceedings held December 30, 2004 at pp.4-5)

[4] Judge Stevens-Guille said: "Quite frankly, this is and should be described as nothing else than a despicable fraud on the public. Not only not insignificant but bordering on a massive scale company, stores, all of these places that we have been told they had stores...We are talking about electrical appliances that cause fires bought by someone who whether they relied on the UL certificate or not it had a certificate on it and to go to the exercise of getting cheap stuff somewhere and dressing it up with false labels and false safety certificates causes me great pause, such pause that if it were an individual who pled guilty before me today my starting point would be a term of imprisonment in a federal penitentiary, without a doubt." (Transcript of the proceedings held December 30, 2004 at pp. 18/15-18 and 19/2-11).

(e) San Francisco was co-operative during the R.C.M.P. investigation and the Crown's prosecution of the case.

(f) San Francisco had been convicted of similar offences in 1998.

[9] Judge Stevens-Guille's condemnation of San Francisco's conduct was the subject of local and national newspaper coverage.

[10] The company paid the $150,000.00 fine from last year's profits.

ANALYSIS

Fundamentals

[11] The well established remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees.[5] The Act is to be given a large and liberal interpretation.[6]

[12] The court's jurisdiction under s. 11(6) to extend a stay of proceedings (beyond the initial 30 days of a *CCAA* order) is preconditioned on the applicant satisfying it that:

(a) circumstances exist that make such an order appropriate; and

(b) the applicant has acted, and is acting, in good faith and with due diligence.

[13] Whether it is "appropriate" to make the order is not dependant on finding "due diligence" and "good faith." Indeed, refusal on that basis can be the result of an independent or interconnected finding. Stays of proceedings have been refused where the company is hopelessly

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[5] See for example ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) and ***Meridian Development Inc. v. Toronto Dominion Bank*** (1984), 52 C.B.R. (N.S.) 109 (ABQB).

[6] ***Elan Corporation v. Comsikey*** (1990), 1 C.B.R. (3d) 101 (Ont. C.A.).

insolvent; has acted in bad faith;[7] or where the plan of arrangement is unworkable, impractical or essentially doomed to failure.[8]

Meaning of "Good Faith"

[14] The term "good faith" is not defined in the *CCAA* and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in *Black's Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

> A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage.[9] [Emphasis added]

[15] "Good faith" is defined as "honesty of intention" in the *Concise Oxford Dictionary*.[10]

[16] Regardless of which definition is used, honesty is at the core. Honesty is what the opposing landlords urge is desperately wanting now and, as evidenced by San Francisco's earlier conviction for *Copyright Act* offences, was wanting in the past.

[17] Accepting that the duty of "good faith" requires honesty, the question is whether that duty is owed to the court and the stakeholders directly affected by the process, including investors, creditors and employees, or does the *CCAA* cast a broader net by requiring good faith in terms of the company's dealings with the public at large? As will be seen from the following review of the jurisprudence, it usually means the former.

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[7] ***Re Avery Construction Co. Ltd.***, [1942] 4 D.L.R. 558 at 559 (Ont. S.C.).

[8] ***Re Fracmaster Ltd.*** (1999), 11 C.B.R. (4th) 204 (Alta. Q.B.); aff'd 11 C.B.R. (4th) 230 (Alta. C.A.).

[9] *Black's Law Dictionary*, 7th ed. (St. Paul, Minnesota: West Group, 1999), p.701.

[10] *The Concise Oxford Dictionary of Current English*, 6th ed., (Oxford, Eng.: Clarendon Press, 1976), p.373.

[18] ***Re Rio Nevada Energy Inc.***[11] and ***Re Skeena Cellulose Inc.***[12] both involved opposed stay extension applications. In ***Skeena***, one of the company's two major secured creditors argued that the company's failure to carry out certain layoffs in the time recommended by the monitor showed a lack of good faith and due diligence. Brenner C.J.S.C. found that the delay in carrying out the layoffs was not a matter of bad faith. Given the severe consequences of terminating the stay, he granted the extension.

[19] Romaine J. rejected a suggestion of lack of good faith arising from a creditor dispute and allegations of debtor dishonesty in ***Rio Nevada***, finding that: "Rio Nevada has acted and is acting in good faith with respect to these proceedings."[13] [Emphasis added]

[20] ***Sairex GmbH v. Prudential Steel Ltd.***[14] involved an application by a creditor to proceed against a company under *CCAA* protection. Farley J. declined the application despite his sympathy for the creditor's position and his view that the creditor could make out a fairly strong case. He said: "... I would think that public policy also dictates that a company under *CCAA* protection or about to apply for it should not be allowed to engage in very offensive business practices against another and thumb its nose at the world from the safety of the *CCAA*."[15] In the end, he concluded that the dominant purpose behind the company's actions was not to harm the creditor.

[21] Inventory suppliers in ***Re Agro Pacific Industries Ltd.*** [16] sought to set aside a *CCAA* stay on the ground that the company had not been acting in good faith in entering into contracts. The suppliers' contention that the company knew it was in shaky financial circumstances when it ordered goods and that it did so to pay down the secured creditors was rejected by Thackeray J. He was not satisfied that there was any lack of good faith or collusion between the company and its secured creditors to disadvantage the unsecured creditors.

[22] ***Re Juniper Lumber Co.***[17] addressed a creditor's allegations of bad faith in the context of an application to set aside the *ex parte* Initial Order. Turnbull J. held that, while fraud may not always preclude *CCAA* relief, it was of such a magnitude in that case as to warrant setting aside

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[11] (2000), 283 A.R. 146 (Q.B.).

[12] 2001 BCSC 1423, 29 C.B.R. (4th) 157.

[13] ***Rio Nevada***, at para. 31.

[14] (1991), 8 C.B.R. (3d) 62 (Ont. Ct. Just. (Gen. Div.).

[15] ***Sairex GmbH***, at p. 73.

[16] 2000 BCSC 837, 76 B.C.L.R. (3d) 364.

[17] [2000] N.B.J. No.125 (Q.B.T.D.) (QL).

the order. He commented that: "basic honesty has to be present" in the course of conduct between a bank and its customer.[18] However, his decision was overturned by the Court of Appeal because the necessary evidentiary foundation was wanting.[19]

[23] ***Elan Corp. v. Comiskey***,[20] although addressing instant trust deeds, which are no longer of concern under the present *CCAA,* offers a useful discussion of "good faith." Doherty J.A., dissenting in part, commented:

> ...A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors.[21]

[24] Doherty J.A. referred to an article by L. Crozier, "*Good Faith and the Companies' Creditors Arrangement Act*,"[22] in which the author contends that the possibility of abuse and manipulation by debtors should be checked by implying a requirement of good faith, as American bankruptcy courts routinely do by invoking good faith to dismiss applications under Chapter 11 of the *Bankruptcy Code* where the debtor's conduct in filing for reorganization is found to constitute bad faith.[23] He also suggests that, as a result of the injunctive nature of the stay, the court's power to take into account the debtor's conduct is inherent in its equitable jurisdiction.

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[18] ***Re Juniper***, at para. 13.

[19] 2001 NBCA 30.

[20] (1990), 1 O.R. (3d) 289 (C.A.).

[21] ***Elan Corp.***, at p. 313.

[22] (1989), 15 Can. Bus. L.J. 89.

[23] Crozier cites ***Re Victory Construction Co. Inc.*** 9 B.R. 549 (1981) as an example of this. The court in that case found that the debtor company's purpose in filing under c. 11 was to isolate assets from its creditors rather than to reorganize the business. At p. 558, the court commented that good faith was "an implicit prerequisite to the filing or continuation of a proceeding under Chapter 11 of the *Code*."

[25] An obligation of good faith in the context of an application to sanction a plan of arrangement was implied in ***Re First Investors Corp. Ltd.***[24] While ***First Investors*** was an atypical *CCAA* proceeding, it is worth discussion. Allegations that fraud had been committed on creditors and consumers/investors led to the additional appointment of both a receiver and an inspector under the Alberta *Business Corporations Act*. The inspector had a broad mandate to investigate the company's affairs and business practices that included inquiring into whether the company had intended to defraud anyone.

[26] Berger J. (as he then was) noted that the *CCAA* is derived from s. 153 of the English *Companies Act*, 1929 (19 and 20 Geo. 5) c. 23. Having sought assistance from other legislation with wording similar to the *CCAA* and with a genesis in the British statute,[25] he concluded that the court should not sanction an illegal, improper or unfair plan of arrangement.[26] He emphasized that: "If evidence of fraud, negligence, wrongdoing or illegality emerges, the Court may be called upon by interested parties to draw certain conclusions in fact and in law that bear directly upon the Plans of Arrangement."[27] He also determined that, while it might be expedient to approve the plans, the court was bound to proceed with caution, "so as to ensure that wrongful acts, if any, do not receive judicial sanction."[28]

[27] In the end, Berger J. adjourned the application pending receipt of a report by the inspector. His decision was reversed on appeal[29] on the basis that there was nothing in the plans that sanctioned wrongful acts or omissions. The Court of Appeal remitted the matter back for reconsideration on the merits, stating that while the discretion to be exercised must relate to the merits or propriety of the plans, the court could consider whether approving the plans would sanction possible wrongdoing or otherwise hinder later litigation.

Supervising Court's Role

[28] The court's role during the stay period has been described as a supervisory one, meant to: "...preserve the *status quo* and to move the process along to the point where an arrangement or

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[24] (1987), 46 D.L.R. (4th) 669 at 673-674, 67 C.B.R. (N.S.) 237 (Alta. Q.B.); See also ***Re Agro Pacific Industries Ltd.***, footnote 16, at para. 40 where Thackray J. held that there was an implied duty of good faith on initial applications.

[25] ***First Investors***, at p. 676.

[26] ***First Investors***, at p. 677.

[27] ***First Investors***, at p. 678.

[28] ***First Investors***, at p. 678.

[29] (1988), 89 A.R. 344, 71 C.B.R. (N.S.) 71 (C.A.).

compromise is approved or it is evident that the attempt is doomed to failure."[30] That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

[29] Although the supervising judge's main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the *CCAA* courts, preserving their public esteem, and doing equity.[31] She cannot turn a blind eye to corporate conduct that could affect the public's confidence in the *CCAA* process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those of the public at large.

CONCLUSIONS

[30] While "good faith" in the context of stay applications is generally focused on the debtor's dealings with stakeholders, concern for the broader public interest mandates that a stay not be granted if the result will be to condone wrongdoing.[32]

[31] Although there is a possibility that a debtor company's business practices will be so offensive as to warrant refusal of a stay extension on public policy grounds, this is not such a case. Clearly, San Francisco's sale of knockoff goods was illegal and offensive. Most troubling was its sale to an unwitting public of goods bearing counterfeit safety labels. Allowing the stay to continue in this case is not to minimize the repugnant nature of San Francisco's conduct. However, the company has been condemned for its illegal conduct in the appropriate forum and punishment levied. Denying the stay extension application would be an additional form of punishment. Of greater concern is the effect that it would have on San Francisco's creditors, particularly the unsecured creditors, who would be denied their right to vote on the plan and whatever chance they might have for a small financial recovery, one which they, for the most part, patiently await.

