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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

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

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

Applicants

BOOK OF AUTHORITIES OF THE QUEBEC CLASS ACTION PLAINTIFFS

June 21, 2019

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LIST OF AUTHORITIES

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1.	*Industrial Properties Regina Limited* v. *Copper Sands Land Corp.*, 2018 SKCA 36
2.	*Imperial Tobacco Canada Ltd.* c. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 173
3.	Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013) at p. 76 (**extract**)
4.	*Skeena Cellulose Inc. (Re)*, 2001 BCSC 1423
5.	*Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327
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7.	*Worldspan Marine Inc. (Re),* 2011 BCSC 1758
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Court of Appeal for Saskatchewan

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

Date: 2018-05-23

Docket: CACV3176

Between:

Industrial Properties Regina Limited

Appellant
(Respondent)

And

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

Respondents
(Applicants)

Docket: CACV3177

Between:

101297277 Saskatchewan Ltd.

Appellant
(Respondent)

And

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

Respondents
(Applicants)

Docket: CACV3178

Between:

Affinity Credit Union 2013

Appellant
(Respondent)

And

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

Respondents
(Applicants)

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

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

Herauf J.A.

I. INTRODUCTION

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

II. BACKGROUND FACTS

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

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

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

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

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

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

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

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

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

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

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

III. STANDARD OF REVIEW

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

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

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

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

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

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

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

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

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

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

IV. THE INITIAL ORDER

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

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

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

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

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

A. Appropriate circumstances

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

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

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

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

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

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

B. Good faith and due diligence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. INTERIM FINANCING

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

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

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

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

> the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (c) whether the company's management has the confidence of its major creditors;
> >
> > (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (e) the nature and value of the company's property;
> >
> > (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (g) the monitor's report referred to in paragraph 23(1)(b), if any.

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

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

"Herauf J.A."

Herauf J.A.

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

Ryan-Froslie J.A.

I concur. "Schwann J.A."

Schwann J.A.

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025385-154, 500-09-025387-150
(500-06-000070-983, 500-06-000076-980)

DATE: October 27, 2015

PRESIDING: THE HONOURABLE MARK SCHRAGER, J.A.

IMPERIAL TOBACCO CANADA LTD.
ROTHMANS, BENSON & HEDGES INC.
APPELLANTS – Defendants

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
RESPONDENTS – Plaintiffs

JUDGMENT

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[1] Respondents have filed identical motions in each of the three appeals seeking orders against Appellants, jointly, to furnish security.

[2] At the commencement of the hearing, the motion against JTI-Macdonald Corp ("JTM").[1] was withdrawn because attorneys were unavailable due to health issues. Hence, reference in this judgment to the "Appellants" should be read as referring to Imperial Tobacco Canada Ltd ("ITL") and Rothmans, Benson & Hedges Inc. ("RBH"), unless the context indicates otherwise.

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[1] Record no: 500-09-025386-152.

[3] On May 27, 2015, the Superior Court, District of Montreal (the Honourable Brian Riordan) condemned the three Appellants to pay moral and punitive damages aggregating in excess of $8 billion, which today would exceed $15 billion with interest and additional indemnity.

[4] The 237 page judgment in first instance culminated two class actions commenced in 1998 against the three Appellant cigarette companies. The class actions were authorized in 2005; the joint trial commenced on March 12, 2012 and terminated on December 11, 2014. More than 70 witnesses, including 27 experts, were heard over a total of 251 hearing days. In excess of 20,000 exhibits were filed in evidence. The judgment found that Appellants were liable under the *Charter of Human Rights and Freedoms*,[2] the *Consumer Protection Act*[3] and under the *Civil Code of Quebec*[4] (*C.C.Q.*) for faults causing injury to others and for failure to properly inform consumers of the risks and dangers associated with the products manufactured by Appellants.

[5] In the conclusions of the judgment, the judge ordered an initial deposit of $1,131,090,000 in partial satisfaction of the two awards within 60 days broken down as follows:

	BLAIS		**LÉTOURNEAU**	
ITL	$670,000,000	(compensatory)	$72,500,000	(punitive)
	$30,000	(punitive)		
RBH	$200,000,000	(compensatory)	$46,000,000	(punitive)
	$30,000	(punitive)		
JTM	$130,000,000	(compensatory)	$12,500,000	(punitive)
	$30,000	(punitive)		
TOTAL	**$1,000,090,000**		**$131,000,000**	

[6] The judge also ordered provisional execution "with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages".

[7] Applying the proportions of liability found by the trial judge (JTM 13%, ITL 67% and RBH 20%), provisional execution payments amounted to:

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2 *Charter of Human Rights and Freedoms*, CQLR, c. C-12.
3 *Consumer Protection Act*, CQLR, c. P-40.1.
4 *Civil Code of Quebec*, CQLR c C-25.

i) JTM $130 million

ii) ITL $670 million

iii) RBH $200 million

[8] All Appellants petitioned this Court to cancel the order for provisional execution. In support of their motions, Appellants filed affidavits and financial information to support their claims that, on a cash basis, they could not pay their respective amounts of the provisional execution orders within the sixty day period imposed by the judgment. RBH stated explicitly that the obligation to pay rendered it insolvent on a cash basis and ITL alluded to the possibility of filing proceedings under the *Companies' Creditors Arrangement Act* ("*C.C.A.A.*").[5]

[9] By judgment of July 23, 2015,[6] this Court granted Appellants' motions and cancelled the provisional execution after identifying a weakness in that part of the judgment ordering provisional execution and the existence of a prejudice for the Appellants arising from the order of provisional execution.

[10] The Court pointed out that provisional execution may be incompatible with class actions because it is only upon final judgment that class members are definitively determined. Moreover, the Court observed that unless funds were provisionally distributed to class members, there would be no benefit to them but added that distribution on a provisional basis raised the problem of obtaining reimbursement should Appellants ultimately succeed in their appeals.

[11] On the issue of prejudice the Court said the following:

> [42] The affidavits filed by ITL and RBH in support of their motions to cancel provisional execution indicate that payment within 60 days of judgment causes serious financial prejudice to them. The evidence filed discloses a significant impact for Appellants despite that they are profitable and sizeable. In the case of JTM, its portion of $142,530,000 exceeds its annual earnings before interest, taxes and other expenses and well exceeds cash on hand of approximately $5.1 million. RBH's $246,030,000 exceeds its projected cash on hand at the end of July by approximately $125 million. ITL's provisional execution amount of $742,530,000 is approximately double its annual profit (before extraordinary items) and greatly exceeds current cash and credit availability to pay such sum.
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> [43] Serious prejudice has been held sufficient to cancel provisional execution where the effect is to negate the right of appeal. At least, in the case of JTM and ITL, based on the affidavits, this appears to be the case. The judge based his

[5] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[6] *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224.

> calculations of Appellants' ability to pay on historical earnings and balance sheet worth. He obviously did not analyze current cash and credit availability as set forth in the affidavits submitted to us. Respondents have pointed to numerous facts put in evidence in the lower court where Appellants have transferred profits and assets to related companies. Respondents assert that if Appellants are today unable to pay, this is their own doing and that of corporations related to them. However, these arguments are not helpful to Respondents given the other considerations germane to provisional execution and elicited above. This is not to say however that such facts and arguments could not give rise to other recourses or orders.

[12] In virtue of the instant motions, Respondents seek security from Appellants in the aforementioned proportions, aggregating $5 billion, within 30 days of judgment or, subsidiarily that such security be provided by way of quarterly instalments of $250 million each commencing as at June 26, 2015. The proposed form of the security requested is irrevocable letters of credit issued by a Canadian bank listed in Schedule I of the *Bank Act*.[7]

[13] Other than facts found by the judge, the Respondents rely on the affidavits filed by Appellants in support of their motions to cancel provisional execution as well as the depositions of the affiants. Respondents submit that Appellants have arranged their affairs so as to be, in effect, judgment proof for any substantial condemnation and that there is every indication that, pending appeal, Appellants will continue to direct their earnings to related entities located out of jurisdiction so that they will be unable to pay any significant condemnation that may be maintained in appeal.

[14] Appellants have argued for the dismissal of the motions. Following are summaries of their submissions.

POSITION OF ITL

[15] ITL pleads that there are no grounds upon which to order it furnish security. The facts which Respondents invoke in support of their motion are not current. The transfer of trademarks to a subsidiary, which hypothecated them in favour of a related out-of-jurisdiction company occurred in the year 2000. The payment out of earnings as dividends to the out-of-jurisdiction parent, stopped in 2014, but in any event these payments merely reflect "business as usual". Thus, because there are no relevant facts occurring after judgment which might jeopardize the satisfaction of that judgment, there is no "special reason" to justify the ordering of security pursuant to article 497 of the *Code of Civil Procedure* ("*C.C.P.*").[8]

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7 *Bank Act*, S.C. 1991, c. 46.

8 *Code of Civil Procedure,* CQLR c. C-25.

[16] ITL adds that should I rule that there are grounds justifying security, the amounts requested are such as to drain all pre-tax earnings and put the going concern viability of ITL in peril. Moreover, ITL is unable to grant security in order to obtain borrowed funds because of its covenant to a related corporation. The latter currently provides credit facilities to ITL. Furthermore, an order of security payable in quarterly instalments would not alleviate this inability to pay.

POSITION OF RBH

[17] RBH submits that because of the magnitude of the judgment, Respondents are in effect seeking an appeal bond. However, the quantum of the judgment is an insufficient ground under article 497 *C.C.P.* The courts have stated that security will only be ordered where indicated by clear and precise facts; hypotheses based on subjective fear of Respondents that a judgment will not be satisfied does not suffice.

[18] RBH has been paying dividends in amounts less than net earnings throughout the litigation, so that Respondents' position once and if they obtain judgment from the Court of Appeal will be the same as it was at the outset of proceedings. Security should not be ordered for a situation existing prior to judgment; Respondents must demonstrate that their position has worsened and that their ability to obtain satisfaction of an eventual judgment will be in jeopardy. Respondents will simply have to obtain satisfaction out of the companies' revenues.[9] Counsel conceded that RBH's tangible or hard assets were of no value upon which to execute a judgment since plant and machinery were only appropriate to the manufacture and sale of cigarettes and inventory required government licensing to sell.

