Court File No. CV-09-8396-00CL

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 CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

BOOK OF AUTHORITIES OF THE APPLICANTS

(Motion returnable December 8, 2009)

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TAB 1

[Indexed as: **Campeau v. Olympia & York Developments Ltd.**]

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

Ontario Court of Justice (General Division), R.A. Blair J.

Judgment – September 21, 1992.

Stay of proceedings – Companies' Creditors Arrangement Act – Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.

The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to pursue their action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex.

The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held – The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

Cases considered

Arab Monetary Fund v. Hashim (June 25, 1992), Doc. 34127/88, O'Connell J. (Ont. Gen. Div.), [1992] O.J. No. 1330 – referred to.

Attorney General v. Arthur Anderson & Co. (1988), [1989] E.C.C. 224 (C.A.) – referred to.

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) – applied.

Empire-Universal Films Ltd. v. Rank, [1947] O.R. 775 (H.C.) – referred to.

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) – referred to.

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) – applied.

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) – referred to.

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) – referred to.

Statutes considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 –
s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43 –
s. 106

Personal Property Security Act, R.S.O. 1990, c. P.10 –
s. 17(1)

Rules considered

Ontario, Rules of Civil Procedure –
r. 6.01(1)

MOTION to lift stay under *Companies' Creditors Arrangement Act*; MOTION for stay under *Courts of Justice Act*.

Stephen T. Goudge, Q.C. and *Peter C. Wardle*, for plaintiffs.

Peter F.C. Howard, for National Bank of Canada.

Yoine Goldstein, for Olympia & York Developments Limited and 857408 Ontario Inc.

(Docs. 92-CQ-19675, B-125/92)

1 September 21, 1992. R.A. BLAIR J: – These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

> a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,
>
> b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent

of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in

connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

13 The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

> "106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure*. The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

> "11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com-

> pany except with the leave of the court and subject to such terms as the court imposes."

The Power to Stay in the Context of C.C.A.A. Proceedings

17 By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> "To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.*" (emphasis added)

20 I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's

right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p. 779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

24 In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with – at least for the purposes of that proceeding – in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and

energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York – whose alleged misdeeds are the real focal point of the attack on both sets of defendants – is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim – like other secured, undersecured, unsecured, and contingent claims – must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings – i.e., the action and the C.C.A.A. proceeding – the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim*, supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where – as is the case here – the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

TAB 2

Indexed as:

Chef Ready Foods Ltd. v. Hongkong Bank of Canada

IN THE MATTER of The Company Act R.S.B.C. 1979, C. 59
AND IN THE MATTER of The Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36
AND IN THE MATTER of Chef Ready Foods Ltd. and Istonio Foods Ltd.
Between
Chef Ready Foods Ltd., Respondent, (Petitioner), and
Hongkong Bank of Canada, Appellant, (Respondent)

[1990] B.C.J. No. 2384

[1991] 2 W.W.R. 136

51 B.C.L.R. (2d) 84

4 C.B.R. (3d) 311

23 A.C.W.S. (3d) 976

1990 CanLII 529

Vancouver Registry: CA12944

British Columbia Court of Appeal

Carrothers, Cumming and Gibbs JJ.A.

Heard: October 12, 1990
Judgment: October 29, 1990

Debtor and creditor -- Arrangement under companies' creditors arrangement act -- Bank Act security -- Priority.

Appeal from a stay order issued under the Companies' Creditors Arrangement Act. Bank supplying credit and services to Chef Ready, and holding security under section 178 of the Bank Act. Bank commencing proceedings upon its security. Chef Ready petitioning for relief under the Companies' Creditors Arrangement Act. Order issued staying realization on any security of Chef Ready. Issue whether Bank Act security should be exempt from the order.

HELD: Appeal dismissed. Nothing in the Companies' Creditors Arrangement Act exempted any creditors from the provisions of the Act, and nothing in the Bank Act excluded the impact of the Companies' Creditors Arrangement Act. Bank's interest not defeated, but its right to seize and

sell postponed. Broad protection of creditors in the Companies' Creditors Arrangement Act to prevail over the Bank Act. Section 178 security included in the term "security" in the Companies' Creditors Relief Act.