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[30] McFarlane J.A. in ***Re Pacific National Lease Holding Corp.*** (1992), 15 C.B.R. (3d) 265 at 270 (B.C.C.A.), quoting with approval Brenner J. in the court below at [1992] B.C.J. No. 3070 at para. 26 (S.C.) (QL).

[31] L. J. Crozier, footnote 22 at p. 95, quotes Edith H. Jones, in "The Good Faith Requirement in Bankruptcy," Proceedings of the 61st Annual Meeting of the National Conference of Bankruptcy Judges, 1987, as statingd that: "... the bankruptcy judge usually at the instance of counsel, upon the filing of appropriate motions, is principally responsible to protect the institutional integrity of the bankruptcy courts, preserve their public esteem, and do equity in specific cases."

[32] ***First Investors Corp. v. Alberta*** (1988), 89 A.R. 344 at para. 16 (C.A.); ***Re Canadian Cottons Limited*** (1952), 33 C.B.R. 38.

[32] San Francisco has met the prerequisites that it has acted and is acting with due diligence and in good faith in working towards presenting a plan of arrangement to its creditors. Appreciating that the *CCAA* is to be given a broad and liberal interpretation to give effect to its remedial purpose, I am satisfied that, in the circumstances, extending the stay of proceedings is appropriate. The stay is extended to July 19, 2005. The revised time frame for next steps in the proceedings is set out on the attached Schedule.

[33] Although San Francisco has paid the $150,000.00 fine, the Monitor is satisfied that the company's current cash flow statements indicate that it is financially viable. Whether San Francisco can weather any loss of public confidence arising from its actions and resulting conviction is yet to be seen. Its creditors may look more critically at the plan of arrangement, and its customers and business associates may reconsider the value of their continued relationship with the company. However, that is sheer speculation.

Heard on the 17th day of January, 2005.
Dated at Edmonton, Alberta February 9th, 2005.

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

Appearances:

Richard T.G. Reeson, Q.C. Miller Thomson LLP (formerly Witten LLP) John Bridgadear Howard J. Sniderman Witten LLP	for the Companies
Michael McCabe, Q.C Reynolds, Mirth, Richards & Farmer LLP	for the Monitor - Browning Crocker Inc.

Jeremy H. Hockin Parlee McLaws LLP	for Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc.; 20 Vic Management Ltd.; Morguard Investments Limited; Morguard Real Estate Investments Trust; Millwoods Town Centre, Edmonton; Park Place, Lethbridge; Metro Town , Burnaby, BC; Northgate Mall, Edmonton; Brandon Shopping Mall, MB; Herongate Mall, Ottawa, ON; Westmount Shopping Centre, London; Village Mall, St. John's NFLD; Kingsway Garden Mall; Westbrook Mall; Bonnie Doon Shopping Centre; Red Deer Centre; Marlborough Mall; Circle Park Mall; Kildonan Place Mall; Cambridge Centre; Oshawa Centre; Tecumseh Mall; Downtown Chatham Centre; Simcoe Town Centre; Niagara Square; Halifax Shopping Centre; RioCan Property Services; 1113443 Ontario Inc.; Shoppers World, Brampton, ON; Tillicum Mall, Victoria, BC; Confederation Mall, Saskatoon, SK; Parkland Mall, Yorkton, SK; Cambrian Mall, Sault Ste. Marie, ON; Northumberland Mall, Cobourg, ON; Orangeville Mall, Orangeville, ON; Renfrew Mall, Renfrew, ON; Orillia Square Mall, Orillia, ON; Elgin Mall, St. Thomas, ON; Lawrence Square, North York, ON; Trinity Conception Square, Carbonear, NFLD; Charlottetown Mall, Charlottetown PEI; Timiskaming Square
Kent Rowan Ogilvie LLP	Locher Evers International Neuvo Rags Quality Press
	And Lauer Transportation Services as represented by its employee Tim Shelley

Schedule

Time Frames

1.	February 14, 2005	Date Monitor posts Notice to Creditors on website
2.	February 14, 2005	Date Monitor publishes the advertisement for one day in Globe & Mail or National Post
3.	April 1, 2005	Date for receipt of claims from creditors
4.	May 13, 2005	Date by which Monitor must send Notice of Revision or Disallowance.
5.	June 13, 2005	Last date for bringing application to challenge a Notice of Revision or Disallowance.
6.	June 27, 2005	Date for creditors meeting to vote on the Plan.
7.	July 11, 2005	Date for court application to approve Plan (if required).
8.	August 18, 2005	Date for Distribution to Prove Unsecured Claims

Stay Extended to July 19, 2005

tab 3

2011 NBQB 211
New Brunswick Court of Queen's Bench

Tepper Holdings Inc., Re

2011 CarswellNB 417, 2011 NBQB 211, 205 A.C.W.S. (3d) 624, 376 N.B.R. (2d) 64, 80 C.B.R. (5th) 339, 970 A.P.R. 64

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

In the Matter of a Plan of Compromise or Arrangement of the Applicants, Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd. and Agri-Tepper & Sons Ltd.

Lucie A. LaVigne J.

Heard: July 18, 2011
Oral reasons: July 18, 2011
Written reasons: July 22, 2011
Docket: E/M/4/2011

Counsel: R. Gary Faloon, Q.C., James L. Mockler for Applicants
Josh J.B. McElman, Rebecca M. Atkinson for Bank of Montreal
Stephen J. Hutchison for Monitor, Paul A. Stehelin of A.C. Poirier & Associates Inc.
Ronald J. LeBlanc, Q.C., Renée Cormier for National Bank of Canada

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.iv Length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Applicant companies were in business of farming — Companies were involved in legal proceedings — Directing mind of companies was incarcerated in foreign country — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditors for three weeks — Monitor was appointed and recommended extension of stay and variation of order — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted — Stay was extended for 2.5 months — Initial order was varied — Extension order was appropriate — Requirements of s. 11(6) of CCAA were satisfied — Companies acted in good faith and with due diligence — Extension sought was not unduly long — Creditors would not be unduly prejudiced by stay — Companies were continuing as going concerns — There was no indication secured creditors' security was being dissipated — There was real prospect of successful restructuring — Companies required additional time to compile information, assess situation and file plan of arrangement — Extension of stay allowed companies to continue operations, fulfil obligation to customers, and employ people.

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

Applicant companies were in business of farming — Companies were involved in legal proceedings — Directing mind of companies was incarcerated in foreign country — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditors for three weeks — Monitor was appointed and recommended extension of stay and variation of order — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted — Stay was extended for 2.5 months — Initial order was varied — There was no standard length of time for extension of stay period — Monitor recommended 2.5 month extension — Monitor was neutral party — It was appropriate to extend stay period for 2.5 months — Companies needed stay to continue farming and harvest their crops for benefit of all stakeholders.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Variation of initial order — Applicant companies were in business of farming — Companies were involved in legal proceedings — Directing mind of companies was incarcerated in foreign country — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditors for three weeks — Monitor was appointed and recommended extension of stay and variation of order — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted — Stay was extended for 2.5 months — Initial order was varied — Administration charge was excessive and was reduced by half — Retainers for monitor and counsel were reduced, as amount set out in initial order was unreasonable and unnecessary — Debtor in possession (DIP) financing was limited to amount needed to meet short-term needs until harvest — Initial order was varied such that companies could not dispose of redundant assets during stay — Due to lack of evidence of sale or factors to allow sale, disposition of assets was not authorized during stay.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Debtor in possession financing — Applicant companies were in business of farming — Companies were involved in legal proceedings — Directing mind of companies was incarcerated in foreign country — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditors for three weeks — Monitor was appointed — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted — Stay was extended for 2.5 months — Initial order was varied to reduce amount of debtor in possession (DIP) financing to amount needed to meet short-term needs — No creditor was prejudiced by change as no DIP financing was in place — DIP financing was fair, reasonable and appropriate — DIP financing was necessary to assist companies in restructuring operations and coming up with plan of arrangement during stay, while continuing as going concern — Companies had reasonable prospect of plan of arrangement and viable basis for restructuring — Companies had urgent need for some interim financing.

Table of Authorities

Cases considered by *Lucie A. LaVigne J.*:

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — considered

Ravelston Corp., Re (2005), 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]) — referred to

Rio Nevada Energy Inc., Re (2000), 2000 CarswellAlta 1584, 283 A.R. 146 (Alta. Q.B.) — considered

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

Statutes considered:

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

Generally — referred to

s. 11 — pursuant to

s. 11(6) — referred to

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

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.51(3) [en. 2005, c. 47, s. 128] — considered

s. 13 — referred to

s. 14(2) — referred to

s. 36(3) — referred to

Farm Debt Mediation Act, S.C. 1997, c. 21

Generally — referred to

MOTION by applicant companies for extension of initial order staying creditors at comeback hearing; MOTION by creditor bank for termination of initial order, or for variation of initial order at comeback hearing.

***Lucie A. LaVigne J.*, (orally):**

I. Introduction

1 On June 27, 2011, this Court issued an *ex parte* Initial Order ("Initial Order") pursuant to section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*" or "*Act*") granting a Stay Period, until and including July 18, 2011, to the applicant companies, namely Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd., and Agri-Tepper & Sons Ltd. ("Companies"). Mr. Paul A. Stehelin of A.C. Poirier & Associates Inc. was appointed monitor ("Monitor"). The Initial Order provided that a comeback hearing would be held on July 18, 2011, to determine whether the Order should be supplemented or otherwise varied and the Stay Period extended or terminated.

2 The Companies filed a motion asking the Court to extend the Initial Order until October 18, 2011 ("Extension Motion").

3 The Bank of Montreal ("BMO") filed a motion seeking an order terminating the Initial Order. In the alternative, BMO suggests that the Stay Period not be extended beyond August 31, 2011, and it seeks a variation of several provisions of the Initial Order, namely the provisions dealing with the disposition of property by the Companies, the interim financing, the Administration Charge, the retainers, and the Director's Charge ("Variation Motion").

4 The Monitor filed with the Court his first report dated July 13, 2011 ("Report"). He recommends an extension of the Stay Period until September 30, 2011, but agrees that several provisions of the Initial Order should be varied.

5 All creditors were notified of these proceedings and other than the BMO, the only creditor who attended the hearing of the motions was the National Bank of Canada and it supports the position of BMO.

6 Pursuant to the July 18th hearing, the Court reserved its decision on the Extension Motion and the Variation Motion, but granted an Order extending the Stay Period until July 29, 2011, and varying other provisions of the Initial Order while considering these motions.

II. Background

7 The Companies are closely held companies engaged in the business of farming in northwestern New Brunswick in a small rural community called Drummond. The Companies are controlled by Hendrik Tepper and his father Berend Tepper. The Tepper family is from the Netherlands and the Teppers have been farming since the 1960's. In 1980, Berend Tepper relocated his family to Drummond and joined other Dutch farmers in northwestern New Brunswick. The Companies have grown an average of 1,400 acres of potatoes and 2,000 acres of grain per year. They own approximately 1,700 cleared acres of land, 400 to 500 acres of woodlot and pasture land, as well as machinery, equipment, and inventory. They have developed a good relationship with McCain Foods Limited. and have multiple contracts with them. They also sell to foreign markets such as Cuba, Lebanon, Turkey, and Russia.