[19] Although RBH maintained in July 2015 before this Court that it could not pay its share of the provisional execution order, this only meant that it could not pay during the 60 day period provided in the judgment and should not be taken as a general admission of insolvency. The cancellation by RBH's parent of its credit facility within 2 days following the Superior Court judgment made it clear that it could not pay the provisional execution order, but is not a justification to order RBH to furnish security. In other words, the inability to satisfy the order of provisional execution should not be projected or be understood as an inability to satisfy a final judgment.

[20] RBH joined ITL by declaring that any security (particularly a letter of credit) cannot be ordered payable following the institution of proceedings (as Respondents seek) under either the *Bankruptcy and Insolvency Act* ("*B.I.A.*")[10] or *C.C.A.A.* That would be a "fraud on the bankruptcy". Moreover, as to the furnishing of security, RBH objects

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[9] This appeared to contradict counsel's assertion that there was no proof that RBH would continue to pay dividends notwithstanding the judgment since its representative was not directly asked the question during the examination on the affidavit supporting the motion to cancel provisional execution.

[10] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2.

to a letter of credit arguing that this would potentially give Respondents priority over other creditors should RBH become subject to any of the insolvency legislation. Should security be ordered, RBH would prefer that it be in the form of cash deposited in a lawyer's trust account.

[21] RBH points out that security for court costs was not requested in the motion originally filed and of which the undersigned is seized and, in any event, in a class action, costs are paid out of first proceeds of recovery.

[22] Lastly, RBH pleaded that the security requested requires the equivalent of an order not to declare any further dividends which, in essence, is a seizure before judgment under article 733 *C.C.P.* or a safeguard order, both of which are within the jurisdiction of the Court but not of a judge sitting alone.

DISCUSSION

[23] Article 497 *C.C.P.* provides that:

497. Sauf les cas où l'exécution provisoire est ordonnée et ceux où la loi y pourvoit, l'appel régulièrement formé suspend l'exécution du jugement.	**497.** Saving the cases where provisional execution is ordered and where so provided by law, an appeal regularly brought suspends the execution of judgment.
Toutefois, un juge de la Cour d'appel peut, sur requête, pour une raison spéciale […], ordonner à l'appelant de fournir, dans le délai fixé dans cette ordonnance, un cautionnement pour une somme déterminée, destiné à garantir, en totalité ou en partie, le paiement des frais d'appel et du montant de la condamnation, au cas où le jugement serait confirmé.	However, a judge of the Court of Appeal may, on a motion, for a special reason (…), order the appellant to furnish, within the time fixed in the order, security in a specified amount to guarantee in whole or in part the payment of the costs of appeal and the amount of the condemnation, if the judgment is upheld.
Si l'appelant ne fournit pas le cautionnement dans le délai fixé, un juge de la Cour d'appel peut, sur requête, rejeter l'appel.	If the appellant does not furnish security within the fixed time, a judge of the Court of Appeal may, upon motion, dismiss the appeal.

[24] The granting of security is a matter of discretion. It is an exceptional remedy and as such, Respondents must indicate facts upon which I may draw the conclusion that

there is a danger that the judgment, if maintained in appeal, may not be susceptible of execution.[11] Clear and precise facts are required; mere hypotheses will not suffice.[12]

[25] The judgment of Baudouin, J.A., in *Blue Bonnets* is the oft quoted starting point in considering a motion for security. The condemnation in that case of wrongful dismissal amounted to $412,956 plus interest and additional indemnity. This sum corresponded to 36 months of salary. Just prior to the presentation of the motion for security, the appellant deposited the equivalent of 12 months of salary which it recognized owing. Baudouin, J.A., summarized the then existing decisions of judges of this Court applying article 497 *C.C.P.* to state that given the change in the law (in 1966) to make security on appeal the exception instead of the rule, it is insufficient to merely allege fear to be unable to execute the eventual judgment or that appellant will become insolvent. He continued that to justify the granting of security a moving party must:

> […] présenter une preuve claire, précise et articulée basée sur des faits et non sur de simples hypothèses ou conjectures de circonstances particulières à l'espèce qui montrent que, sans l'octroi de ce cautionnement, ses droits reconnus par le jugement de première instance seront effectivement mis en péril.

[26] Baudouin, J.A., in applying these criteria to the facts before him dismissed the motion for security because even though the appellant distributed its earnings as dividends, it did so net of expenses, so that it was not in a "permanent state of insolvency" and that the "heavy" hypothecation of its assets in the absence of fraud was not sufficient as a "special reason" to order security under article 497 *C.C.P.* The report does not disclose the quantum of the appellant's earnings so that there is no means of comparison with the liability in virtue of the judgment appealed.

[27] Several years later, in *Europaper S.A. v. Avenor inc.*[13] Baudouin, J.A., again sitting on a motion[14] seeking security for a costs award of $92,694 found that recovery was in jeopardy because of the appellant's "insolvabilité complète" reflected by the fact that it had ceased activity, and had no place of business, no employees or assets of value. He concluded:

> Il y a donc là une importante différence factuelle avec l'arrêt *Blue Bonnets* […], où le moyen invoqué était la simple crainte éventuelle de difficultés financières d'une des principales parties du litige.

[28] The decided cases on point have considered a variety of factual circumstances as potentially constituting special reasons and, as such, have refined our understanding

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11 *Brouillette v. Grégoire*, 2011 QCCA 376 (Kasirer, J.A.); *Sodexin Financement mercantile inc. v. Aly*, 2009 QCCA 1860 (Pelletier, J.A.) [*Sodexin*]; *Nadeau v. Nadeau*, 2008 QCCA 300; *Hippodrome Blue Bonnets inc. v. Jolicoeur*, [1990] R.D.J. 458 (Baudouin, J.A.) [*Blue Bonnets*].

12 *Blue Bonnets*, *supra*, note 11.

13 *Europaper S.A. v. Avenor inc.*, AZ-97011392, 1997 CanLII 10448 (Baudouin, J.A.).

14 *Ibid.*, p. 2.

of the test. An accounting firm subject to a multi-million dollar judgment amalgamated with another firm, which asserted that it was not liable for the delictual acts of the partners of the judgment debtor firm. It was ordered to furnish security of $16.9 million.[15] The sale of a company's principal assets has been held sufficient grounds to order security,[16] just as the funnelling of all revenues to a related company has been deemed a special reason.[17] While the apparent insolvency of the judgment debtor continues to be a justification for the furnishing of security, at the end of the day, the correct criterion for the exercise of the discretion, is whether in the absence of security, the execution of the judgment would be in jeopardy.[18] The interpretation of "special reason" in article 497 *C.C.P.* has gone beyond restricting it to cases akin to those where a seizure before judgment could be issued.[19] Naturally, insolvency may constitute a special reason as may fraudulent behaviour, but neither is the criterion *per se*. Moreover, the insolvency discussed by Appellants and seemingly in many of the judgments, is insolvency on a cash basis. The *B.I.A.* defines an insolvent person in a threefold manner including a definition based on the value of assets on a forced sale being less than liabilities (or, a balance sheet test).[20]

[29] I do not subscribe to Appellants' theory that the clear and precise facts underlying an order of security, in appeal, must have occurred since judgment was rendered in first instance. While the existence prior to judgment of the facts invoked may have been noted in certain decisions of my colleagues,[21] no judgment has asserted the existence of such a hard and fast rule. Indeed, in *Widdrington* (which is the highest award of security in appeal of which I am aware), the most salient fact alluded to is the amalgamation of the two accounting firms, which occurred in July, 1998 i.e. after the institution of proceedings in first instance but years before the appeal.

[30] Appellants have submitted a judgment of Mongeon, J.S.C., of 2013,[22] dismissing an application for a safeguard order against JTM because it had transferred its trademarks valued at $1.2 billion to an "offshore" subsidiary in 1999, the year following the institution of proceedings in the Superior Court. The transferee then pledged the trademark to secure an indebtedness. JTM pays substantial royalties to the transferee in consideration of the use by it of the trademark. Its president agreed that the purpose

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15 *Wightman v. Widdrington (Succession de)*, 2011 QCCA 1393 [*Widdrington*].

16 *Gagné v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2003 CanLII 55068, J.E. 2003-497 (Dalphond, J.A.).

17 *Entreprise Enapex inc. v. Recouvrements métalliques Bussières ltée*, 2008 QCCA 261 (Rochette, J.A.).

18 *Pothitos v. Demers*, 2013 QCCA 603, para. 15 (St-Pierre, J.A.); *Shama Textiles inc. v. Certain Underwriters at Lloyd's*, 2012 QCCA 473, paras. 13-14 (Dalphond, J.A.).

19 André Rochon, *Guide des requêtes devant le juge unique de la Cour d'appel*, Cowansville, Éditions Yvon Blais, 2013, pp. 158-159.

20 *B.I.A.*, *supra*, note 10, s. 2, "insolvent person".

21 *Sodexin*, *supra*, note 11.

22 *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 6085; leave to appeal denied in *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2014 QCCA 520 (Savard, J.A.).

of the transaction was “creditor proofing” and Riordan, J.S.C., also characterized “the tangled web of interconnecting contracts” as a creditor proofing exercise.[23] The judgment of Mongeon, J.S.C., however is of no assistance to Appellants as it did not address any point before me for adjudication. It did not support the contention that facts pre-appeal cannot be relied upon. Mongeon, J.S.C., faced with a demand to enjoin JTM from continuing the royalty payments, concluded that he could not do so because the other party to the royalty contract was not a party to the litigation. Mongeon, J.S.C., held that all parties to the contract should be parties to the litigation, in order that he alter their contractual rights.

[31] As a final argument, counsel for RBH likened the motions before me to applications for a seizure before judgment under article 733 *C.C.P.* or a safeguard order and in any event beyond the jurisdiction of a judge in chambers and within the jurisdiction of the Court. The argument is clearly wrong as it flies in the face of the clear wording of article 497 *C.C.P*. according jurisdiction over the motions before me to a “judge of the Court of Appeal”.

[32] From 2008 to 2013, RBH’s average annual earnings from operations was approximately $450 million. It paid $300 million annually on average to its parent, Phillip Morris International (“PMI”). RBH had benefited from a credit facility with PMI but as indicated, that was cancelled the day following the judgment in first instance. Historically, RBH’s short term credit comes from the PMI cash pool, so given the cancellation, it appears to have little short term availability of cash. In June, RBH’s representative confirmed its inability to pay its share of the provisional execution ($200 million) within sixty days, but projected that it could pay the amount by March 2016. At the time of the judgment, its available cash was $70 million.