STATUTES, REGULATIONS AND RULES CITED:

Bank Act, R.S.C. 1985, c. B-1, s. 178, 179.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 8, 11.

Counsel for the Appellant: D.I. Knowles and H.M. Ferris.
Counsel for the Respondent: R.H. Sahrmann and L.D. Goldberg.

GIBBS J.A. (for the Court, dismissing the appeal):-- The sole issue on this appeal is whether a stay order made by a Chambers judge under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, Chap. C-36 is a bar to realization by the Hongkong Bank of Canada (the "Bank") on security granted to it under s. 178 of the Bank Act, R.S.C. 1985, Chap. B-1.

The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant Bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the Bank Act. Accordingly the Bank holds what is commonly referred to as "section 178 security".

Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the Bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.443 per day. Chef Ready did not pay.

On August 27, 1990 the Bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the Bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the Companies' Creditors Arrangement Act (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the Bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A. for an order to be issued that day granting the relief claimed in the petition.

The application was heard in Chambers in the afternoon of August 28, 1990 and the following day. The Bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the Chambers judge. The affidavit evidence had appended to it, inter

alia, the s. 178 security documentation. On August 30, 1990 the Chambers judge granted the order and delivered oral reasons at the end of which he said:

> "I therefore conclude that the Companies' Creditors Arrangement Act is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable."

The reasons refer specifically to the accounts receivable because the Bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under clause 4 of the s. 178 security instrument:

> " 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts."

The formal order made by the Chambers judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> " THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the Bankruptcy Act (Canada) or the Winding-Up Act (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any person, firm or corporation to realize upon or otherwise deal with any property right or security held by that person firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed;"
>
> (Emphasis added.)

The jurisdiction in the court to make such a stay order is found in s. 11 of the C.C.A.A.:

> " ii. Notwithstanding anything in the Bankruptcy Act or the Winding-Up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-Up Act or either of them;
(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes."

The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding ... against the company" is not before the court on this appeal. The Bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A. it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the Bank asks only that the stay order be varied to free up the s. 178 security:

"NATURE OF ORDER SOUGHT

An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security..."

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.

There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the Bank Act to consider.

There is nothing in the Loans and Security division of the Bank Act either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless the Bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. or orders made under it can penetrate. In support of its position the Bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in Bank of Montreal v. Hall, [1990 1 S.C.R. 121, and to a lesser degree

upon an earlier unanimous Supreme Court of Canada judgment in Flintoft v. Royal Bank of Canada (1964), S.C.R. 631.

The principal issue in Hall was whether ss. 19 to 36 of the Saskatchewan Limitation of Civil Rights Act applied to a security taken under ss. 178 and 179 of the Bank Act. The court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the Bank Act" (p. 154). In the course of arriving at its decision the court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However a few extracts will serve to illustrate the Bank's reliance:

> "... a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower" (p. 134)
>
> "... the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers" (p. 139)
>
> "... These sections of the Bank Act have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking" (p. 139)
>
> "The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" (p. 143)
>
> "... the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the Bank Act ..." (p. 143)
>
> "The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, and immediate right to seize and sell those goods ..." (p. 152)
>
> "... it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the Bank Act itself" (p. 154)
>
> "... Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest" (p. 155).

It is the insular theme which runs through these propositions that the Bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the

Bank under ss. 178 and 179? It does not detract from the Bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of the right to seize and sell; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the Bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the Bank Act to the application of the C.C.A.A. to s. 178 security and the Bank's rights in respect of it.

Having regard to the broad public policy objectives of the C.C.A.A. there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-Up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by Stanley E. Edwards at p. 587 of 1947 Vol. 25 of the Canadian Bar Review, entitled "Reorganizations Under The Companies' Creditors Arrangement Act", explain very well the historic and continuing purposes of the Act:

> " It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)
>
> " There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.

> Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations." (p. 590)

It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded an unique status which renders those rights immune from the provisions of the C.C.A.A. the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the Bank signifies and collects the accounts receivable Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependant upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted it is difficult to imagine that the legislators of the day intended that result to follow.