8 From May 2010 to May 2011, the Companies employed 18 persons on average, reaching a maximum of 40 employees during harvesting season in the fall of 2010. The total salaries paid to the employees by the Companies during this period was approximately $495,000.

9 Berend Tepper had retired from managing the operations of the Companies approximately five years ago, and since then, his son Hendrik had been responsible for all aspects of the day-to-day management of the Companies and for resolving the problems of the Companies. The Companies are involved in proceedings, some provincial, some foreign, concerning, amongst others, the collection of receivables, the pursuance of insurance claims, and the enforcement of contracts. Hendrik Tepper was the person who handled these matters and therefore he has the personal knowledge needed to resolve a number of these disputes. He was the chief operations officer and primary salesman for the Companies. Without him it is very difficult to settle or otherwise resolve the outstanding litigation.

10 Unfortunately, Hendrik Tepper has been incarcerated in Lebanon since March 23, 2011 as a result of being arrested while attempting to clear Lebanese customs, under an Interpol warrant on behalf of the government of Algeria in relation to potatoes shipped to Algeria by one of the Companies in 2007. Algerian officials allege that Mr. Tepper was part of a scheme to falsify documents concerning the quality of the potatoes arriving in Algeria and they want him extradited to Algeria. This, of course, has caused a crisis in the Tepper family and has put tremendous pressure on the Companies. Efforts are continuing on a daily basis to return Hendrik Tepper home soon.

11 Berend Tepper has come out of retirement and is back to managing the Companies. The 2011 crop is in the ground, it is healthy and the Companies estimate that the realization at harvest will be about $2.2 million.

III. The Companies' Financial Situation

12 The Monitor, with the assistance of the Companies and their external accountants, has prepared an unaudited balance sheet of the Companies on a consolidated basis. The balance sheet gives us an overall view of the potential assets and potential liabilities of the Companies on an accounting basis. It shows assets of $7.7 million and liabilities of $11.2 million. It is not an estimate of realizable or fair market values for the assets. The Monitor has received preliminary estimates of values for the land, the equipment, and the machinery. These have not been placed in the public domain but they have been shared with BMO and the Monitor states that the values are significantly greater than the book value.

13 The Companies' largest creditor is BMO who is owed in excess of $8 million. It seems that discussions between BMO and the Companies had been open and frequent in the period leading up to the filing of the *CCAA* proceedings. Berend Tepper and BMO have been working together closely since Hendrik Tepper's incarceration. BMO encouraged the Companies to plant potatoes this year even if Hendrik Tepper was absent.

14 On July 11, 2011, BMO and its advisor PriceWaterhouseCoopers, the Monitor, Berend Tepper, and the Companies' external accountant, Denis Ouellette, met to discuss various issues and share information. I was not left with the impression that BMO has lost confidence in the Companies' management.

15 BMO informed the Court that they have no immediate plan to enforce its security. They are understanding of the predicament that the Tepper family and the Companies are in. It supported the Companies' efforts thus far and was optimistic that they could get through these difficult times. It is now worried that if the *CCAA* process burdens the Companies with the extra debts and charges as requested by the Companies and provided for in the Initial Order, it will cause the demise of the Companies.

16 BMO alleges that the Companies cannot continue to operate in the long term because they have insufficient revenue to meet their obligations. It submits that if the relief sought is granted, BMO's security will be eroded and its ability to recover its losses will be further jeopardized.

17 Since the Initial Order, part of the 2010 crop has been sold for a total of $446,400. The cash flow statements show a cash requirement of approximately $166,000 by the end of July with a cash surplus of approximately $267,000 by the end of September 2011. This included estimates for administrative expenses of $260,000 to the end of September, but does not include interest on DIP financing.

18 The $2 million operating line of credit with BMO is fully advanced. BMO has offered to advance the DIP financing should this Court extend the Initial Order and provide for DIP financing.

19 Section 6 of the *CCAA* requires that for a plan to be successful, it must be approved by a majority in number representing two thirds in value of the creditors, or the class of creditors. BMO holds approximately 82 % of the secured claims and therefore the Companies cannot present a successful plan without BMO's support.

20 BMO has made it very clear that the possibility that they will approve any Plan of Compromise and Arrangement is close to nil unless such plan provides for the complete payment of BMO's advances.

IV. The Monitor

21 A Monitor is in place, which, as noted in *Rio Nevada Energy Inc., Re* (Alta. Q.B.), should provide comfort to the creditors that assets are not being dissipated and current operations are being supervised.

22 The Monitor in the present case recommends the extension of the stay until September 30, 2011 and is of the opinion that the Companies have been acting in good faith and with due diligence, and that an extension of the stay is appropriate.

23 At page 4 of his report, the Monitor states that: "...the Companies, their accountant, and counsel have provided the Monitor with their full cooperation and unrestricted access to the Companies' books and records and other information to permit the Monitor to fulfill its responsibilities".

24 At page 9, he adds:

> a) The companies have and continue to act in good faith and have been forthcoming with information, books, and records, and unrestricted access to their premises.

b) The monitor is satisfied that the companies will be forthcoming to both the monitor and the companies' major creditor with respect to any significant events which might adversely affect the various stakeholders in the these proceedings.

c) Time is needed for the companies with the assistance of the monitor, their counsel, and the Court to try to deal with the foreign issues and contingent liabilities and to permit a plan to be presented which maximizes the recovery to all stakeholders.

d) An extension will permit an orderly sale of the existing inventory and the harvesting of the 2011 crops.

e) The cash flow statement reflects that the companies will be able to finance operations from cash flow with a requirement for debtor and possession financing in the approximate amount of $210,000 before servicing existing debt. The projections indicate that the DIP financing will be repaid by the end of September 2011.

V. First Issue: Should the Court Grant an Extension Order?

(1) Burden of Proof

25 The onus is on the Companies to justify the continued existence of the provisions of the Initial Order. The Initial Order was granted without notice to persons who may be affected and without any proper debate, therefore the Court will always be willing to adjust, amend, vary, or delete any term or terminate such an order if that is the appropriate thing to do: see *Ravelston Corp., Re*, 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]).

(2) Purpose of the CCAA

26 When determining whether a stay ought to be extended it is important to consider the overall purpose of the *CCAA*.

27 As was stated by Professor Janis Sarra in the first paragraph of her book entitled *Rescue! The Companies' Creditors Arrangement Act* (2007):

> [...] The statute's full title, *An Act to Facilitate Compromises and Arrangements between Companies and Their Creditors*, precisely describes its purpose: providing a court-supervised process to facilitate the negotiation of compromises and arrangements where companies are experiencing financial distress, in order to allow them to devise a survival strategy that is acceptable to their creditors.

28 Justice Blair of the Ontario Court of Appeal discussed the purpose of the *CCAA* in *Stelco Inc., Re* (Ont. C.A.), at paragraph 36, where he states:

> In the *CCAA* context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditor, shareholders, employees and other stakeholders.

29 In *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]), McFarlane J. at paragraph 27, quoted with approval the following statements made by the trial judge, Justice Brenner:

> (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.

30 In my view, the above quoted statement sums up the principles to consider in applications under the *CCAA*.

(3) Applicable Sections of the CCAA

31 Subsection 11.02(2) of the *CCAA* provides as follows:

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

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

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

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

32 As stated, the burden of proof on an application to extend a stay rests on the debtor company.

33 To have a stay extended past the period of the initial stay, the company must meet the test set out in subsection 11.02(3) of the *CCAA*. It states that:

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.

34 When deciding whether to terminate or extend a stay, a court must balance the interests of all affected parties, including secured and unsecured creditors, preferred creditors, contractors and suppliers, employees, shareholders, and the public generally. I must consider the Companies and all the interests its demise would affect. I must consider the interests of the shareholders who risk losing their investments and the employees of this small community who risk losing their jobs.

(4) Farm Debt Mediation Program

35 BMO has stated that it will not support a plan under the *CCAA* proceedings. It doubts that the *CCAA* approach to the insolvency is the appropriate one in the circumstances. It has suggested and will support a restructuring of the Companies under the *Farm Debt Mediation Act*, S.C. 1997, c. 21 ("*FDMA*"), which provides free mediation services by the Federal Department of Agriculture and Agri-Food Canada, while the Companies can still have the benefit of a stay of proceedings and save on professional fees.

36 The Monitor feels that the *FDMA* process does not have all of the necessary tools. The Companies allege that the *FDMA* process does not lend itself to the present circumstances. It is argued that although a mediator is involved in this process with the objective of arriving at a settlement, there is no one to provide the type of professional service that the Monitor provides in guiding the debtor company through the *CCAA* process. The Companies chose to apply for a stay period under the *CCAA* hoping to gain the benefit of professional advice on how best to restructure this business. This professional advice is made possible under the *CCAA* with the interim financing and the Administrator's Charge in aid.

37 I have no evidence that the relief sought under the *CCAA* is more drastic to all constituencies than a process under the *FDMA* would be or that it is less beneficial.

(5) Ending the Protection for Two of the Companies

38 BMO has expressed concern as to whether the purpose of the *CCAA* in this matter is to fund litigation against some of the Companies. BMO suggests that the Court should at the very least consider terminating *CCAA* protection for two of the Companies that do not own any assets and are potential liabilities as there are lawsuits or claims pending against them. BMO argues that these companies will drag the others down because of the costs associated with the litigation. The Monitor is alive to these issues but is concerned that such a move at this time may be premature; he needs more time to investigate before deciding whether these companies should be allowed to continue. It should be easier to assure that undue time and costs are not spent on these litigations if those companies are left under the protection of the *CCAA* while the Monitor obtains the information to make a proper decision.

(6) Conclusion Concerning the Extension Order

39 The extension sought is not unduly long. As with the Initial Order, the extension of the stay would only be a temporary suspension of creditors' rights. There is no evidence that the assets are being liquidated. The Companies have continued their farming business and are continuing as going concerns.

40 There is no indication that the secured creditors' security is being dissipated. Notwithstanding BMO's assertion that it will not support a plan under the *CCAA* proceedings, there is hope that the Companies can restructure and refinance and come up with a plan that could eventually be accepted by BMO. They have been working closely thus far.

41 The extension is supported by the independent Monitor and the shareholders. I cannot conclude at this point in time, that the plan is doomed to fail or that the *CCAA* proceeding is being used to delay inevitable liquidation. I am satisfied that progress is being made, however on the evidence, I find that the Companies require additional time to compile information, assess their situation, and file their Plan of Arrangement.

42 The Companies made an application under the *CCAA* for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the *CCAA*. The legislative remedies within the *CCAA* for a stay must be understood to acknowledge the hope that the eventual, successful reorganization of a debtor company will benefit the different stakeholders and society in general: see *Stelco Inc., Re*.