[33] Despite RBH’s assertion that it does not pay out all of its earnings, its financial statements clearly show negative shareholder equity for 2013 and 2014. Counsel’s attempts to qualify its insolvency on a cash basis by stating that it only said it could not pay the provisional execution within 60 days does not change the conclusion that it was insolvent if it was obliged to pay. The *B.I.A.* measures insolvency by the ability to pay debts when due.[24] In answer to my questioning how Respondents would obtain satisfaction upon receipt of a favourable judgment on the merits, counsel stated that they would have to wait to be paid out of cash flow. By way of illustration, if RBH owed $1 billion (including interest and additional indemnity) upon judgment of the Court on the merits, it would require more than two years, at least, to satisfy that judgment. This is not payment when due.

[34] RBH confirms that its real estate and equipment being appropriate for tobacco production only are not readily marketable. Counsel informed me that the sale of tobacco products requires special government permits so that inventory could be

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[23] *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382, para. 1101.

[24] *B.I.A.*, *supra*, note 10, s. 2, “insolvent person”.

difficult if not impossible to seize and sell in execution of a judgment. Also, the trademarks are not owned by RBH. Thus, it appears that the only real “assets” on the balance sheet against which a creditor might execute judgment are the accounts receivable which is the cash flow and which is substantially and regularly paid out in dividends to PMI.

[35] Irrespective of whether RBH is technically insolvent, it is certainly unable to satisfy the judgment of the Superior Court even if the quantum was reduced. That fact and the on-going practice of distributing earnings leads the undersigned to conclude that Respondents are in jeopardy of not being able to execute any substantial award that this Court may uphold.

[36] ITL earned $535 million from operations in 2014 and paid $334 million in dividends to its out of jurisdiction parent, British American Tobacco Corp. (“BAT”).

[37] Not only has ITL never set aside funds for a condemnation in this matter, it has still not done so even after the judgment of first instance herein because it does not consider the outcome unfavourable according to its representative during the deposition. I understand that he meant that the outcome would not be unfavourable until all appeals have been exhausted.

[38] Similar statements could be made concerning ITL’s tangible assets as those of RBH. The trademarks are also encumbered.

[39] ITL is indebted to BAT under various financing agreements. The credit facilities are fully drawn upon. BAT was not willing to fund the provisional execution award and I am given to understand that BAT makes no commitment to fund a final judgment.

[40] Though counsel asserted that payments of dividends stopped at the end of 2014, this results from payments made to BAT for the repayment of the loan made to finance the settlement of other litigation (*i.e.* the Flinkote matter). In other words, the funds were not available to pay a dividend. Though there is equity for the shareholders on the balance sheet of 2014, there is no liquidity to pay a judgment.

[41] I am also of the opinion that Respondents are in jeopardy of not being able to satisfy any substantial judgment against ITL.

[42] The depositions conducted by Respondents’ attorneys of the affiants upon the motions to cancel the provisional execution make it clear that the Appellants intend to continue payments (dividends and otherwise) to their out-of-jurisdiction related entities while the appeal is pending. That practice caused them to protest their inability to satisfy the order of provisional execution. It is reasonable to deduce that should their appeals fail completely or merely reduce the condemnation marginally, leaving a substantial condemnation, the Appellants will be unable to pay just as they were unable to pay the provisional execution in a timely fashion. This state of affairs is not due to any cause

extraneous to the will of Appellants such as an unsuccessful business. Rather, their businesses are profitable. The situation is the result of the ongoing business practice continued consistently during the litigation of paying out surplus earnings. This was not illegal. However, there is now and has been since May 27, 2015, a judgment, which includes a condemnation with interest and additional indemnity aggregating approximately $15.5 billion at today's value. Interest and additional indemnity run at approximately $1 million per day. This changes the equation radically. Even if the grounds of appeal are not frivolous, in the circumstances Appellants cannot be allowed to continue on a course of conduct where they will not be able to satisfy the judgment.

[43] A judgment pending appeal benefits from a presumption of validity.[25] Findings of fact of the trial judge are compelling as only a palpable error of fact justifies a reversal by an appellate court. It is not an answer for the Appellants to state that they are not behaving differently now than they were prior to the judgment of the Superior Court. That judgment, in the circumstances, and despite the appeal requires that they do behave differently given the circumstances presented to me. It is in my opinion far too cynical to adopt the position that we were so foresightful and efficient in ordering our affairs so as not to have the liquidity to satisfy the judgment, that there is no special reason existing to re-balance the situation. Counsel for Respondents characterized the situation as "heads I win, tails you lose". Sometimes, the vernacular is pointedly apt.

[44] Both Appellants have structured their affairs in a manner that drastically, if not completely, reduces their exposure to satisfy any substantial condemnation that might be made against them in this litigation. Of course, the companies are not empty shells because it is in their obvious interest and that of their parent companies that they continue to operate so as to continue to generate profits. The structure and *modus operandi* was put in place years ago because no doubt Appellants could observe the seriousness of the case and resolve of the Respondents to conclude that a substantial award was possible, even perhaps likely. In these circumstances, now that there is a judgment condemning them to pay $8 billion ($15.5 billion at today's value) and nothing to suggest that the practice (of distributing virtually all earnings) will not continue and notwithstanding that the transfer and encumbrance of trademarks may have occurred long ago, I am faced with a situation where on balance I conclude that the Respondents are in jeopardy of not obtaining satisfaction of any substantial amount confirmed in appeal. I am mindful that Appellants stated clearly that they could not pay the provisional execution award as ordered. Positive action is necessary to convince me that the reaction to a final judgment would not be the same. These circumstances taken together are a "special reason". I will order that security be furnished.

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[25] *Épiciers unis Métro-Richelieu inc. v. Syndicat des travailleuses et des travailleurs des épiciers unis Métro-Richelieu (C.S.N.)*, 1997 CanLII 10141 (Baudouin, J.A.); *Québec (Ministre de l'Agriculture, des Pêcheries et de l'Alimentation du Québec) v. Produits de l'érable Bolduc & Fils ltée*, AZ-50134137, J.E. 2002-1239, para. 6 (Pelletier, J.A.); *Droit de la famille — 102409*, 2010 QCCA 1725, para. 2 (Rochon, J.A.); *Soft Informatique Inc. v. Gestion Gérald Bluteau Inc.*, 2012 QCCA 2018, para. 12 (Dalphond, J.A.); *Droit de la famille — 151906*, 2015 QCCA 1309, para. 6 (Kasirer, J.A.).

[45] What amount of security is appropriate? The initial deposit required in the class action as awarded by Justice Riordan was $1.131 billion on the rationale that 80% of the estimated compensatory damages might be enough to satisfy claims:

> [927] In nearly every class action, especially ones with a large number of class members, only a small portion of the eligible members actually make claims. Thus, the remaining balance, or "reliquat", could often be greater than the amount actually paid out. Hence, it is not unreasonable to proceed on the basis that the full amount of the initial deposits might not be claimed.
>
> [928] We thus feel comfortable in ordering the Companies initially to deposit only 80% of the estimated total compensatory damages, i.e., before any reduction based on the smoking dates. If that proves insufficient to cover all claims eventually made, it will be possible to order additional deposits later, unless something unforeseen occurs and all three Companies disappear. The Court is willing to assume that this will not happen. We shall thus reserve the Plaintiffs' rights with respect to such additional deposits.

[46] Counsel for Respondents noted that Justice Riordan's reasoning here may be strained because lower "take up rates" in class actions are prevalent where the amount distributed to each member is minimal which will not be the case here. However, I have no evidence of these assertions. I prefer to rely on the judgment.

[47] Also, as the Court noted in cancelling the provisional execution, it cannot be said that the grounds of appeal are frivolous, so that the $5 billion of security requested being nearly the capital amount of the judgment and given Justice Riordan's reasoning above, is not an appropriate amount of security. An amount of security approaching the entire amount of the judgment in first instance is to be avoided as too closely equivalent to provisional execution.[26]

[48] No amount of security for legal costs was requested in the motions as filed so that consideration does not enter into the calculation. Moreover, article 1035 *C.C.P.* provides that first proceeds of collection of class action judgments are directed towards the payment of costs.

[49] Considering the foregoing, the security will be calculated on the basis of the initial deposit of $1.131 billion or, based on the proportions of liability determined by the judge (ITL 67% and RBH 20%), the order against ITL will be $758 million and against RBH $226 million. Both figures are rounded.

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[26] *Bell v. Molson*, 2013 QCCA 377 [*Bell*]; *Agaisse v. Duranceau*, 2015 QCCA 1320, para. 7; *Laforest v. Côté*, 2015 QCCA 119 (G. Gagnon, J.A.), para. 17.

[50] I am mindful of judgments holding that the amount of security ordered should not, in effect, negate an Appellant's right to appeal.[27]

[51] This Court considered a similar principle in cancelling the provisional execution where Appellants pleaded their inability (or at least inability within 60 days following judgment) to pay the amount of the provisional execution as set forth in the extract quoted above.

[52] I see the current situation as somewhat different. The Appellants chose not to reserve funds to satisfy an eventual condemnation as was their right. However, now that there is a judgment, which I have stated, benefits from a presumption of validity, the situation is changed. Given my conclusions based on the facts in the record, it is not acceptable that Appellants merely say that they have no funds to satisfy the judgment or an order to furnish security and continue to distribute earnings because that is "business as usual". A strategic decision is required by Appellants in caucus with their parent companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal? I do not question Appellants' right to appeal but neither can I stand idly by while Appellants pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose. Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith.

[53] That being said, in fixing the mode of payment, I am willing to make some compromise to the cash requirements of Appellants. As Justice Riordan said, the object of the exercise is not to bankrupt the Appellants,[28] nor should Appellants appeal rights be defeated by the amount of security.[29]

[54] Accordingly, I will order that the security be provided in quarterly instalments as Respondents concluded, subsidiarily, in their motions. I am unaware of any legal impediment to so ordering. In this manner, each instalment of security will not exceed quarterly earnings.

[55] The trial judge found that the average annual net earnings before tax of Appellants was as follows:

ITL – $483 million

RBH – $460 million

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27 *Bell*, *supra*, note 26, para. 10; *Camirand v. Gagnon*, 2013 QCCA 375; *Inversiones Bellrim, s.a. v. Guzzler Manufacturing inc.*, 2009 QCCA 1685 (Dalphond, J.A.); *Inversiones Bellrim, s.a. v. Guzzler Manufacturing Inc.*, 2009 QCCA 550 (Dufresne, J.A.); *Sharma Textiles inc. v. Certain Underwriters at Lloyd's*, 2007 QCCA 771 (Bich, J.A.).