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as Meridian Developments Inc. v. T.D. Bank (1984), 52 C.B.R. 109 (Alta. Q.B.); Northland Properties Limited v. Excelsior Life Insurance Company (1989), 34 B.C.L.R. (2d) 122 (B.C.C.A.); Re Feifer and Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Que. C.A.); Wynden Canada Inc. v. Gaz Metropolitaine (1982), 44 C.B.R. 285 (Que. S.C.); and Norcen Energy Resources v. Oakwood Petroleums (1988) 72 C.B.R. 2 (Alta. Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails.

For these reasons the disposition by the Chambers judge of the application made by Chef Ready will be upheld. it follows that the appeal is dismissed.

GIBBS J.A.
CARROTHERS J.A.:-- I agree.

CUMMING J.A.:-- I agree.

TAB 3

Indexed as:

George v. Harris

Between
Maynard Donald George, on his own behalf and
Maynard Donald George as Administrator of the estate of
Anthony O'Brien "Dudley" George, deceased, plaintiff and
Michael D. Harris, Charles Harnick, Robert Runciman,
Her Majesty the Queen in Right of Ontario, Christopher Coles,
Mark Wright, John Frederick Carson, Kenneth Deane, Thomas B.
O'Grady, Attorney General of Canada and certain unnamed
individuals, defendants

[2000] O.J. No. 1762

97 A.C.W.S. (3d) 225

Court File No. 96-CU-99569

Ontario Superior Court of Justice

Epstein J.

Heard: May 15, 2000.
Judgment: May 19, 2000.

(50 paras.)

Practice -- Pleadings -- Striking out pleadings -- Grounds, false, frivolous, vexatious or scandalous -- Grounds, abuse of process or delay -- Appeals, applications or motions.

Cross-motion by the defendant Harris to strike out portions of the notice of motion of the plaintiff George. George's brother was fatally shot in an incident involving the Ontario Provincial Police. George brought an action in negligence against the provincial Premier, Harris, and members of his cabinet. George then brought a motion to strike Harris's statement of defence for failure to deliver an affidavit of documents. An affidavit in support of the motion contained an allegation that assistants of Harris had removed relevant documents from the legislature. The affiant relied on a confidential source for the allegation, and refused to answer any questions about the identity of the source. Harris then delivered an affidavit of documents, which resulted in a motion by George for relief in respect of alleged deficiencies in the affidavit. The parties agreed to have the cross-motion by Harris heard in advance of the main motion. Harris contended that certain paragraphs of George's notice of motion were scandalous, vexatious and an abuse of process.

HELD: Cross-motion allowed. All of the impugned paragraphs were struck. Some paragraphs contained inflammatory and unsupported attacks on the integrity of Harris and were therefore

scandalous. Other paragraphs contained pure argument. Some comments were conclusory and argumentative, and were struck as an abuse of process. References to the issue of the anonymous source were conclusions disguised as facts. Three paragraphs invited the drawing of an inference based on unproven facts. The notice of motion in general appeared to have been worded for embarrassment rather than to advance concerns over documentary production, and was therefore abusive.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 21, 25.11, 37.15.

Counsel:

Murray Klippenstein, for the plaintiffs.
Dennis W. Brown, Q.C., and John P. Zarudny, for the defendants, Charles Harnick, Robert Runciman and Her Majesty the Queen in Right of Ontario.
Eleanore A. Cronk, for the defendant, Michael D. Harris.
Harold Cares, for the defendants Christopher Coles, Mark Wright, John Frederick Carson, Kenneth Deane and Thomas B. O'Grady.

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1 **EPSTEIN J.** (endorsement):-- The plaintiffs have brought a motion in which they seek relief in respect of alleged deficiencies in the Affidavit of Documents delivered on February 25, 2000 by the defendant, Mr. Harris (the "main motion"). In response, Mr. Harris has defended the main motion and has brought this cross-motion for an order striking out many of the grounds set out in the Notice of Motion delivered in the main motion. The portions of the grounds section that Mr. Harris seeks to strike are set out in Schedule "A" to the Notice of Motion and will be referred to as the "impugned paragraphs". There was no opposition to the proposal that the cross-motion should proceed and be determined in advance of the main motion.