43 The assets of the Companies have a greater value as part of an integrated system than individually.

44 The extension of the stay and the granting of certain charges will allow the Companies to continue operations and harvest its potato crops and fulfill their obligation to customers.

45 The Companies directly employ from seven to 40 people at different times throughout the year and thereby make a significant contribution to the local and regional economy.

46 The Companies have to find a way to restructure their indebtedness and the *CCAA* can be used to do this practically and effectively. The Companies need to be able to focus and concentrate its efforts on negotiating a compromise or arrangement.

47 It is essential that the Companies be afforded a respite from its creditors. The creditors must be held at bay while the Companies attempt to carry on as a going concern and to negotiate an acceptable restructuring arrangement with the creditors.

48 I do not share BMO's position that the Companies are doomed. I feel that there is a real prospect of a successful restructuring under the *CCAA*. This is an attempt at a legitimate reorganization. I do not feel that the continuance of the *CCAA* proceedings is simply delaying the inevitable.

49 I do not find that the position of the objecting creditors will be unduly prejudiced by the stay. The value of the harvest and therefore the Companies' overall value increases the closer we get to harvest time.

50 The Court finds that the requirements of subsection 11(6) of the *CCAA* have been satisfied. The extension of the stay is 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 maneuvers for positioning among creditors in the interim.

51 The Court is satisfied that the circumstances are such that an extension order is appropriate. I am satisfied that the Companies have acted and continue to act in good faith and that they have acted and continue to act with due diligence.

52 I conclude that this is a proper case to exercise the Court's discretion to grant an extension order.

(7) Length of the Extension

53 BMO argues that given the nature of the operations, a stay until the end of August should be sufficient to allow the Companies to reorganize and come up with a viable plan, if possible. The Companies argue that the stay should be long enough to allow the Companies to go through the harvesting season without having to come back to Court. They are suggesting October 18 th . The Monitor recommends September 30 th .

54 There is no standard length of time provided in the *CCAA* for an extension of the Stay Period, and therefore it depends on the facts of the case. David Baird, Q.C., in his text, Baird's Practical Guide to the Companies' Creditors Arrangement Act (Toronto: Thompson Reuters, 2009) at page 155 summarizes the factors to be considered as follows:

> 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.
>
> 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.

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.

55 The Companies need to continue farming and bring their crops to harvest in the fall for the benefit of all the stakeholders. The purpose of the stay is to give them time to reorganize and do what needs to be done. They need to come up with a plan and try to sell it to their creditors. This takes time. I feel that August 31st is not realistic, and to require the Companies to come up with an acceptable plan by that date would be setting them up for failure.

56 The Monitor is an officer of the Court. He is to remain neutral in this process and if in a month's time he realizes that there is no way to put a viable plan together, then I expect him to forthwith advise the parties and the Court accordingly. In the circumstances, I am satisfied that it is appropriate to extend the Stay Period to September 30, 2011 at 11:59 p.m.

57 Hopefully, this is long enough to allow the parties to find a solution but short enough to prevent complacency so that the various creditors rights and remedies not be sacrificed any longer than necessary.

VI. Second Issue: Should any Other Provision of the Initial Order be Amended or Varied?

(1) The Administration Charge

58 The Court may order an Administration Charge for fees and expenses related to the *CCAA* process pursuant to section 11.52.

59 The appointment of a monitor is mandatory when the courts grant *CCAA* relief. If this *Act* is to have any effect, then there has to be some assurance and money available to pay the professionals that will be working on the restructuring, that is the Monitor, his counsel as well as the Companies' counsel. The *CCAA* proceeding is for the benefit of all stakeholders, including all creditors.

60 The goal of a *CCAA* Stay Period is to provide the Companies with access to the time and expertise needed to develop both a plan of arrangement and to restructure its businesses. This is not possible if those professionals, including the Monitor, are not paid proper fees.

61 The Initial Order provided for an Administration Charge not to exceed $500,000. The Companies are suggesting that it continues at that amount. BMO is suggesting $150,000 while the Monitor in his report felt that it could be reduced somewhere between $200,000 and $300,000. The original projections included payments of $130,000 for legal fees, $85,000 for the Monitor's fees, and $45,000 for accounting fees to the end of September. The Monitor has now had an opportunity to assess the time required and feels that the Monitor's fees and the accounting fees should be no more than $90,000 to the end of September provided no additional proceedings are initiated.

62 I find that an amount not exceeding $250,000 would be appropriate, fair, and reasonable for the Administration Charge.

(2) The Retainer

63 The Initial Order provided retainers for the Monitor, counsel to the Monitor, and counsel to the Companies of $200,000 collectively. These professionals are already protected under the Administration Charge. BMO suggests $30,000 each as a retainer for a total amount of $90,000. The Monitor agrees with this suggestion and would make accounts payable within 15 days instead of 30 days as it now stands.

64 On the evidence now before the Court, I find the $200,000 unreasonable and unnecessary. I find that a retainer of $30,000 each for a total amount of $90,000 is warranted and I so order with accounts made payable within 15 days.

(3) The DIP Lender's Charge

65 Subsection 11.2(1) of the *Act* deals with interim financing. DIP financing, as we know, alters the existing priorities in the sense of placing encumbrances ahead of those presently in existence, and it may therefore prejudice BMO's security. It follows that the DIP Lender's Charge should be fair, reasonable, and appropriate in the circumstances.

66 The Companies' expected cash flows without an order being made exceed existing credit facilities and presently available funds. If an order is not made, the Companies' viability as a going concern is doubtful.

67 The Initial Order provided for DIP financing to a maximum of $1 million. In retrospect, based on the Companies' cash flow statements, there was no need for such a large DIP financing. No creditor was prejudiced as no DIP financing is yet in place. The Monitor recommends DIP financing to a maximum of $300,000 and sees no reason why BMO could not be the DIP Lender for this amount if it is so inclined.

68 It is understandable that BMO is not prepared to have their position affected by DIP financing. It suggests that the maximum amount needed is no more than $150,000. However, if the Court provides for a maximum amount of $300,000 in DIP financing, BMO is ready to advance this amount to the Companies. The Companies have obtained a proposal from another lender but is not opposed to BMO being the DIP Lender as long as the terms of the financing are comparable to what they have been able to secure elsewhere.

69 I am satisfied that the Companies need the special remedy of DIP financing, however I conclude that the amount presently provided for in the Initial Order is greater than what is required by the Companies having regard to their cash flow statements. The Companies' request is therefore excessive and inappropriate in the circumstances. I must balance the benefit of such financing with the potential prejudice to the existing secured creditors whose security is being eroded.

70 I am satisfied that the DIP financing is necessary to assist the Companies in restructuring their operations and coming up with a plan of arrangement during the stay. I am satisfied on the evidence before me that the Companies have a reasonable prospect of a plan of arrangement and a viable basis for restructuring, and an urgent need for some interim financing; however I will restrict the amount to what is necessary to meet the short-term needs until harvest, at which time revenues will be realized. I therefore authorize a DIP Lender's Charge in an amount not to exceed $300,000 with BMO as the DIP Lender.

71 I am satisfied that the quantum of the Administration Charge and the DIP Lender's Charge fall well within the range of what is usually ordered considering the magnitude and complexity of the Companies' operations, and the debts to be incorporated into a plan of arrangement.

(4) The Director's Charge

72 Section 11.51 of the *CCAA* deals with the indemnification of Directors and the Director's Charge. The Initial Order provided a Director's Charge not to exceed $500,000 and stipulated that this Charge would only apply if the Directors' did not have the benefit of coverage pursuant to an insurance policy. Subsection 11.52(3) of the *CCAA* prohibits the Court from making such an order if it is convinced that the Companies could obtain adequate indemnification insurance.

73 The Directors of the Companies are Berend and Hendrik Tepper. I realize that certain liabilities may be imposed upon the directors during the stay. The Companies are closely held family entities and BMO submits that the directors should be required to accept the risks that come with the position because they are the main decision makers. The directors have not applied for insurance coverage. There is no evidence to show that the companies cannot obtain adequate indemnification insurance for their directors or officers at a reasonable cost.

74 The Director's Charge will not be granted at this time. The Directors are to explore the possibility of getting insurance coverage and may reapply to the Court at a later time for this charge if absolutely necessary.

(5) The Disposition of Property

75 If the Companies want to sell or otherwise dispose of assets outside of the ordinary course of business, they must obtain authorization from the Court. The Initial Order provided that the Companies could dispose of redundant or non-material assets not exceeding $150,000 in any one transaction or $500,000 in the aggregate. They presently have two pieces of equipment that they would like to sell, namely a bailer and a combine. It is estimated that each is worth approximately $50,000. It would seem that there is a buyer for the bailer which has become redundant. It is expected that this sale could generate revenues of $50,000 and the Companies are suggesting that these proceeds be deposited in the general accounts and it would therefore increase the cash flow of that amount. BMO does not agree; it argues that the sale of these equipments will erode their security. The Monitor suggests that if a buyer is found for one or the other piece of equipment before the end of September, the Companies should be allowed to sell this equipment for which they no longer have any utility, subject to the consent of BMO and provided that the funds be kept in trust.

76 In deciding whether to grant an authorization to dispose of an asset, the Court must consider the factors set out in subsection 36(3) of the *CCAA*. It must consider:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

77 The Companies have not presented evidence of an actual "proposed sale or disposition" or evidence in relation to the factors including the "process", the "effects of the proposed sale or disposition on the creditors", the "market value" of the assets to be disposed, or "the extent to which the creditors were consulted".

78 In the circumstances, due to this lack of evidence, I will not authorize the disposition of assets during the stay.

(6) Variance and Allocation

79 BMO suggests that variances of more than 5 % in the cash flow not be permitted without further court approval. As we all know, any motion to the court is expensive and time consuming. One of the main objectives of the stay is to allow the Companies respite to focus their time, money and efforts on their reorganization.

80 BMO also requests that all fees, costs and expenses, at least those related to the Administration Charge, be allocated as per the different companies or tracked separately. Having heard the parties and the Monitor on this issue, I am satisfied that the better option is to leave the Monitor deal with these two issues.

VII. Conclusions and Disposition

81 The Stay Period is extended until September 30, 2011, at 11:59 p.m. or such other date or time as this Court may order.

82 The Initial Order is hereby varied and amended as follows:

• Subparagraph 9(a) of the Initial Order is amended by the deletion of the words "and to dispose of redundant or non-material assets not exceeding $150,000 in any one transaction or $500,000 in the aggregate".

• Paragraphs 16, 17 and 18 of the Initial Order are deleted in their entirety and all references to the "Director's Charge", as defined in paragraph 17 of the Initial Order, are deleted throughout the Initial Order.

• Retainers are reduced from $200,000 collectively to $90,000 collectively, being $30,000 each for the Monitor, the Monitor's counsel, and the Companies' counsel. Paragraph 25 will have to be amended to reflect this and the accounts are to be paid within fifteen (15) days of receipt.

• Paragraph 27 of the Initial Order is to be amended to reduce the Administration Charge from a maximum of $500,000 to a maximum of $250,000.