28 *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382, para. 1068.

29 *Labene v. Paquette*, 2015 QCCA 962 (Mainville, J.A.), para. 6, and *supra*, note 27.

On a quarterly basis, this computes to:

ITL – $121 million (rounded up)

RBH – $115 million

[56] I have financial statements for 2014 of ITL and RBH, which were filed in the record of this Court with the affidavits in support of the motions to cancel provisional execution. For 2014, RBH's net pre-tax earnings were $495 million. ITL shows a loss due to the pay out of the settlement of the Flinkote litigation. For consistency, I will use the averages determined by the judge for the period 2008 to 2013 as quoted above.

[57] Respondents concluded in the alternative for security to be deposited by way of quarterly instalments of $250 million each in the aggregate. As indicated, I have decided to award security equal to the initial deposit of $1.131 billion or $758 million for ITL and $226 million for RBH. The RBH security will be payable by way of six quarterly instalments and that of ITL in seven quarterly instalments so that the amount of each instalment does not exceed average quarterly earnings. In both cases, payments will commence at the end of December, 2015. In addition to the six months since the judgment, this allows 60 days before the first instalment as requested at the hearing by counsel of RBH.

[58] Accordingly, the Appellants will be ordered to furnish security as follows:

Payable on or before last juridical day of	ITL ($758 million)	RBH ($226 million)
December, 2015	$108,285,000	$37,666,000
March, 2016	$108,285,000	$37,666,000
June, 2016	$108,285,000	$37,666,000
September, 2016	$108,285,000	$37,666,000
December, 2016	$108,285,000	$37,666,000
March, 2017	$108,285,000	$37,666,000
June, 2017	$108,285,000	

The instalments bring us to March 2017 and June 2017. A hearing for the appeal has been tentatively scheduled before this Court during the autumn of 2016. I think it safe to assume that given the projected volume of the joint record, a lengthy advisement can be anticipated. If judgment is rendered before June or even March 2017, the remaining instalments of security will not be payable.

[59] The above amounts are less than average quarterly revenue. They are far easier to manage financially than a single lump sum. Again, according to the figures that we have, I am fully cognizant that Appellants may require some infusion or assistance of their related entities on a short or medium term basis in order to furnish the security. However, the amounts compared to earnings are such that it cannot be said, in my view, that the security ordered has negated the right to appeal.

[60] The security will be in the form of cash or irrevocable letters of credit issued by a Schedule I Canadian bank to remain in force until final judgment of this Court, or further order of this Court.

[61] As to the form of security, an argument was attempted by counsel for Appellants concerning the legality or appropriateness of letters of credit as security.

[62] This Court has held that an irrevocable letter of credit of a Canadian bank could constitute valid security in lieu of the deposit of cash.[30]

[63] A letter of credit of a bank is an undertaking by that bank. The latter is not a party to the litigation. The Appellants voiced concerns that this undertaking would remain despite any insolvency proceedings initiated by the Appellants. However, the deposit of cash at the office of the Court (in effect with the Ministre des Finances)[31] is also security in the sense that a litigant has, conditionally, a right exercisable in respect of the deposit.[32] This is not as Appellants seem to suppose a "fraud on the bankruptcy" or the granting of a "super priority". Valid security, consensual or court ordered, is supposed to offer priority to its beneficiaries in an insolvency and is so recognized in the *B.I.A*.[33] The effect of such security in the event of an insolvency may be the subject of a decision by a judge or court having jurisdiction but at present the question is hypothetical. In any event, Appellants will have the option of depositing the cash or furnishing letters of credit.

[64] Counsel for RBH suggested that any security take the form of a deposit in one of the lawyer's trust accounts. This is a matter for consent if any, by the parties but should not, in my view, form part of a court order.

[65] Accordingly, I will order security and allow letters of credit to be provided to Respondents' counsel instead of cash deposits in court at each Appellants' option.

[66] The security becomes payable upon a final judgment of this Court maintaining in whole or in part the judgment of first instance. It cannot be payable, as suggested by Respondents on a *B.I.A.* or *C.C.A.A.* filing. Any applicable stay of proceedings arising from such a filing would have to be respected; any exception should be court ordered at

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30 *Droit de la famille – 2054*, AZ-97011711, 1997 CanLII 10660 (C.A.); see also article 1574 *C.C.Q.*
31 *Deposit Act*, CQLR, c. D-5, s. 8.
32 *Basille v. 9159-1503 Québec inc.*, 2014 QCCA 1653 (Kasirer, J.A.).
33 Ss. 69(2), 69.1(2), 69.3 (2), 71 and 136 *B.I.A.*, *supra*, note 10.

the appropriate time by the court having jurisdiction. The undersigned cannot order now that a letter of credit be payable following an insolvency filing which may impose a suspension of such recourse.

[67] The letter of credit will be payable upon receipt by the issuing bank of a sworn statement by one of Respondents' attorneys certifying that the Court of Appeal has rendered judgment in this matter and specifying the amounts due by Appellants. A copy of the judgment will be annexed to the sworn statement. Since an appeal to the Supreme Court does not automatically operate a stay, I need not include that possibility in the conditions of payment of the letters of credit. In the alternative, the letters of credit will be payable subject to further order of the Court. Any letter of credit must of course be issued by a Canadian bank listed in Schedule I of the *Bank Act* and be irrevocable, payable in whole or in part and remain in force until final judgment either by renewal or replacement prior to expiry.

CONCLUSIONS:

[68] **IN RECORD FILE NO: 500-09-025385-154**

FOR ALL THE FOREGOING REASONS, THE UNDERSIGNED:

[69] **GRANTS** in part Respondents' motion to order Appellants to furnish security;

[70] **ORDERS** Appellant, Imperial Tobacco Canada Ltd, to furnish security in accordance with article 497 *C.C.P.* in an amount of $758 million, which security may at Appellant's option, be in the form of cash or letter of credit and shall be furnished in equal consecutive quarterly instalments of $108,285,000 each, on or before the last juridical day of the following months: December, 2015, March, 2016, June, 2016, September, 2016, December, 2016, March, 2017 and June, 2017.

[71] **DECLARES** that security in the form of cash shall be deposited at the Registry of the Court of Appeal, Montreal, and that security by way of letter of credit be delivered to one of the attorneys of Respondents and comply with the following:

i) be issued by a Canadian bank listed in Schedule I of the *Bank Act*;

ii) make reference to the record number of the Court of Appeal;

iii) be irrevocable;

iv) remain in force until: a) judgment on the merits in this Court record either by renewal or replacement prior to expiry or b) further order of the Court of Appeal;

v) be payable: a) upon receipt by the issuing bank of a sworn statement of one of Respondents' attorneys declaring that judgment has been rendered

and stating the amount owing by the Appellant pursuant to the judgment on the merits, a copy of such judgment to be annexed to such sworn statement or b) upon further order of the Court of Appeal.

[72] **DECLARES** that any and all costs or expenses incurred to furnish the said security will be for the account of Appellant, Imperial Tobacco Canada Ltd.

[73] **THE WHOLE** with costs to follow suit.

[74] **IN RECORD FILE NO: 500-09-025387-150**

FOR ALL THE FOREGOING REASONS, THE UNDERSIGNED:

[75] **GRANTS** in part Respondents' motion to order Appellants to furnish security;

[76] **ORDERS** Appellant, Rothmans, Benson & Hedges Inc., to furnish security in accordance with article 497 *C.C.P.* in an amount of $226 million, which security may at Appellant's option, be in the form of cash or letter of credit and shall be furnished in equal consecutive quarterly instalments of $37,666,000.00 each on or before the last juridical day of the following months: December, 2015, March, 2016, June, 2016, September, 2016, December, 2016 and March, 2017.

[77] **DECLARES** that security in the form of cash shall be deposited at the Registry of the Court of Appeal, Montreal, and that security by way of letter of credit be delivered to one of the attorneys of Respondents and comply with the following:

i) be issued by a Canadian bank listed in Schedule I of the *Bank Act*;

ii) make reference to the record number of the Court of Appeal;

iii) be irrevocable;

iv) remain in force until: a) judgment on the merits in this Court record either by renewal or replacement prior to expiry or b) further order of the Court of Appeal;

v) be payable: a) upon receipt by the issuing bank of a sworn statement of one of Respondents' attorneys declaring that judgment has been rendered and stating the amount owing by the Appellant pursuant to the judgment on the merits, a copy of such judgment to be annexed to such sworn statement or b) upon further order of the Court of Appeal.

[78] **DECLARES** that any and all costs or expenses incurred to furnish the said security will be for the account of Appellant, Rothmans, Benson & Hedges Inc.

[79] **THE WHOLE** with costs to follow suit.

MARK SCHRAGER, J.A.

Mtre Deborah Glendinning
Mtre Éric Préfontaine
OSLER, HOSKIN & HARCOURT
For Imperial Tobacco Canada Ltd.

Mtre Simon V. Potter
Mtre Pierre-Jérôme Bouchard
McCARTHY TÉTRAULT
For Rothmans, Benson & Hedges Inc.

Mtre Gordon Kugler
KUGLER, KANDESTIN
Mtre Philippe Trudel
TRUDEL, JOHNSTON & LESPÉRANCE
For Conseil québécois sur le tabac et la santé, Jean-Yves Blais et Cécilia Létourneau

Date of hearing: October 6, 2015

Rescue!

The Companies' Creditors Arrangement Act

Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.

University of British Columbia Faculty of Law and
Peter Wall Institute for Advanced Studies

Second edition

2013

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

7. Extension of the Stay

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

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

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

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106 *Ibid.* at para. 59.

107 *Ibid.* at para. 66.

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

109 Section 11.02(2), *CCAA*.

110 Section 11.02(3), *CCAA*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

136 *Ibid.* at para. 14.

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

138 *Ibid.* at para. 4.

139 *Ibid.* at para. 6.

140 *Ibid.* at para. 7.

141 *Ibid.* at para. 8.

142 *Ibid.* at para. 9.

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

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

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

[144] *Ibid.* at para. 24.

[145] *Ibid.* at para. 33.

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

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

[148] *Ibid.* at para. 56.

[149] *Ibid.* at para. 57.

[150] *Ibid.* at para. 58.

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

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

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

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

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151 *Ibid.* at para. 59.

152 *Ibid.* at para. 60.

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

154 *Ibid.*

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

156 *Ibid.* at para. 1.

157 *Ibid.* at para. 7.