• Paragraphs 28 to 32 are to be amended to reduce the DIP Lender's Charge from a maximum of $1 million to a maximum of $300,000 and BMO will be the DIP Lender.

83 The Initial Order remains unamended other than as set out herein or as may be necessary to give effect to the terms of this Order.

84 The time period of 21 days provided in subsection 14(2) of the *CCAA* is hereby extended in relation to any appeal proceedings initiated by BMO of the Initial Order, pursuant to section 13 of the *CCAA* until July 27, 2011.

85 This order takes effect immediately and replaces the Interim Order issued in this matter on July 18, 2011.

86 With more time, new money and professional guidance the Companies have a reasonable prospect of a plan of arrangement and a viable basis for restructuring. The stay will facilitate the ongoing operation. The extension will give the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation.

87 The Companies need to continue farming and bring their crops to harvest for the benefit of all their stakeholders. The Companies' creditors will receive greater benefit from a plan of arrangement made at the end of the extended Stay Period than at this time.

88 The evidence before me is that Hendrik Tepper is the directing mind of the Companies' farming operations and brings considerable value to the Companies' operations. Hopefully, the ongoing efforts to return Mr. Tepper home will bear fruit soon.

Motions granted.

2011 NBBR 311, 2011 NBQB 311
New Brunswick Trial Division

Tepper Holdings Inc., Re

2011 CarswellNB 592, 2011 CarswellNB 849, 2011 NBBR 311, 2011 NBQB 311, [2011] N.B.J. No. 388, 209 A.C.W.S. (3d) 952, 381 N.B.R. (2d) 1, 82 C.B.R. (5th) 293, 984 A.P.R. 1

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

In the Matter of a Plan of Compromise or Arrangement of the Applicants, Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd. and Agri-Tepper & Sons Ltd.

Lucie A. LaVigne J.

Heard: October 5, 2011
Oral reasons: October 5, 2011
Written reasons: October 18, 2011
Docket: E/M/4/2011

Proceedings: additional reasons to *Tepper Holdings Inc., Re* (2011), 2011 NBQB 211, 2011 CarswellNB 417, 80 C.B.R. (5th) 339 (N.B. Q.B.)

Counsel: Josh J.B. McElman, Rebecca M. Atkinson for Bank of Montreal
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Ronald J. LeBlanc, Q.C. for National Bank of Canada

Subject: Insolvency; Civil Practice and Procedure; Public; Torts

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.i Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Applicant companies were involved in legal proceedings — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditor banks, BM and NB, for three weeks — Monitor was appointed — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted; stay was extended for 2.5 months — Initial order was varied to reduce amount of debtor in possession (DIP) financing to amount needed to meet short-term needs — No creditor was prejudiced by change as no DIP financing was in place — DIP financing was fair, reasonable and appropriate — DIP financing was necessary to assist companies in restructuring operations and coming up with plan of arrangement during stay, while continuing as going concern — Total amount of companies' legal accounts was $508,686 — Submissions were made regarding legal accounts of companies;

creditors argued that legal fees should be capped or ought not to be compensated at all — Legal accounts of companies reduced — Of 20 different people billed to companies' account, nine people were not identified as articling students or paralegals; this information was necessary to verify that time recorded was in fact spent by personnel whose experience can reasonably be said to justify rates charged — Nine different lawyers including three senior lawyers worked on this file and had discussions amongst themselves concerning this matter; level of duplication of experienced counsel could not be endorsed without further explanation — Companies applied ex parte for DIP financing alleging that there was urgency as creditor was about to enforce its security — However, creditor had not asked for payment and there was no indication at that time that creditor was about to enforce its security; companies' solicitor did not advise Court of recent amendments to CCAA, which required that proper notice be given to affected secured creditors before approving DIP lender's charge — Legal fees reduced to $150,000.

Civil practice and procedure --- Costs — Scale and quantum of costs — Miscellaneous

Applicant companies were involved in legal proceedings — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditor banks, BM and NB, for three weeks — Monitor was appointed — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted; stay was extended for 2.5 months — Initial order was varied to reduce amount of debtor in possession (DIP) financing to amount needed to meet short-term needs — No creditor was prejudiced by change as no DIP financing was in place — DIP financing was fair, reasonable and appropriate — DIP financing was necessary to assist companies in restructuring operations and coming up with plan of arrangement during stay, while continuing as going concern — Total amount of companies' legal accounts was $508,686 — Submissions were made regarding legal accounts of companies; creditors argued that legal fees should be capped or ought not to be compensated at all — Legal accounts of companies reduced — Of 20 different people billed to companies' account, nine people were not identified as articling students or paralegals; this information was necessary to verify that time recorded was in fact spent by personnel whose experience can reasonably be said to justify rates charged — Nine different lawyers including three senior lawyers worked on this file and had discussions amongst themselves concerning this matter; level of duplication of experienced counsel could not be endorsed without further explanation — Companies applied ex parte for DIP financing alleging that there was urgency as creditor was about to enforce its security — However, creditor had not asked for payment and there was no indication at that time that creditor was about to enforce its security; companies' solicitor did not advise Court of recent amendments to CCAA, which required that proper notice be given to affected secured creditors before approving DIP lender's charge — Legal fees reduced to $150,000.

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s. 11 — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1)(b) [en. 2005, c. 47, s. 128] — considered

Farm Debt Mediation Act, S.C. 1997, c. 21

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Rules considered:

Rules of Court, N.B. Reg. 82-73

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ADDITIONAL REASONS to judgment reported at *Tepper Holdings Inc., Re* (2011), 2011 NBQB 211, 2011 CarswellNB 417, 80 C.B.R. (5th) 339 (N.B. Q.B.), regarding quantum of legal costs.

***Lucie A. LaVigne J.*, (orally):**

I. Introduction

1 This motion, brought within CCAA proceedings, concerns the capping and/or taxation of insolvent Corporations', namely Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd. and Agri-Tepper & Sons Ltd., legal accounts. The Initial Order under the CCAA was issued on June 27, 2011. The total amount of the Corporations' legal fees, as billed by its solicitors, the law firm of Gilbert McGloan Gillis ("GMG"), inclusive of disbursements and taxes, up to and including September 30, 2011, is $508,686.06 ("Legal Accounts"). The Bank of Montreal submits that the Legal Accounts should be reduced to $60,000 or less, while the National Bank argues that when considering the results achieved and counsel's behavior throughout these proceedings, GMG ought not to be compensated at all for their efforts.

2 GMG no longer represents the Corporations for the purpose of the CCAA proceedings and therefore I am of the view that this is the proper time to proceed with the taxation of the Legal Accounts. In retrospect, limiting the fees may have been a wise thing to do at the beginning of these proceedings; however, I am afraid that capping the fees at this time will not put an end to the question of GMG's Legal Accounts.

3 I did consider referring the question of the Legal Accounts to the Registrar for assessment. However, this would increase costs for all and would cause additional delay. Since I am the judge who has managed this file from the beginning and has heard the different proceedings with the exception of one motion, I've concluded that it was best that I determine the appropriate *quantum* for legal fees and that it be done immediately so that the professionals would have this information in mind while trying to put a viable plan of arrangement in place. Even if at times I use the words "legal fees", of course I am referring to fees inclusive of disbursements and taxes.

II. The Issue

4 The Court will determine what the appropriate *quantum* of legal fees is by answering the following question: What is a fair, just, and reasonable amount for the Corporations' legal fees in the circumstances of these CCAA proceedings?

III. Background

5 As previously mentioned, the Initial Order was issued on June 27, 2011. At the comeback hearing heard July 18, 2011 ("Comeback Hearing"), the Bank of Montreal and the National Bank, the two major creditors, objected to any extension of the Order, and in the alternative argued that the Court should revisit the Initial Order in order to vary several of its provisions. On July 22, 2011, this Court rendered an oral decision. This decision can now be found at [2011] N.B.J. No. 265. I refer the reader to this decision for additional details concerning this matter. Suffice it to say for the purposes of this motion that the Stay was extended until September 30, 2011, but several provisions of the Initial Order

were varied, such as: the DIP Lender's Charge was reduced from $1,000,000 to $300,000; the Administrative Charge was reduced from $500,000 to $250,000; and the Retainer was reduced from $200,000 to $90,000.

6 It took some time for the parties to agree on the wording of the order incorporating the Court's decision. Finally on August 19, 2011, the Extension Order was signed. Since that date various other motions were forwarded to the clerk's office.

7 On August 30, the Corporations forwarded a motion dealing with the DIP financing. This motion was withdrawn before it was served on any party.

8 On August 31, the Corporations filed another motion dealing with the DIP financing. BMO consented to the relief requested and was involved in drafting the materials for the motion. The purpose of this motion was to obtain from the Court confirmation of the corporate authority of Mr. Berend Tepper. This would have allowed the Corporations to obtain DIP financing without its solicitors having to provide the opinion that they had undertaken to give to the DIP lender, BMO; i.e. an opinion confirming the corporate capacity of the borrowers and the validity and enforceability of the DIP facility documents. The Court heard this motion on September 1, 2011, but refused to grant the relief requested. It was suggested that the Corporations proceed to get the proper minutes, authorizations, or documents signed by their directors or shareholders so that GMG could sign the letter of opinion previously agreed to. The Corporations were able to do this, and therefore their counsel provided the opinion and the motion was withdrawn on September 7.

9 On September 13, BMO filed the present motion asking the Court to limit the Corporations' legal fees. This matter was scheduled for September 30, 2011, since I was out of the office from September 12 to September 26, inclusively.

10 On September 20, the Corporations filed a motion soliciting an order directing payment of their legal counsel's accounts and allowing the Corporations to draw upon all of the available DIP financing. As counsel knew that I was absent, they also requested that the motion proceed in the Judicial District of Saint John alleging that it had to be heard forthwith due to the urgency of the matter. It was agreed that Justice Glennie would, the following day, hear the only part of the motion that seemed to be urgent, namely the immediate financial needs of the Corporations to meet their payroll obligations so that the harvesting activities could continue. Justice Glennie refused to grant an order as no urgency existed since the Corporations had sufficient cash in their bank account to pay their employees. The motion was adjourned to September 30, 2011, to be heard at the same time as the BMO motion already scheduled for that day. This motion was withdrawn on September 30 after the Court, at the request of the Monitor, gave directions concerning the DIP financing and the payment of professional fees including a payment of $32,000 to GMG.

11 On September 23, the Corporations filed a motion requesting a further extension of the stay period. This motion was also scheduled to be heard on September 30, 2011.

12 On September 28, BMO filed a motion soliciting an order requiring GMG to personally pay all or part of the legal accounts of BMO and any other party entitled to be compensated. This motion was also originally scheduled to be heard on September 30, 2011, however, by consent on September 29, this motion was adjourned *sine die* since the various parties had not received proper notice. This motion is scheduled to be heard on Friday, October 21, 2011.

13 On September 30, 2011, the Court dealt with the extension motion, as well as a request from the Monitor asking for directions as to the withdrawals to be made from the DIP financing account. The Court settled the question of the DIP financing, but had to adjourn the motion dealing with the extension.

14 BMO, the National Bank, and the Monitor were willing to consent to an automatic extension of the stay period until October 31, 2011, provided that GMG cease to represent the Corporations in this matter. Since GMG would not agree to terminate its representation of the Corporations in this matter unless some sort of arrangement could be arrived at concerning their Legal Accounts, the various parties would not consent to an automatic extension of the Stay. The Corporations' representatives were not in court and it was not possible to ascertain if they had been informed of the offer or whether they were in agreement with the position of their solicitors. At this point, the Court decided that the

Corporations needed independent legal advice in relation to these proceedings and specifically to consider the extension offer. The matter was adjourned to October 6.

15 Mr. Joshua J.B. McElman, the solicitor for the Bank of Montreal, then asked the Court if BMO's motion dealing with the capping of GMG's legal fees could be dealt with during the week of October 11 as it was important for the parties to know the amount to be considered for this item in the restructuring plan. The parties were advised that the Court was not available during the week of October 11, but was available the week of October 3 since a matter scheduled for that week would not be proceeding. Mr. Rodney Gillis and Mr. Gary Faloon were in court from GMG. There were some discussions as to whether the Court should also be dealing with the taxation of GMG's fees at the same time as the motion for capping, since it seemed that GMG's role as counsel representing the Corporations in the CCAA proceedings was about to come to an end.

16 Mr. Rodney J. Gillis, Q.C., who is the senior partner at GMG, asked, or at the very least agreed, that we should proceed with BMO's motion and the taxation at the same time, but requested to proceed either October 4 or October 5 as he was not available on Thursday, October 6. It was expected that someone else from his office would be in court on Thursday for the continuation of the motion requesting an extension but he would be present for the motion dealing with the capping of the fees and the taxation on Tuesday or Wednesday. With the parties consent, the motion and the taxation was scheduled to be heard Wednesday, October 5, 2011, at 9:30.

17 On Tuesday, October 4, BMO, through abundance of caution, filed an amended Notice of Motion which now specifically requested that the Court proceed with a taxation as well as a capping of the fees on October 5.

18 On October 4, BMO also filed a motion for an order removing the law firm of GMG as solicitors of record for the Corporations in these CCAA proceedings. It was not necessary to proceed with this motion as a Notice of Change of Solicitors was filed by the Corporations at the beginning of the hearing on October 5.

IV. Request for an Adjournment

19 On Wednesday, October 5, Mr. Gillis was not in court. Mr. Faloon and Mr. James Mockler appeared in court. Before commencing the hearing of the motion, the Corporations filed with the court the Notice of Change of Solicitors, stating that they were now represented by Robert M. Creamer from the law firm of Lawson Creamer concerning the proceedings under the CCAA. Mr. Creamer was in court. For the record, Mr. Creamer and Mr. Faloon acknowledged that Mr. Creamer would only be representing the Corporations in the proceedings concerning the CCAA, and that the law firm of GMG would continue to represent the Tepper family concerning the repatriation of Mr. Hendrick Tepper.

20 Mr. Faloon then asked the Court to adjourn the motion for an extra 10 days. Three arguments were put forward in support of his request; namely, they had not received proper or adequate notice of the Amended Notice of Motion; secondly, if they had more time, it was hoped that they could arrive at a settlement concerning their fees; and thirdly, they wanted more time to consider whether GMG should obtain independent legal advice.

21 The Bank of Montreal, the National Bank, the Monitor, and the Corporations strongly objected to the adjournment since it was very important to have the amount of legal fees attributable to the CCAA proceedings ascertained as soon as possible as this information was necessary to prepare the restructuring plan which the parties hope to present to the Court on or before October 31, 2011. The evidence was that the extraordinary cost of these CCAA proceedings was impairing the Corporations' ability to develop a workable plan.

22 I was of the view that proper and adequate notice was given as the Motion for capping had been served on September 14. GMG knew from that day that their fees were being questioned. Furthermore, Mr. Gillis had specifically agreed to deal with the capping and the taxation on October 5 and I concluded that counsel had to be held to his word.

23 As to the possibility of settlement, all parties except for Mr. Faloon were of the opinion that if a settlement was to be reached, it would be reached immediately or not at all since the parties had all necessary information to make an informed decision.

24 The Court concluded that legal counsel had had sufficient time to consider and decide whether they should obtain independent legal advice concerning their fees since they knew as of September 14 that their invoices were being seriously questioned, and they knew since September 30 that the taxation would proceed on October 5, 2011.

25 The Legal Accounts are signed by Rodney J. Gillis, Q.C., on behalf of GMG. Furthermore, two senior solicitors from GMG, namely R. Gary Faloon, Q.C., and James L. Mockler were in court and they were certainly capable of dealing with this question, since they, along with Mr. Gillis, were the senior solicitors representing the Corporations in this file. They are the ones with the information concerning this issue and they are the ones best suited to justify their fees or answer questions concerning their fees and disbursements. It is not unusual in CCAA proceedings for a legal firm to be represented by one of its own solicitors when their legal accounts are being taxed. I note as an example that Mr. Mockler represented GMG in a taxation within another CCAA proceeding that I had referred to Registrar Bray in the matter of *Long Potato Growers Ltd., Re*, 2009 NBQB 349, 351 N.B.R. (2d) 376 (N.B. Q.B.).

26 The question before the Court is not substantially different from the original motion, that is, the Court, in its supervisory role, is asked to look at the Corporations' Legal Accounts and make a finding as to what is fair, just, and reasonable in the circumstances, to be charged in these CCAA proceedings.

27 Tight timing is critical in CCAA proceedings. A "hands-on" approach of the court in CCAA matters is recommended. In several Canadian jurisdictions, a commercial list is identified, which means that CCAA files are case managed and assigned to justices with commercial expertise. This is not the case in New Brunswick. Judicial specialization in this province could be very difficult due to the relatively small pool of justices, the distances between the different communities, and the language issue. Nevertheless, parties involved in these matters recognize the need for expeditious treatment of these proceedings. The ability of parties to seek direction or have disputes resolved expeditiously ensures that the process of negotiations continues on a timely basis. In the present file, the parties have suggested and adhered to fairly rigorous time requirements. Parties were permitted to file documents that did not comply with the time requirements contained in the *Rules of Court*. Parties were permitted to proceed with motions in considerably less time than what is required by the *Rules of Court*.

28 The court must supervise proceedings and make rulings that keep the process moving towards an expeditious solution when parties hit a particular impasse. Business and financial constraints involved in CCAA proceedings require that we proceed on a timely basis. The adjournment requested would have unduly hindered the progress of the restructuring plan. The Court was of the opinion that failure to proceed at this time and render a timely decision created a serious risk of failure as it would be difficult for the parties to arrive at a viable plan of restructure without knowing the Corporations' legal fees.

29 In the circumstances of this proceeding, the Court refused to adjourn the matter.

V. The Court's Jurisdiction to Review Professional Fees Within Ccaa Proceedings

30 The CCAA does not specifically provide for the review of remuneration claimed by professionals. However, the court is granted a broad discretion under section 11 of the CCAA to make any order it considers appropriate. Proceedings under the CCAA primarily engage the court's supervisory powers. The court, in its supervisory role, has the inherent jurisdiction to approve or disapprove of any account during CCAA proceedings if it concludes that it is just and equitable to do so (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42 (N.B. C.A.) at paragraph 24, and also *Bolands Ltd. v. 052897 N.B. Ltd.* (1994), 144 N.B.R. (2d) 9 (N.B. Q.B.)).

31 The court's jurisdiction to approve or disapprove legal fees is also addressed by Stephanie Ben-Ishai and Virginia Torrie in "*A 'Cost'-Benefit Analysis: Examining Professional Fees in CCAA Proceedings*", (2009) Ann. Rev. Insol. L. 5. (edited by Janis P. Sarra), as follows:

> In Canada, insolvency professionals' fees are also subject to court approval. Due to the brevity of the governing legislation, the *Corporations Creditors' Arrangement Act, (CCAA)*, which does not specifically touch on court approval of professsional fees, the supervisory role of the court is held to confer jurisdiction to authorize the payment of legal fees and disbursements incurred in the course of a restructuring. Where necessary, the court may also rely on its inherent jurisdiction or applicable provincial laws to approve payment of insolvency professionals' fees in *CCAA* proceedingss. Under the *CCAA*, legal professionals are entitled to recover fees and expenses for authorized restructuring work provided that the court considers these amounts to be just and reasonable.

32 Furthermore, section 11.52 of the CCAA now provides statutory jurisdiction to grant an administrative charge for professional fees in a CCAA matter.

33 Although the court's jurisdiction extends to capping legal fees in appropriate circumstances, as previously mentioned, I find that in the present case it is more appropriate to determine the legal fees to which GMG is entitled rather than just capping their fees since their services have now been terminated.

34 At this stage of the proceedings, the Court must consider what is just, fair, and reasonable in the circumstances, including a balancing of the interests of, and prejudice to, the different stakeholders who have an interest in the financially distressed Corporations.

VI. Factors to Be Considered

35 The Court was referred to several cases dealing with different factors to be considered when assessing the remuneration of professionals within different contexts: see *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), *Randle, Re* (1995), 13 B.C.L.R. (3d) 237 (B.C. S.C.), *Long Potato Growers Ltd., Re*, *Heinrichs Estate v. Baker, Zivot & Co.* (1996), 108 Man. R. (2d) 47 (Man. Q.B.), and *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]).

36 In my view, the following factors are to be considered when the court is considering the legal fees charged within a CCAA context:

- The time expended by counsel;
- The degree of skill and competence demonstrated by counsel;
- The general conduct and costs of the proceedings;
- The result of counsel's effort and extent to which success was achieved;
- The nature, importance and urgency of the matters involved;
- The size and complexity of the business being restructured;
- The reasonable expectation of various parties including any estimates given to the court or other stakeholders;
- The fund out of which the fees are to be paid;
- The circumstances and interest of the company;
- The company's ability to pay; and,

• The views of the monitor, the major creditors and the insolvent company.

37 The following should *prima facie* be disallowed: services not authorized by law, services not connected to the CCAA, unproductive or unnecessary services, irresponsible decisions producing no positive results, charging for services not clearly performed, unwarranted duplication of efforts, and charging at an unjustified excessive rate for services and disbursements.

38 These factors are neither exhaustive nor of universal application.

VII. The Legal Accounts Of GMG

39 GMG issued four invoices with respect to services provided to the Corporations in connection with the CCAA proceedings; namely the first one dated July 7, covering the period from June 13 to June 30 in the amount of $184,294.88; the second one, dated July 29 covering the period from July 1 to July 25 in the amount of $136,430.21; the third one, dated September 19 covering the period from July 26th to September 15th in the amount of $111,289.88; and the fourth and final invoice, dated September 30 covering the period from September 16 to September 30 in the amount of $76,671.09; for a grand total amounting to $508,686.06.