158 *Ibid.* at para. 8.

159 *Ibid.* at para. 9.

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

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

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

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

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

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

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

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

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

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

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

8. The Problem of Overreach

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

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

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

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

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

Citation: In the Matter of Skeena Cellulose Inc. et al
2001 BCSC 1423

Date: 20011023

Docket: L012405
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C. 1985, c. c-44, as amended

AND

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

AND

IN THE MATTER OF SKEENA CELLULOSE INC.
ORENDA FOREST PRODUCTS LTD.
ORENDA LOGGING LTD. and
9753 ACQUISITION CORP.

PETITIONERS

REASONS FOR JUDGMENT

OF THE

HONOURABLE CHIEF JUSTICE BRENNER

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Counsel for the T.D. Bank	R.J. Kearns
Counsel for Arthur Andersen Inc. Monitor	D.R. Leigh
Counsel for The District of Port Edward	R. Macquisten
Counsel for Pacific Northern Gas Inc.	T.D. Timberg
Counsel for Pulp, Paper and Woodworkers of Canada, Local 4	W.E. Skelly
Counsel for Slocan Forest Products Ltd.	C.M. Baron
Counsel for the City of Prince Rupert	G. Anderson
Counsel for Alstom Canada Inc.	T.V. Martin
Counsel for The City of Terrace	J.J. Talstra
Counsel for Jock's Excavating Ltd. and William Scott Milne	B.J. Brown
Date and Place of Hearing/Trial:	October 5, 2001 Vancouver, BC

[1] On September 5, 2001, I granted the Petitioners' application for an initial stay pursuant to the provisions of the *Companies' Creditors Arrangement Act ("CCAA"*). At the comeback hearing on October 5, 2001, I extended that stay for 30 days to November 5, 2001. These are the written reasons for that Order.

[2] Skeena Cellulose Inc. ("SCI") is an integrated forest company operating in Northwestern British Columbia. It has a two-line pulp mill on Watson Island near Prince Rupert, sawmills in Terrace, South Hazelton, Smithers and one sawmill near Kitwanga. It has numerous timber tenures held either directly or through subsidiary companies.

[3] After accumulating operating losses through much of the 1990s, the owner of Repap British Columbia (as Skeena was previously known) abandoned the operation in 1996. The company filed for *CCAA* protection. In early 1998 SCI formally emerged from *CCAA* protection with the Province of British Columbia and the Toronto Dominion Bank ("TD Bank") acting as the company's major lenders and shareholders.

[4] As noted by the Monitor, poor markets combined with a number of unforeseen operational delays have required SCI's lenders to advance further funding on a number of occasions to maintain operations.

[5] The enterprise again filed for *CCAA* protection on September 5, 2001. SCI was unable to meet its obligations after the TD Bank issued a payment demand on August 31, 2001, and froze the company's bank accounts.

[6] As a condition of the TD Bank's involvement following the 1997 reorganization, the Province guaranteed a proportion of the TD debt. The functioning of this arrangement is described in the Monitor's report as follows:

> Virtually all of the funding provided to Skeena since the Company emerged from CCAA protection has been loaned directly or indirectly, by the Province, with TD Bank providing additional advances only if the Province provided its guarantee.

Prior to this hearing on October 5, 2001 the Province paid much of this guaranteed debt to the TD Bank. In the result, SCI currently owes $410 million to the secured lenders. Of this $94.2 million or 23% of the secured debt is owed to the TD Bank while the balance is owed to the Province. Approximately $100 million is owed to unsecured creditors.

[7] At page 24 of his Report, the Monitor sets out the status of the restructuring plan. It is wholly dependent on a purchaser being found. The two major shareholders, the Province and the TD Bank, have been seeking a new owner for

SCI since 1998 when they engaged Goepel and McDermid Inc. (now Raymond James Limited ("RJL")) for this purpose.

[8] The history of RJL's efforts is set out in the Monitor's Report. Since 1998 RJL has actively exposed the assets of SCI to the worldwide market. Since September 6, 2001 RJL has held discussions with numerous parties and written proposals were requested by September 27, 2001. This produced two proposals, one of which has been withdrawn. SCI also advises that a third party has approached it and has outlined its intentions and a written presentation that it wishes to discuss further.

[9] The Monitor has reviewed the remaining proposal and the written presentation and comments as follows:

1. Neither of the documents constitute a formal offer but rather a basis of further discussion between the parties;

2. Each proposal requires changes to the forest practices for the region in which Skeena operates and requires indemnities from the Province for certain potential liabilities;

3. Each proposal is dependent upon the parties raising funds in excess of 100 million to complete the transaction and provide funding for working capital and proposed capital investment programs aimed at enhancing the competitiveness of Skeena; and

4. The purchase prices are less than the projected net realizable values of Skeena's working capital assets at September 30, 2001.

[10] The Monitor notes that SCI and the Province have indicated that they intend to continue discussions with both parties to determine whether an agreement for the sale of the shares of SCI can be reached as part of its restructuring plan. A share sale is critical if a purchaser is to be able to take the benefit of what I understand to be significant SCI tax losses.

[11] The Monitor also states that a sale of the Company's shares under the current proposals will not maximize the recovery to the secured creditors given the current estimates of the net realizable value of the working capital assets. However, the Monitor does note if an agreement can be reached and a restructuring plan approved the employee and supplier stakeholders to the CCAA process stand to realize a significant benefit through ongoing employment and supply business. If a sale of shares cannot be achieved, a sale of SCI's assets through a bankruptcy or receivership process will likely be done on a piecemeal basis. The likely result will be that various components of SCI's operations will be dismantled and discontinued.

[12] Apart from the TD Bank, which opposed this application, all parties before the court on October 5, 2001 supported a 30-day extension of the Stay Order. As noted by counsel for

the TD Bank, any extension will effectively be financed by the secured lenders. While the Province is prepared to bear its share, the TD Bank is not. The cost of a 30-day extension to the Bank is approximately $3.5 million.

[13] The burden of proof on this application rests on the Petitioners. S. 11 (6) of the *CCAA* provides that:

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

[14] It is important to note the distinction between an initial stay under the *CCAA*, which the court can grant for a period of up to 30 days and any subsequent extensions. To have a stay extended past the period of the initial stay, the petitioner must meet the test set out in s.11(6).

[15] Here the TD Bank says SCI has failed to meet the tests in both subsection (a) and (b). It complains about SCI's lack of good faith and due diligence in the delays in laying off both salaried and non-salaried personnel. These were steps recommended by the Monitor to conserve cash. In the TD Bank's

view SCI did not act with sufficient alacrity. Its counsel submits that SCI's failure to carry out the layoffs on the timetable recommended by the Monitor constitutes a lack of good faith and due diligence.

[16] However, in my view, the simple failure of SCI's management to comply with the Monitor's recommended timetable does not constitute, in and of itself, a lack of either good faith or due diligence. This is not a case where a management has completely ignored a Monitor's recommendations. Here SCI's management is being criticized only for the delay in carrying out the Monitor's recommendations. Given all the stakeholders in this matter and their respective interests, such a delay did not represent a lack of due diligence or good faith.

[17] The TD Bank's principal objection is that the Petitioners have failed the test in s. 11(6)(a) and that they have failed to establish that there are circumstances that make an extension of the stay appropriate. In the case at bar, SCI's restructuring plan is wholly dependent upon SCI finding a purchaser. Without a purchaser, there will be no plan and the stay will terminate.

[18] An affidavit was filed by Mark Lofthouse, Director, Financial and Project Evaluation Branch of the Ministry of Competition, Service and Enterprise, of the Province of

British Columbia. Mr. Lofthouse is also a director of SCI. He deposed as to information he has received from Daniel D. Veniez, who is the CEO of a company involved in the written presentation. His group has raised $10 million for this purpose. In addition, members of the group were to travel to New York on October 8, 2001 for meetings to raise the additional financing. Lofthouse further deposes that following the New York meetings, Mr. Veniez and his group intend to travel to British Columbia to outline their business plan to SCI.

[19] With respect to the one proposal, Mr. Lofthouse deposes that it contains requirements for significant provincial government financial support that the Province has determined is not feasible. He deposes that discussions with this proposor are continuing to see if the existing proposal can be further amended in a way that is acceptable to both parties.

[20] One cannot overstate the economic impact of SCI's operations in the communities of Northwestern British Columbia. For example, in the District of Port Edward, SCI constitutes 43% of the general municipal tax base. As set out in the affidavit of Ron Bedard, the District’s Chief Administrative Officer, the loss of SCI’s tax revenue will

mean that the taxes for the owner of a $100,000 home will have to increase from $539.45 to $980.33 per year.

[21] In addition to losing the SCI municipal tax payments, the District has also been required to make substantial payments to other agencies in the form of school taxes, regional and hospital district assessments based on taxes SCI ought to have paid.

[22] The position of the District of Port Edward is replicated in the many other Northwestern communities in which SCI has its operations.

[23] There are also many unpaid SCI contractors. In addition to suffering the loss of their SCI receivables, they are out-of-pocket for the necessary expenses they have incurred to provide their services to SCI, which in turn has enabled SCI to earn revenue. Many employees of SCI have also been directly affected.

[24] I have earlier stated that the effect of the additional 30-day stay that is sought will be to erode the position of the TD Bank by some $3.5 million.

[25] In his affidavit of October 3, 2001 Robert Allen, the President and Chief Executive Officer of SCI states:

> In my opinion, if the stay of proceedings is continued for a further 30 days, this will allow for a more full consideration of the two outstanding proposals and put the Petitioners in a position of being able to place a more complete and comprehensive plan before the court.

[26] In my view the extraordinary nature of this case justifies a 30-day extension to the Stay Order. When it decided to continue financing SCI at the time of the last *CCAA* re-organization, the TD Bank negotiated substantial protections for its position by obtaining indemnities from the Provincial Government. It has called on these indemnities and shortly before this hearing was paid some $125 million pursuant to those guarantees.

[27] The consequences of terminating the *CCAA* protection will be severe. The liquidation of SCI will have a drastic impact on Northwestern British Columbia. This will be felt directly by the employees, contractors and suppliers of SCI. It will also be felt by many of the other residents, including each and every property taxpayer. These far reaching consequences are appropriate matters for the court to weigh and consider when determining whether to extend a Stay Order under the *CCAA*.

[28] In my view, circumstances did exist on October 5, 2001 that made it appropriate to extend the stay to November 5, 2001.