40 These invoices consist of 40 pages of what I understand are computer generated detailed time billing records.

41 Twenty different persons billed time to this account. Nine of which I recognize as being solicitors including the senior partner, Mr. Gillis, and at least two other senior solicitors, Mr. Faloon and Mr. Mockler. Rates for the different solicitors range from $100 to $400 per hour. The hourly rates of the other 11 individuals who billed time to this account range from $50 to $75. I can see from different Affidavits of Service filed in the Records on Motion, that at least one is a student-at-law and one is identified as a paralegal. I do not know who the other nine individuals are: articling students, paralegals, legal assistants, or something else? This information is necessary to verify that the time recorded was in fact spent by personnel whose talents and experience can reasonably be said to justify the rates charged.

42 In the context of a CCAA matter, it is not unusual for professionals to be called upon to prove their entitlement to the fees charged since any money in their pocket is money not available for the Corporations, its creditors, or other stakeholders. It is therefore expected that various affected parties will be examining these carefully.

43 In the case of *Heinrichs Estate v. Baker, Zivot & Co.*, the Court was reviewing an assessment of a solicitor's account. The solicitor argued that the onus was on the client to object to the legal accounts and supporting time record information. At paragraph 11, Hamilton J. rejected that argument in these words:

> 11. (...) I do not accept the respondents' argument that, in assessing a lawyer's account, the onus is on the client. If a client proceeds with an assessment of a lawyer's account it is the lawyer's responsibility to justify the account. If time records are the basis of an account, the lawyer must satisfy the court that the time spent was appropriate in the circumstances.

44 I adopt these comments. The onus is upon GMG to satisfy the court that the Legal Accounts are appropriate in the circumstances and that they are entitled to the fees charged.

45 The Monitor supports this motion. In his affidavit dated September 28, he makes the following comments pursuant to his analysis of GMG's first and second invoice:

> (i) GMG's first invoice dated July 7, 2011 for the 18 day period of June 13 to June 30, 2011, totaled $184,294.88 (including disbursements and taxes);
>
> (ii) Based on A.C. Poirier's analysis of the first GMG invoice dated July 7, 2011, approximately $134,000.00 in fees charged was for the 15 day period of June 13 to June 27, 2011, when the initial order was issued.

(iii) On the first GMG invoice dated July 7, 2011, a total of 651.5 hours was billed for the 18 day period of June 13 to June 30, 2011 by 14 separate timekeepers, including a total of 333.9 hours by the 3 principal counsel involved in these CCAA proceedings, namely, Rod Gillis, Gary Faloon and James Mockler, with fees for these 3 counsel alone totaling $108,654.00.

(iv) Included in the first invoice dated July 7, 2011 were disbursements totaling $16,148.82, among which included $4,099.00 for photocopies, $1,474.02 for travel-mileage expense, $970.00 for fax and $6,478.94 for travel-miscellaneous.

(v) GMG's second invoice dated July 29, 2011 for the 25 day period of July 1 to July 25, 2011, totaled $136,430.21 (including disbursements and taxes);

(vi) On the second GMG invoice dated July 29, 2011, a total of 569 hours was billed for the 25 day period of July 1 to July 25, 2011 by 12 separate timekeepers, including a total of 258 hours by the same 3 principal counsel, Rod Gillis, Gary Faloon and James Mockler, with fees for these 3 counsel alone totaling $78,498.00.

(vii) Included in the second GMG invoice dated July 29, 2011 were disbursement (sic) totaling $11,675.70 among which included $2,873.50 for photocopies, $1,14.00 (sic) for travel-mileage expense, $1,550 for fax and $4,821.44 for travel-miscellaneous.

(viii) Both the first and second GMG invoices were stamped "Private and Confidential not to be shared with anyone without the Consent of GMG". As such, I was forced to file the two GMG invoices with the Court in sealed envelopes and I had to refuse a request from counsel for Bank of Montreal for a copy of the invoices.

(ix) Notwithstanding that the Court order dated August 22, 2011, provided for legal counsel to bill on a bi-weekly basis, GMG did not render any further accounts subsequent to the second invoice dated July 29, 2011. On September 19, 2011, in response to the request of my office for details of GMG's unbilled work in progress, A.C. Poirier received a summary statement of account from GMG from July 26, 2011 to September 15, 2011 totalling (sic) $111,289.88. A.C. Poirier requested a breakdown of this summary statement, but to date, none has been received.

46 No affidavit evidence was filed to respond to the concerns raised by the Monitor in his affidavit.

47 Before asking Mr. Faloon to justify the Legal Accounts, the Court invited Mr. McElman to summarize some of his concerns with the Legal Accounts. His comments, in great part, echoed the Monitor's concerns and the Court's concerns. Here are parts of Mr. McElman's comments:

> ... we have the concerns with respect to the issues that we raised this morning, the nine separate issues related to waste; unnecessary applications; services that were as a result of irresponsible decision or producing no positive results; what we would submit is attempt to take advantage of the estate by performing unproductive or unnecessary services; overcharging for routine services; charges for services not clearly performed; unjustifiable amounts that would be to the detriment of the creditors; charging at an excessive rate for professional services and for non-professional services; [...] errors of judgment; any matter that was not required by law to be done that adversely affected the parties; [...]

48 Then Mr. McElman submits that the accounts themselves are wholly inadequate and goes on to mention:

> [...] Insufficient detail; clumping (...) it's hard to determine, as the Court pointed out. There's a lot of consultations between three or four solicitors. To know exactly how much time was spent on that is very difficult for this Court to determine if it's appropriate. (...) And we submit that Gilbert McGloan Gillis has not established that those consultation times are fair and reasonable in the circumstances because they haven't provided the detail related to how much time that was.

The same would (...) be applicable to each other category of work performed. There's no detail breakdown on the time spent on research. There's no detail breakdown of the time spent on the preparation of documents. We have days where you have multiple parties working on the same sets of documents, but we have no idea what they're doing.

Further, the number (...) of senior solicitors working on [the] file is of concern. Not only do we have the three that we know, have been in court, but there's also John Gillis, there's Mr. Bujold, we have what I understand to be assistants of Gilbert McGloan Gillis that charge out at 50 dollars an hour.

[...]

And the detail that isn't there is we don't know what kind of training does this assistant have? Do they qualify as a paralegal? Should they be charging out rates? (...) Is it appropriate to be charging for booking hotels and booking flights?

49 Mr. McElman then focuses on the disbursements and continues:

... there's not sufficient detail with respect to the photocopies. There's not a perphotocopy rate. We're unsure of the charges that related to each photocopy.

With respect to the binding: What does that involve? How much binding was involved? Is that a charge in addition to a paralegal's time while they're standing there binding? (...) Are they charging $264 for coils that go on the binding? What are they doing?

[...]

Travel miscellaneous: [$6,478.94], and that was on July 7 th . Where did they go?

Travel miscellaneous: You know, what does that relate to? (...) Where does miscellaneous money go?

There's also travel parking: There's parking expense on September 19 th of $676.95.

[...]

50 He then questions the fees charged for appearances at the *ex parte* hearing of June 27, 2011 and the Comeback Hearing of July 18, 2011, and says:

...the initial order, the attendees were Mr. Falloon, Mr. Gillis and Miss Toner, I'm not sure, she may be an articling clerk. And the total for that day, for the attendance in court of an *ex parte* application, $11,628.83.

[...]

And then the July 18 th hearing, we had Mr. Stoyanov, Mr. Faloon and Mr. Mockler and that day we had $12,000 for attending that hearing. But the beauty of their account is it's just not the hearing dates that everybody's working on the same thing, it's every single day. (...) We've seen how over the first 18 days, there's an average of $10,000 a day. Those are the items we'd like them to address in their submissions. (...)

51 No *viva voce* evidence was heard during this motion. No one was called to answer these concerns. No affidavit evidence was presented to justify or explain the accounts.

52 Mr. Faloon explained to the Court that he did not have the information to respond to the different concerns raised, and that he would be relying on Mr. Mockler's affidavit and the accounts annexed thereto. As we all know, the time records of GMG is just one factor in determining an appropriate fee that is just, fair, and reasonable.

53 Mr. Creamer was also troubled by the Legal Accounts and argued that the questions raised by the various parties begged answers and needed to be explained. He added that he had discussed the Legal Accounts with Berend Tepper, and that generally speaking, the Corporations were in agreement with the submissions of BMO and the Monitor.

VIII. Applicability of the Different Factors to the Present Matter

54 Although I have no intention of dealing individually with each factor listed above, I will deal specifically with certain of them and determine how they apply to the present matter.

A. Information Contained in Cash Flow Statements of July 11, 2011

55 The CCAA required the debtor to table detailed projected cash flow statements for the Comeback Hearing. Cash flow statements and the notes thereto are essential to the restructuring process and essential for the court to make an informed decision.

56 At the Comeback Hearing, in support of the request for an extension of the Stay Period, the Corporations presented cash flow statements that were prepared on July 11, 2011 ("Cash Flow Statements"). This Court's decision of July 22, 2011, relied on the accuracy of those statements and the notes thereto.

57 The cash flow statements indicate a total of $130,000 in legal fees to the end of September, 2011, to cover the Corporations' legal fees and the Monitor's legal fees. The information before the Court was that from this amount, approximately $30,000 would go towards the payment of the Monitor's legal fees, and the difference would be for the Corporations' legal fees. As of September 28, the Monitor's legal fees were $ 87,430.80.

58 BMO submits that the Legal Accounts should not be endorsed as presented and should be reduced to what is fair and reasonable in the circumstances, namely, the amount set out in the July 11, 2011 cash flow statements which GMG presented to this Court at the Comeback Hearing of July 18.

59 During the Comeback Hearing, the parties spent considerable time discussing the cash flow statements in relation to legal fees and the various court ordered charges against the Corporations' assets, and also during argument on the erosion of BMO's security, prejudice to the stakeholders under the CCAA and/or costs under CCAA compared to those under the *Farm Debt Mediation Act*. BMO did not support the extension. It was very concerned with the Corporations' ability to afford the costs associated with these CCAA proceedings. It was concerned that their secured position would erode and become unsecured, and that the amount of DIP financing or other priority charges such as the Administrative Charge would place its interests under water.

60 GMG's invoice dated July 7 indicates legal fees in the amount of $184,294.88 for the period ending June 30. As of July 25, that is seven days after the Comeback Hearing, GMG's total legal fees, which do not account for the Monitor's legal fees, were $320,725.09.

61 Although GMG's first invoice is dated July 7, 2011, it would seem that it was not forwarded to the Monitor or any other party before the end of July or early August, definitely not prior to the Comeback Hearing. In the Monitor's first report dated July 13, 2011, he states on page 7, that:

> With respect to the legal fees of $130,000, the Monitor has retained Stewart McKelvey as counsel to the Monitor and the figure of $130,000 is assumed to include these fees.

62 At the Comeback Hearing, the Court was not told of any error in the cash flow statements prepared by the Corporations or of any error in the Monitor's first report concerning his assumptions regarding legal fees. It should have been apparent to counsel at that time that the figures for its legal fees contained in the cash flow statements and being discussed was grossly inaccurate. GMG knew, or ought to have known, that their accrued fees and disbursements to date at the Comeback Hearing were far in excess of the amount submitted to the Court on that day.