[29] However, I also want to state my view that a further extension of the Stay Order past November 5, 2001 will likely require the Petitioners to demonstrate measurable and substantive progress towards a plan.

[30] In this case the Petitioners are not looking to reorganize the companies and continue to operate. Everyone agrees that the only viable plan of arrangement open to SCI is a sale to a purchaser that can take advantage of the accumulated tax losses. The company at this stage is almost completely shutdown; it is now operating only one sawmill. The tenuous nature of SCI's position was, no doubt, a consideration in the Petitioners' decision to apply for an extension of only 30 days and not a longer period at the comeback hearing.

[31] Accordingly, if there is an application for a further stay I would expect the Petitioners to place before the court evidence that measurable and demonstrable progress towards a plan of arrangement has been made.

"D.I. Brenner, C.J.S.C."
The Honourable Chief Justice D.I. Brenner

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,*** 2008 BCCA 327

Date: 20080815
Docket: CA036261

Between:

Cliffs Over Maple Bay Investments Ltd.

Respondent
(Petitioner/Respondent)

And

Fisgard Capital Corp. and Liberty Holdings Excel Corp.

Appellants
(Respondents/Applicants)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

Oral Reasons for Judgment

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H.M.B. Ferris P.J. Roberts	Counsel for the Respondent
M. Sennott	Counsel for Century Services Inc.
M.B. Paine	Counsel for the Monitor, The Bowra Group
Place and Date of Hearing:	Vancouver, British Columbia 12 August 2008
Place and Date of Judgment:	Vancouver, British Columbia 15 August 2008

[1] **TYSOE, J.A.**: The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

[2] The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, (the "***CCAA***") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the ***CCAA***, no notice was given to the appellants or any other of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the ***CCAA***, the stay contained in the order was expressed to expire on June 25.

[3] The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

Background

[4] The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

[5] The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

[6] Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

[7] The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

[8] There are four mortgages registered against the development. The first two mortgages are not significant – the first mortgage secures an amount of $900,000

that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

[9] The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

[10] In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

$4,460,000 – trade creditors
1,700,000 – equipment leases
1,135,000 – loans from related parties
45,000 – unpaid source deductions
$7,340,000

[11] The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008

when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

[12] It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

[13] The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the ***CCAA*** proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the ***CCAA*** and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

[14] When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the ***CCAA*** (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing for the development, the Monitor estimated the value of the development under the following three scenarios:

(a) liquidation value with no source of water for irrigation - $10 million;

(b) liquidation value with a source of water for irrigation - $28 million;

(c) going concern value with completion of the development - $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

[15] In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court with respect to the completion of the

development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

Decision of the Chambers Judge

[16] The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the ***CCAA*** because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the ***CCAA***, which reads as follows:

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

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the Debtor Company's business.

[17] The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

[18] Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

Appraisal Evidence

[19] The affidavit of the principal of the Debtor Company filed at the time of the commencement of the ***CCAA*** proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

[20] In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

[21] Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In ***Reza v. Canada***, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61, the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (¶ 20).

[22] In ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1, the Court quoted the

following statement in ***Charles Osenton & Co. v. Johnston***, [1942] A.C. 130 at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the ***CCAA***, ***Re New Skeena Forest Products Inc.***, 2005 BCCA 192 at ¶ 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in ***CCAA*** matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at ¶ 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

[23] In my opinion, the comments of Newbury J.A. in ***New Skeena*** were directed at ongoing ***CCAA*** matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need

not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of ***CCAA*** proceedings.

Analysis

[24] On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the ***CCAA*** should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the ***CCAA*** applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the ***CCAA*** and it satisfies the criterion contained in s. 3(1) of the ***CCAA*** of having liabilities in excess of $5 million. The ***CCAA*** clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the ***CCAA***. The real question is whether a stay of proceedings should have been granted under s. 11 of the ***CCAA*** for the benefit of the Debtor Company.

[25] I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did

give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

[26] In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the ***CCAA***, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the ***CCAA***'s fundamental purpose.

[27] The fundamental purpose of the ***CCAA*** is expressed in the long title of the statute:

> "An Act to facilitate compromises and arrangements between companies and their creditors".

[28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in ***Re United Used Auto & Truck Parts Ltd.***, 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is ***A.G. Can. v. A.G. Que.***(*sub. nom.* ***Reference re Companies' Creditors Arrangement Act***), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."

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

[29] The second decision is ***Hongkong Bank v. Chef Ready Foods*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315-16, where Gibbs J.A. said the following:

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

[30] Sections 4 and 5 of the ***CCAA*** provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

[31] The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see ***Re Fairview Industries Ltd.*** (1991), 109

N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of ***Re Ursel Investments Ltd.*** (1990), 2 C.B.R. 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the ***CCAA*** because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

[32] Counsel for the Debtor Company has cited two decisions containing comments approving the use of the ***CCAA*** to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, ***Re Lehndorff General Partner Ltd.*** (1992), 17 C.B.R. (3d) 24 at ¶ 7(Ont. Ct. Jus. – Gen. Div.) and ***Re Anvil Range Mining Corp.*** (2001), 25 C.B.R. (4th) 1 at ¶ 11 (Ont. Sup. Ct. Jus.), aff'd (2002) 34 C.B.R. (4th) 157 at ¶ 32 (Ont. C.A.). I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the ***CCAA*** to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that

the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

[33] Counsel for the Debtor Company also relies upon the decision in ***Re Skeena Cellulose Inc.*** (2001), 29 C.B.R. (4th) 157 (B.C.S.C.), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

[34] In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the ***CCAA*** proceeding:

> 47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
>
> (b) securing access to water for the irrigation system of the golf course; and
>
> (c) finishing the construction of the golf course.
>
> 48. Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1 – 3, will be sufficient

> to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

[35] It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the ***CCAA***. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

[36] Although the ***CCAA*** can apply to companies whose sole business is a single land development as long as the requirements set out in the ***CCAA*** are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue

it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[37] The failure of the chambers judge to consider the fundamental purpose of the ***CCAA*** and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the ***CCAA*** should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

[38] I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The ***CCAA*** was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan

that does not involve an arrangement or compromise upon which the creditors may vote.

Other Matters

[39] In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

[40] The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

[41] I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

[42] **FRANKEL, J.A.**: I agree.

[43] **D. SMITH, J.A.**: I agree.

[44] **FRANKEL, J.A.**: The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

"The Honourable Mr. Justice Tysoe"

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Date: 20150709
Docket: S154746
Registry: Vancouver

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

And

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

And

In the Matter of North American Tungsten Corporation Ltd.

Petitioner

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

In Chambers

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Position of the Company

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

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

Position of the Customers

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

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

Position of the GNWT

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

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

The Monitor

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

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

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

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

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

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

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

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

Extension of the Stay

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

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

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

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

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

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

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

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

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

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

The Interim Facility

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

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> …
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report… if any.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[41] MR. SCHULTZ: Okay.

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

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

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

"Butler J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Worldspan Marine Inc. (Re),* 2011 BCSC 1758

Date: 20111221
Docket: S113550
Registry: Vancouver

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

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products Ltd.

Petitioners

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Petitioners Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products	J.R. Sandrelli & J.D. Schultz
Counsel for Wolrige Mahon (the "VCO"):	K. Jackson & V. Tickle
Counsel for the Respondent, Harry Sargeant III:	K.E. Siddall
Counsel for Ontrack Systems Ltd.:	J. Leathley, Q.C.

Counsel for Mohammed Al-Saleh:	D. Rossi
Counsel for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.:	G. Wharton & P. Mooney
Counsel for Canada Revenue Agency:	N. Beckie
Counsel for Comerica Bank:	J. McLean, Q.C.
Counsel for The Monitor:	G. Dabbs
Place and Date of Hearing:	Vancouver, B.C. December 16, 2011
Place and Date of Judgment:	Vancouver, B.C. December 21, 2011

INTRODUCTION

[1] On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

POSITIONS OF THE PARTIES

[2] The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

[3] The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

[4] The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

[5] These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

[6] The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May 2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

[7] Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

[8] Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

[9] Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have

> gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

[10] Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

[11] As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

DISCUSSION AND ANALYSIS

[12] On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

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

[13] In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

[14] In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70, Deschamps J., for the Court, stated:

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

> means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[15] A frequently cited statement of the purpose of the *CCAA* is found in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 at p. 3 where the Court of Appeal held:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

[16] In *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 (S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

> (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 manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-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.

[17] In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, the Court of Appeal set aside the extension of a stay granted to the debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

[18] At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

[19] In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

> ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[20] As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

[21] Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

[22] Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co. (Re)*, 2007 NSSC 347, 40 C.B.R. (5th) 80 at paras. 24-29.

[23] The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings , the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at paras. 14-17.

Whether circumstances exist that make an extension appropriate

[24] The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

[25] There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

(a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.

(b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while

> recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the CCAA proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.
>
> (c) The Vessel, which is the principal asset of the petitioner Worldspan, is a partially completed custom built super yacht for which there is a limited market.

[26] All of these factors have extended the time reasonably required for the petitioners to proceed with their restructuring, and to prepare a plan of arrangement.

[27] On September 19, 2011, when this court confirmed and extended the Initial Order to December 16, 2011, it also authorized the petitioners to commence marketing the Vessel unless Mr. Sargeant paid $4 million into his solicitor's trust account on or before September 29, 2011.

[28] Mr. Sargeant failed to pay the $4 million into trust with his solicitors, and subsequently made known his intention not to fund the completion of the Vessel by the petitioners.

[29] On October 7, 2011, the Federal Court also made an order authorizing the petitioners to market the Vessel and to retain a leading international yacht broker, Fraser Yachts, to market the Vessel for an initial term of six months, expiring on April 7, 2012. Fraser Yachts has listed the Vessel for sale at $18.9 million, and is endeavouring to find a buyer. Although its efforts have attracted little interest to date, Fraser Yachts have expressed confidence that they will be able to find a buyer for the Vessel during the prime yacht buying season, which runs from February through July. Fraser Yachts and the Monitor have advised that process may take up to 9 months.

[30] On November 10, 2011, this Court, on the application of the petitioners, made an order authorizing and approving the sale of their shipyard located at 27222

Lougheed Highway, with a leaseback of sufficient space to enable the petitioners to complete the construction of the Vessel, should they find a buyer who wishes to have the Vessel completed as a Crescent yacht at its current location. The sale and leaseback of the shipyard has now completed.

[31] Both this Court and the Federal Court have made orders regarding the filing of claims by creditors against the petitioners and the filing of *in rem* claims in the Federal Court against the Vessel.