63 A solicitor should advise his client without delay of any developments that are likely to increase the fee far beyond the estimate. When GMG realized that there would be a huge variance between the projections presented at the Comeback Hearing and the actual legal fees, the Monitor should have been advised forthwith as to the magnitude and the escalation of the fees. GMG were the only ones with this information until late July or early August. They should have promptly sought adjustments to their estimate or the cash flow projections.

64 An estimate given by a lawyer in any proceeding is not a binding contract; however, it is a relevant consideration when the court is called upon to assess that lawyer's legal fees. A reasonable difference between a solicitor's estimate and his actual fees can be justified if, for example, he or she does work outside its mandate at the request of the client, or if unforeseen circumstances add a new and unexpected dimension to the work (see *Denecky v. Butkiewicz* (1993), 16 Alta. L.R. (3d) 356 (Alta. Q.B.)). However, there is no evidence that there was anything unusual or unexpected in these proceedings that would justify such a variance between the projections and the actual fees.

65 No explanation was provided to explain the increase in the legal fees' magnitude or the escalation of the fees during the process

66 If the amount of legal fees incurred by the Corporations up to the Comeback Hearing had been disclosed or if the cash flow projections had revealed an amount for the Corporations' legal fees to the end of September exceeding $500,000, the Court's decision on the extension may have been different.

67 BMO argues that if the legal fees are not limited to the amounts presented to the Court on July 18, 2011, as per the cash flow statements of July 11, it will bring into question the integrity of these proceedings and the judicial system.

B. Complexity of the Matter

68 Granted, proceedings under the CCAA are more complex in their nature than many other procedures before the courts. However, there is no evidence that these CCAA proceedings are more complicated or difficult than the average CCAA proceeding. Basically, we are dealing with a family farming operation in Northwestern New Brunswick, with assets as per book value of approximately 8 million dollars, and liabilities in the vicinity of 11 million dollars, and one major secured creditor, BMO, that is owed in excess of 8 million dollars.

C. Results Achieved

69 Counsel for the Corporations did achieve certain results. No applicant for relief under the CCAA is guaranteed that the court will grant the relief even if proceeding *ex parte*. Success is very much dependent upon the quality of the application itself. The pre-filing preparatory stages of a CCAA application is a generally very intense time for counsel involved. Of course, counsel would know this ahead of time. Counsel for the Corporations was successful in obtaining the Initial Order with a Stay Period up to July 18, 2011, and the extension up to September 30, 2011.

70 However, as of September 30, there had been little or no progress towards the production of a plan of arrangement and restructuring.

71 Additional legal fees will have to be incurred by the Corporations in order to complete the process.

72 There must be an overriding principle of reasonableness. While it is appropriate to look at time spent and hourly rates, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable.

D. The Initial Ex Parte Order and Its Overreach

73 The Corporations applied *ex parte* for the Initial Order including DIP financing alleging that there was an urgency as its major creditor, the Bank of Montreal, was about to make a move. Preventing a race to the assets is in part what

the legislation is aimed at remedying. However, as per the evidence that has been put before the Court since the Initial Hearing, I have to conclude that the Bank had not asked for payment and there was no indication at that time that the Bank of Montreal was about to enforce its security. Notwithstanding this Court's hesitancy to proceed *ex parte* and questions raised by the Court at the initial hearing, the Corporations' solicitors did not advise the Court of recent amendments to the CCAA, which required that proper notice be given to affected secured creditors before approving a DIP Lender's Charge or an Administration Charge. At the Comeback Hearing, after hearing from the various parties, the Court did substantially reduce these charges and varied other provisions as well.

74 The overreach of the Initial Order which was obtained *ex parte* created a particular dynamic between the various parties. While parties could seek to set aside or vary particular provisions, as was done in the present case, it is time consuming and costly to appear before the court more than necessary. In the present matter, I find that proceeding *ex parte* contrary to the CCAA amendments and the overreach of the Initial Order set the ground for distrust amongst the insolvent Corporations, its counsel, and the major creditors, which ended with the Corporations having to retain different counsel in order for these proceedings to continue.

E. Superfluous Procedures and Wasted Time

75 The CCAA is an instrument for the restructuring of insolvent Corporations. Counsel is expected to prosecute these matters in a reasonably cost-effective manner consistent with the probability of success and avoid superfluous procedures or an excess of caution.

76 Additional motions were filed or at least prepared by the Corporations between the signing of the extension order on August 19 and September 30. I find that at least three of these should not have been brought; that is the one of August 30 that was never proceeded with, the one of September 1 where the Court refused the remedy being sought, and the allegedly urgent motion heard by Justice Glennie on September 21 that was also refused.

77 I also find that some time was wasted due to actions of counsel such as GMG's refusal to remove themselves from the file unless some sort of agreement could be concluded concerning their Legal Accounts, and trying to repudiate an agreement reached with all parties concerning the taxation to be heard of October 5.

F. Unwarranted Duplication of Efforts

78 From the Legal Accounts, I can conclude that nine different lawyers, including three senior lawyers, worked in this file and had discussions amongst themselves concerning this matter. This by itself is cause for concern, as it no doubt takes considerable time just to keep the different lawyers informed of the progress of the file. Furthermore, there were at least two of the senior solicitors present during most of the court appearances.

79 In *Long Potato Growers Ltd., Re*, Registrar Bray considered whether the services of Gilbert McGloan Gillis, who acted as counsel for the debtor corporations, were consistent with properly advancing the clients' position while respecting the spirit of the CCAA. Mr. Mockler was the solicitor of record for that taxation. Registrar Bray stated at paragraph 30:

> 30 Concerning the suggestion that there was unnecessary caution in having two senior counsel prepare for the hearing of a motion, the argument has merit. Should a litigant wish to have the comfort of two highly experienced lawyers present before the court, this is understandable. The cost of such comfort, however, is not visited upon other parties at an assessment. I believe that the assessing officer may take notice that although Mr. Mockler may see his expertise to be primarily in corporate and commercial matters; in previous appearances before the courts in this province he has shown himself to be a competent litigator with skills more than adequate to such a representation.

80 In the present case, the Legal Accounts are replete with entries by multiple experienced solicitors working on the same material or issues. Although I realize that there is always some degree of professional overlap in the sense that less senior professionals are reporting to and discussing their findings with more senior professionals, solicitors with hourly

rates of $250, $340, and $400 per hour should not require constant directions from each other. The level of duplication of experienced counsel set out in the Legal Accounts cannot be endorsed by this Court without additional explanation.

G. Were the Fees and Disbursments Incurred for the Purpose of Proceedings Under the CCAA?

81 When dealing with the Administrative Charge for legal fees, subsection 11.52(b) of the CCAA explains that this charge is in respect of remuneration and expenses for legal experts engaged by the company *for the purpose of proceedings under this Act*.

82 The court, in its supervisory role, must ensure that the Legal Accounts are reasonable in amount and incurred fairly. It must also ensure that they were incurred for the purpose of proceedings under the CCAA; namely, efforts to restructure the insolvent Corporations by attempting to negotiate a compromised plan of arrangement that will enable the Corporations to emerge and continue as a viable economic entity.

83 Counsel is entitled to payment of fees and disbursements that relate to the fair and reasonable legal services rendered in connection with the restructuring work within the CCAA proceedings.

84 In his affidavit of October 4, 2011, Mr. Mockler declares that 50 % of Rodney J. Gillis's time billed in this file, and 60 % of his own time, relates to efforts to repatriate Mr. Hendrick Tepper.

85 Although the time, effort, and disbursements dedicated to the repatriation of Hendrick Tepper is laudable, I cannot find that it is a matter related to the CCAA proceedings. I have no reason to doubt that the solicitors worked very hard on trying to bring Mr. Tepper back home, and I realize that Mr. Mockler's going to Lebanon was anything but a holiday. However, GMG's role as counsel for the purpose of the CCAA was to represent the Corporations in its efforts to restructure. The supervisory role of the court is held to confer jurisdiction to authorize the payment of legal fees and disbursements incurred in the course of a restructuring.

86 From the evidence, and from the comments of Mr. Faloon, and the comments of Mr. Creamer who is now representing the Corporations, I conclude that approximately 50 % of the Legal Accounts relate to efforts to repatriate Mr. Tepper.

87 I conclude that it would not be just, fair, and reasonable to include in the Corporations' legal fees for the purpose of the CCAA the amount related to the repatriation of Mr. Tepper, and therefore Legal Accounts must be reduced accordingly.

H. The Corporations' Capacity to Pay

88 The parties think that they may now arrive at a plan of arrangement that could have the general agreement of the major secured creditors; however, the large legal fees may be the straw that breaks the camel's back. The Corporations have no capacity to pay the Legal Accounts. They cannot afford these. If these fees are made payable in their entirety they may sink the debtor Corporations. They definitely threaten the viability of any proposal.

89 The object of the restructuring process is to reorganize the insolvent debtor so that it can present a plan to its creditors that will be accepted and will allow it to continue as a going concern. Huge professional fees on an already insolvent company can make this reorganization impossible.

I. Opposition to the Legal Accounts

90 The Monitor and primary secured creditors oppose the accounts of GMG as presented. The Court also heard from Mr. Creamer that the Corporations also support BMO's motion and agree with the position that it takes concerning the legal fees related to the CCAA proceedings.

91 The court must consider and give proper weight to the views of the primary secured creditors and the monitor. These individuals are involved with the Corporations and its solicitors on a regular basis.

92 Courts consider with great deference and weight the views and recommendations of the court appointed monitor. The Monitor, due to his ongoing supervision, is in a strong position to evaluate whether the work done and the results achieved merit the compensation claimed.

IX. Conclusion

93 The CCAA is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the corporation to carry on business for the benefit of the company, its creditors, and shareholders in a manner that causes the least possible harm to employees and the communities in which it operates.

94 The court must exercise its discretion judicially to ensure fairness to counsel, the Corporations, the secured creditors, and all other stakeholders.

95 Counsel is to be allowed a compensation that is just, fair, and reasonable for the time spent in the CCAA proceedings.

96 My examination of the Legal Accounts and the evidence submitted does not satisfy me that the Corporations' Legal Accounts are just, fair, and reasonable having regards to all the relevant factors, the material facts, and circumstances of this particular matter. Even if I was to subtract 50 % from the legal fees to account for the efforts connected to Mr. Tepper's repatriation, I still find the charges too high for these CCAA proceedings.

X. Disposition

97 I reduce the Corporations' legal fees to $150,000, inclusive of disbursements and taxes. On September 30, I authorized a first payment of $32,000 to GMG, and therefore there is an outstanding account payable of $118,000.

98 Having taken into consideration all of the relevant factors as explained up above, I am of the opinion that this amount represents fair, just, and reasonable compensation in the circumstances.

99 The goal of the CCAA stay period is to provide the insolvent corporation with access to the time and expertise needed to develop a plan of arrangement and to restructure its business. Therefore, there has to be some assurance and money available to pay the professionals to do this work. However, these professional fees should not bankrupt the corporation. If at the end of the day, the professional fees are what threatens the viability of any proposal and sinks the debtor corporation, the integrity of these proceedings and the judicial system will be brought into question.

Order accordingly.

End of Document

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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

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