[32] The determination of the *in rem* claims against the Vessel is proceeding in the Federal Court.

[33] After dismissing the *in rem* claims of various creditors, the Federal Court has determined that the creditors having *in rem* claims against the Vessel are:

Sargeant	$20,945.924.05
Capri Insurance Services	$ 45,573.63
Cascade Raider	$ 64,460.02
Arrow Transportation and CCY	$ 50,000.00
Offshore Interiors Inc.	$659,011.85
Continental Hardwood Co.	$ 15,614.99
Paynes Marine Group	$ 35,833.17
Restaurant Design and Sales LLC	$254,383.28

[34] The petitioner, Worldspan's, *in rem* claim in the amount of $6,643,082.59 was dismissed by the Federal Court and is currently subject to an appeal to be heard January 9, 2012.

[35] In addition, Comerica Bank has asserted an *in rem* claim against the Vessel for $9,429,913.86, representing the amount it advanced toward the construction of the Vessel. Mr. Mohammed Al-Saleh, a judgment creditor of certain companies controlled by Mr. Sargeant has also asserted an *in rem* claim against the Vessel in the amount of $28,800,000.

[36] The Federal Court will determine the validity of the outstanding *in rem* claims, and the priorities amongst the *in rem* claims against the Vessel.

[37] The petitioners, in addition to seeking a buyer for the Vessel through Fraser Yachts are also currently in discussions with potential DIP lenders for a DIP facility for approximately $10 million that would be used to complete construction of the Vessel in the shipyard they now lease. Fraser Yachts has estimated that the value of the Vessel, if completed as a Crescent brand yacht at the petitioners' facility would be $28.5 million. If the petitioners are able to negotiate a DIP facility, resumption of construction of the Vessel would likely assist their marketing efforts, would permit the petitioners to resume operations, to generate cash flow and to re-hire workers. However, the petitioners anticipate that at least 90 days will be required to obtain a DIP facility, to review the cost of completing the Vessel, to assemble workers and trades, and to bring an application for DIP financing in both this Court and the Federal Court.

[38] An extension of the stay will not materially prejudice any of the creditors or other stakeholders. This case is distinguishable from *Cliffs Over Maple Bay Investments Ltd.*, where the debtor was using the *CCAA* proceedings to freeze creditors' rights in order to prevent them from realizing against the property. Here, the petitioners are simultaneously pursuing both the marketing of the Vessel and efforts to obtain DIP financing that, if successful, would enable them to complete the construction of the Vessel at their rented facility. While they do so, a court supervised process for the sale of the Vessel is underway.

[39] Mr. Sargeant also relies on *Encore Developments Ltd. (Re)*, 2009 BCSC 13, in support of his submission that the Court should refuse to extend the stay. There, two secure creditors applied successfully to set aside an Initial Order and stay granted *ex parte* to the debtor real estate development company. The debtor had obtained the Initial Order on the basis that it had sufficient equity in its real estate projects to fund the completion of the remaining projects. In reality, the debtor company had no equity in the projects, and at the time of the application the debtor

company had no active business that required the protection of a *CCAA* stay. Here, when the petitioners applied for and obtained the Initial Order, they continued to employ a skeleton workforce at their facility. Their principal asset, aside from the shipyard, was the partially constructed Vessel. All parties recognized that the *CCAA* proceedings afforded an opportunity for the completion of the Vessel as a custom Crescent brand yacht, which represented the best way of maximizing the return on the Vessel. On the hearing of this application, all of the creditors, other than Mr. Sargeant share the view that the Vessel should be marketed and sold through and orderly process supervised by this Court and the Federal Court.

[40] I share the view of the Monitor that in the particular circumstances of this case the petitioners cannot finalize a restructuring plan until the Vessel is sold and terms are negotiated for completing the Vessel either at Worldspan's rented facility, or elsewhere. In addition, before the creditors will be in a position to vote on a plan, the amounts and priorities of the creditors' claims, including the *in rem* claims against the Vessel, will need to be determined. The process for determining the *in rem* claims and their priorities is currently underway in the Federal Court.

[41] The Monitor has recommended the Court grant the extension sought by the petitioners. The Monitor has raised one concern, which relates to the petitioners' current inability to fund ongoing operating costs, insurance, and professional fees incurred in the continuation of the *CCAA* proceedings. At this stage, the landlord has deferred rent for the shipyard for six months until May 2012. At present, the petitioners are not conducting any operations which generate cash flow. Since the last come back hearing in September, the petitioners were able to negotiate an arrangement whereby Mr. Sargeant paid for insurance coverage on the Vessel. It remains to be seen whether Mr. Sargeant, Comerica Bank, or some other party will pay the insurance for the Vessel which comes up for renewal in January, 2012.

[42] Since the sale of the shipyard lands and premises, the petitioners have no assets other than the Vessel capable of protecting an Administration Charge. The Monitor has suggested that the petitioners apply to the Federal Court for an

Administration Charge against the Vessel. Whether the petitioners do so is of course a matter for them to determine.

[43] The petitioners will need to make arrangements for the continuing payment of their legal fees and the Monitor's fees and disbursements.

[44] The *CCAA* proceedings cannot be extended indefinitely. However, at this stage, a *CCAA* restructuring still offers the best option for all of the stakeholders. Mr. Sargeant wants the stay lifted so that he may apply for the appointment of Receiver and exercise his remedies against the Vessel. Any application by Mr. Sargeant for the appointment of a Receiver would be resisted by the other creditors who want the Vessel to continue to be marketed under the Court supervised process now underway.

[45] There is still the prospect that through the *CCAA* process the Vessel may be completed by the petitioners either as a result of their finding a buyer who wishes to have the Vessel completed at its present location, or by negotiating DIP financing that enables them to resume construction of the Vessel. Both the marine surveyor engaged by Comerica Bank and Fraser Yachts have opined that finishing construction of the Vessel elsewhere would likely significantly reduce its value.

[46] I am satisfied that there is a reasonable possibility that the petitioners, working with Fraser Yachts, will be able to find a purchaser for the Vessel before April 13, 2012, or that alternatively they will be able to negotiate DIP financing and then proceed with construction. I find there remains a reasonable prospect that the petitioners will be able to present a plan of arrangement to their creditors. I am satisfied that it is their intention to do so. Accordingly, I find that circumstances do exist at this time that make the extension order appropriate.

Good faith and due diligence

[47] Since the last extension order granted on September 19, 2011, the petitioners have acted diligently by completing the sale of the shipyard and thereby reducing their overheads; by proceeding with the marketing of the Vessel pursuant to orders

of this Court and the Federal Court; and by embarking upon negotiations for possible DIP financing, all in furtherance of their restructuring.

[48] Notwithstanding the dispute between Mr. Barnett and Mr. Blane, which resulted in the commencement of litigation in the State of Florida at or about the same time this Court made its Initial Order in the *CCAA* proceedings, the petitioners have been able to take significant steps in the restructuring process, including the sale of the shipyard and leaseback of a portion of that facility, and the applications in both this Court and the Federal Court for orders for the marketing of the Vessel. The dispute between Mr. Barnett and his former partner, Mr. Blane has not prevented the petitioners from acting diligently in these proceedings. Nor am I persuaded on the evidence adduced on this application that dispute would preclude the petitioners from carrying on their business of designing and constructing custom yachts, in the event of a successful restructuring.

[49] While the allegations of misconduct, fraud and misappropriation of funds made by Mr. Barnett against Mr. Blane are serious, at this stage they are no more than allegations. They have not yet been adjudicated. The allegations, which are as yet unproven, do not involve dishonesty, bad faith, of fraud by the debtor companies in their dealings with stakeholders in the course of the *CCAA* process.

[50] In my view, the failure of the petitioners to disclose the dispute between Mr. Barnett and Mr. Blane does not constitute bad faith in the *CCAA* proceedings or warrant the exercise of the Court's discretion against an extension of the stay.

[51] This case is distinguishable from *Re San Francisco Gifts Ltd.*, where the debtor company had pleaded guilty to 9 counts of copyright infringement, and had received a large fine for doing so.

[52] In *Re San Francisco Gifts Ltd*., at paras 30 to 32, the Alberta Court of Queen's Bench acknowledged that a debtor company's business practices may be so offensive as to warrant refusal of a stay extension on public policy grounds. However, the court declined to do so where the debtor company was acting in good

faith and with due diligence in working toward presenting a plan of arrangement to its creditors.

[53] The good faith requirement of s. 11.02(3) is concerned primarily with good faith by the debtor in the *CCAA* proceedings. I am satisfied that the petitioners have acted in good faith and with due diligence in these proceedings.

Conclusion

[54] The petitioners have met the onus of establishing that circumstances exist that make the extension order appropriate and that they have acted and are acting in good faith and with due diligence. Accordingly, the extension of the Initial Order and stay to April 13, 2012 is granted on the terms pronounced on December 16, 2011.

"PEARLMAN J."

Hunters Trailer & Marine Ltd., 2000 ABQB 952

Date: 20001201
Action No. 0003 19315

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

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

AND IN THE MATTER OF Hunters Trailer & Marine Ltd.

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

APPEARANCES:

Michael J. McCabe
Reynolds Mirth Richards & Farmer

Kentigern A. Rowan
Ogilvie & Company

Darcy G. Readman
Duncan & Craig

Terrence M. Warner
Miller Thompson

John L. Ircandia
Borden Ladner Gervais LLP

Douglas H. Shell
Lucas Bowker & White

Jeremy Hockin
Parlee McLaws

Background

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

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

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

Current Application

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

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

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

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

DIP Financing

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

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

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

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

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

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

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

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

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

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

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

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

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

Purpose of the *CCAA*

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

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

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

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

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

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

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

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

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

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

_____

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

Court of Queen's Bench of Alberta

Citation: Alberta Treasury Branches v Tallgrass Energy Corp, 2013 ABQB 432

Date: 20130806
Docket: 1301 08759; 1301 08497
Registry: Calgary

Between:

Alberta Treasury Branches

Plaintiff

- and -

Tallgrass Energy Corp.

Defendant

1301 08497

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

And in the Matter of the *Alberta Business Corporation Act*, R.S.A. 2000, c. B-9, as amended

-and-

Tallgrass Energy Corp.

Defendant

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] Tallgrass Energy Corp applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended. That application was opposed by its secured creditors, Alberta Treasury Branches and Toscana Capital Corporation, which prior to Tallgrass' application for CCAA protection had applied for an order appointing a receiver over the property and assets of the company. I dismissed Tallgrass' application for an initial CCAA order and allowed the receivership application. These are my reasons.

Facts

[2] In July, 2012, ATB extended a $12 million credit facility to Tallgrass, payable on demand and secured by a first charge on all of the company's assets. At about the same time, Toscana granted Tallgrass a bridge loan credit facility in the amount of $6 million secured by a second in priority charge against the assets. This bridge loan facility matured on April 30, 2013.

[3] In July, 2012, John McAdam, the CEO of Tallgrass, began the process of looking for traditional financing to replace the Toscana bridge financing. In early 2013, Mr. McAdam realized that no conventional financing was available, and Tallgrass began to explore the availability of non-traditional forms of financing.

[4] Tallgrass management decided to attempt to obtain $100 million of non-traditional financing, as there were no third parties willing to step into the shoes of Toscana's subordinate position. The company retained an advisor in March, 2013 to aid in the search.

[5] After the Toscana facility matured on April 30, 2013, Tallgrass acknowledged that the loan was in default. Toscana agreed to forbear enforcement until May 31, 2013 to provide Tallgrass with additional time to finalize certain financing alternatives that were being explored.

[6] On June 17, 2013, Toscana issued a demand to Tallgrass, and on June 25, 2013, ATB followed with its demand. There is no issue that Tallgrass is also in default of the ATB credit facility.

[7] On June 27, 2013, at the request of the secured lenders, Tallgrass retained Grant Thornton Limited as financial advisor, on the condition that Grant Thornton would provide financial information and reports to the secured lenders. Grant Thornton provided two reports to the lenders, on July 4 and on July 11, 2013. The lenders granted further forbearance during this period and continuing until July 17, 2013.

[8] On about July 15, 2013, on the basis of the information and reports received from Grant Thornton, Toscana advised Tallgrass that it would not be prepared to grant further forbearance, and that it intended to bring an application to appoint a receiver on Wednesday, July 24, 2013. On July 16, 2013, ATB advised Tallgrass that it was taking the same position, and that after July 17, 2013, Tallgrass would have no further access to the remaining $100,000 available under the line of credit.

[9] Tallgrass sought an initial order under the CCAA on July 17, 2013. The application was put over to July 24, 2013 to be heard at the same time as the receivership application, with a temporary stay to preserve the status quo. ATB agreed to allow Tallgrass access to up to $50,000 of the line of credit to pay certain critical suppliers.

[10] In its application, Tallgrass represented that it currently has assets of $28,829,874 and liabilities of $28,896,371. The secured lenders are owed approximately $18 million and Tallgrass has unsecured accounts payable in the amount of roughly $3 million, decommissioning liabilities as of March 31, 2013 in the amount of approximately $7.4 million and a financing contract under which approximately $484,000 is outstanding as of March 31, 2013.

[11] The company values its property, plant and equipment, including undeveloped land, at approximately $21.6 million.

Analysis

[12] As a preliminary matter, it is clear that Tallgrass meets the technical requirements for protection under the CCAA. It is also clear and uncontested that Tallgrass has breached various provisions of the ATB credit facility and the Toscana bridge loan facility, and that the secured lenders are entitled to apply for a receivership order. In fact, there was no question that, if Tallgrass's application for an initial order under the CCAA did not succeed, a receivership would follow.

[13] As I indicated in *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, (1 August 2006), Docket No. 060108395, a section 11 order under the CCAA is not granted merely upon the fact of its application. Tallgrass must satisfy the court that circumstances exist that make the order appropriate, and that it has acted and is acting in good faith and with due diligence. The CCAA therefore requires that the court hearing the application exercise discretion in making these determinations.

[14] A key issue here is whether Tallgrass can establish that there is any reasonable possibility that it will be able to restructure its affairs. The burden placed on an applicant for an initial CCAA order in this regard is not a very onerous one, in that it is not necessary for an applicant company to have a fully-developed plan or the support of its secured creditors, although either or both are desirable and helpful. However, there must be some evidence of what Farley J. in *Re*

Inducon Development Corp., 1991 CarswellOnt 219 referred to as the outline of a plan, what he called the "germ of a plan": para 14. I would add a further gloss on that phrase: there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. As noted in *Inducon* at para 13, the CCAA is remedial, not preventative, and it should not be the "last gasp of a dying company". Unfortunately, Tallgrass appears to be at that desperate stage.

[15] While it is certainly true that the fundamental purpose of the CCAA is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets, this is a company with very few employees, a handful of independent contractors, and relatively minor unsecured debt. Tallgrass does not carry on a business that has broader community or social implications that may require greater flexibility from creditors. The major stakeholders here are the secured lenders who oppose the application, and the equity holders.

[16] The secured lenders submit that the restructuring options presented by Tallgrass are commercially unrealistic and unlikely to come to fruitation, that it is obvious that a liquidation of the assets will be the end result for this company, and that they have lost confidence in the management of Tallgrass to effect such a liquidation. They submit that, as they are likely the only parties with any economic interest in the company, their preference for a receivership over what would ultimately be a liquidating CCAA should be taken into account.

[17] I must agree that the restructuring options proposed by Tallgrass, while more detailed than the kind of general good intentions offered by the applicant in *Matco*, are not realistic or commercially reasonable. Specifically:

> 1. Tallgrass concedes that it has exhausted any chance of conventional financing after nearly a year of attempting to find a conventional lender to take out its existing secured debt, turning in early 2013 to what it calls non-traditional sources;
>
> 2. Company management decided in March of this year to pursue $100 million in non-traditional debt rather than merely retiring existing secured debt of $18 million. As noted by the secured lenders, it is unrealistic for a small public company with a market capitalization of approximately $800,000 and existing assets worth roughly $29 million, which has already encountered difficulties finding sources of funding to take out Toscana's subordinate position, to attempt to obtain $100 million in financing within a reasonable time frame. The unsatisfactory and uncertain results of approximately six months of effort in that regard must be analyzed carefully;
>
> 3. Tallgrass has obtained no firm commitments for refinancing. What it has been able to obtain is the following:

a) a letter dated July 23, 2013 from a financing broker that purports to be a "commitment letter". This "commitment" to lend $100 million states that the broker will source the finding through an unnamed "top 25 bank". It requires an upfront "bank guarantee fee" of $2 million. The letter provides that the broker shall have no liability to Tallgrass "under any theory of law or equity" for the failure of any transaction contemplated by the loan commitment letter . The secured lenders have pointed out the many unusual provisions of this letter, and ask, reasonably enough, why a "top 25 bank" would contemplate a loan of $100 million to Tallgrass in its present circumstances. Tallgrass management has had no direct discussion with any financial institution and is relying on assurances from the broker that the source of funding would be reputable.

This "commitment letter" lacks credibility. At any rate, Tallgrass is unable in its current financial state even to fund the $2 million bank guarantee fee necessary to take the proposal to a next step. This leads to the next proposal.

b) Tallgrass has obtained a letter from a friend of its CEO that indicates that he has obtained verbal commitments from Chinese investors in the amount of $10 million for the purpose of investing in the company, and that they are willing to fund the $2 million required by the above-noted proposal. The secured lenders note that this potential funding source has no track record or experience with respect to Canadian oil and gas assets, and that, even if the commitment became firm, the amount is insufficient to pay off existing indebtedness.

c) Tallgrass has identified a further option, a potential loan in the process of negotiations with a broker, not a source lender, that would involve the broker earning approximately $16 million in fees to find a source for a $100 million loan. This is an even softer proposal, with no real commitment. Tallgrass' CEO concedes in understatement that this would be "expensive funding".

[18] Given that these options are not commercially realistic, I must conclude that the secured lenders are correct in their view that this would likely be a liquidating CCAA. While this does not in itself preclude the use of the statute, the secured lenders object to Tallgrass management controlling the liquidation process under CCAA protection as they have lost faith in such management. The secured lenders have identified concerns about management's estimate of the value of Tallgrass' oil and gas assets, concerns about the effect of abandonment liabilities on realization values, and concerns about discrepancies between the Cost Flow Projections contained in the CCAA application as compared to those prepared by Grant Thornton. The secured lenders also have concerns with respect to how management is executing its alternate financing strategy, particularly its decision to pursue financing from the kind of sources it has identified, and what they feel is a lack of attention from senior management to realistic

alternatives and options. They are critical of management's decisions with respect to covering short-term liabilities in the course of these applications.

[19] Tallgrass submits that the opinions given by an officer of Toscana, Dean Jensen, on behalf of the secured lenders with respect to the value of its oil and gas assets should be given little weight as Mr. Jensen does not have the proper expertise to comment on the reserve reports. I take Mr. Jensen's comments to be the opinions of a banker experienced with loans in the oil and gas sector and with familiarity with reserve reports. What Mr. Jensen is really questioning is whether Tallgrass would be able to achieve a price for these assets equal to management's projections, and whether such projections are reliable. He thus questions whether the secured lenders are assured of recovery or whether they are at risk.

[20] The concern expressed by Mr. Jensen with respect to cost flow projections relates to whether the costs of a CCAA proceeding will be as projected by Tallgrass, and, again, a lack of confidence with respect to management's projections in that regard. While it appears that Mr. Jensen may have misunderstood some of the calculations, there remain unanswered questions about the projections.

[21] This is not a case where the secured lenders have acted precipitously, or where the debtor has not had a more than adequate opportunity to canvass the market for refinancing and restructuring options. This process has been ongoing for more than a year under Tallgrass management, which was not able to obtain take-out financing for Toscana's bridge loan, nor obtain sufficient financing to satisfy its licensee liability rating report requirements and provide funding necessary for further development activities. It is also clear that Tallgrass and its major secured stakeholders are in an adversarial mode, which does not bode well for an efficient or relatively inexpensive CCAA restructuring. Tallgrass was most likely a liquidating CCAA, and given the lack of confidence and the adversarial relationship between the company and the secured lenders at risk, I was not satisfied that a CCAA order would be appropriate in the circumstances. I dismissed Tallgrass' application.

[22] It thus followed that the secured lenders' application for a receivership order must succeed.

Heard on the 24th day of July, 2013.
Dated at the City of Calgary, Alberta this 6th day of August, 2013.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Thomas Cumming and Jeffrey Oliver
for the Plaintiff Alberta Treasury Branches

Howard Gorman
for Toscana Capital Corporation

Ryan Zahara and Matthew Beavers
for the Defendant Tallgrass Energy Corp.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF:

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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