The Background

2 This action was launched as a result of events that occurred in the fall of 1995 at Ipperwash Provincial Park. Mr. Anthony O'Brien "Dudley" George, a member of the Chippewas of Kettle and Stony Point First Nation, was fatally shot during an encounter that included the Ontario Provincial Police. The plaintiff, Maynard Donald George is the brother of the deceased, Dudley George, and brings this action on his own behalf and in his capacity as administrator of his brother's estate. The action claims damages against various defendants including Mr. Harris, several members of his then cabinet and the Province of Ontario based on alleged negligence and a breach of constitutional rights. The plaintiffs claim that the defendants' actions or omissions caused or contributed to the wrongful death of Dudley George.

3 There has been a history of difficulty with respect to the parties' efforts to proceed through the pleading and discovery stage of the litigation. As a result, in August of 1999 I was appointed the Rule 37.15 judge. Since my appointment I have attempted to work with counsel to assist the parties in moving forward in a more cooperative fashion. Unfortunately, it would appear that fairly regular judicial intervention continues to be required.

4 While it is not important for the purposes of these reasons to detail the various interlocutory struggles in which the parties have been embroiled, the background to what I will call the confidential source issue is necessary for an understanding of some of the concerns raised about the impugned paragraphs.

5 This background is as follows. Counsel for the plaintiffs delivered a Request to Admit in November 1998, the thrust of which was an attempt to raise allegations that certain defendants, including Mr. Harris, had participated in the improper removal or destruction of documents relevant to this action. Thereafter a number of reports appeared in the press concerning these allegations of interference with the fact-finding process of the Court.

6 Throughout the winter and spring of 1999, in the course of other interlocutory proceedings, the plaintiffs brought a motion to strike out Mr. Harris' Statement of Defence for failure to deliver an Affidavit of Documents. One of the grounds set out in the Notice of Motion in support of the order sought was that relevant documents were being removed from their proper location. In her Affidavit affirmed May 26, 1999, Mr. Klippenstein's articling student, Ms. Savage, deposed that Mr. Klippenstein had relied upon a confidential source as a basis for the allegation that two assistants of Mr. Harris had removed relevant documents from the legislature. Ms. Savage was cross-examined on this evidence during which she was asked about the identity and other matters relating to this confidential source. The refusals given in response to that line of questioning gave rise to a refusals motion that I dealt with in my decision dated March 28, 2000.

7 In ordering that the questions be answered I said the following.

> "In my view if a party puts evidence before the Court upon which it intends the Court to rely, it must be in a position to prove it. To hold otherwise would open the door to considerable abuse. It would allow a party, at any stage in the proceedings, to raise inflammatory allegations that would be in the record, for the eyes of the Court and the consumption of the public, and then resolve the matter to shield the aspersions from any meaningful challenge. I am not suggesting that such a Machiavellian plot entered into the plaintiffs' strategy in this case. I am merely pointing out the dangers of allowing a party to advance, knowingly or recklessly, potentially inflammatory information with no recourse available to the affected party. The better view is that all evidence put before the Court ought to be accurate and reliable and be able to withstand scrutiny.
>
> Secondly, I do believe that there is a real possibility that this issue of the alleged removal and destruction of documents will come up again at some point in this proceeding and that to leave it untested would be grossly unfair to those against whom this type of misconduct has been alleged."

8 This portion of my March 28 order has not been complied with as it is currently under review in two respects. First, there is a motion pending before me to set aside my order that the refusals be answered. The motion is based on new evidence in the form of Mr. Harris' Affidavit of Documents that was delivered between the date of argument of the refusals motion and the date when I released my decision. Secondly, depending on how I deal with the motion to set aside that part of the March 28 order the plaintiffs have a pending motion for leave to appeal to the Divisional Court on the refusals decision.

9 This ongoing struggle about the confidential source issue is part of the main motion scheduled to be heard next week in conjunction with the argument that the form and listing of documents in Mr. Harris' Affidavit of Documents is not adequate and in various respects violates the Rules of Civil Procedure.

The Materials in Support of the Cross-Motion and the Submissions Concerning those Materials

10 The materials initially delivered in support of the main motion were a Notice of Motion and a brief supporting Affidavit sworn by Santina Goldman who is an assistant to Mr. Klippenstein, counsel for the plaintiffs. A factum was subsequently delivered a few days prior to the return date. The Notice of Motion is unusual in that the grounds set out in support of the main motion comprise 34 paragraphs. Many of these paragraphs contain detailed factual submissions and argument in support of the relief sought. By way of example only, I set out paragraph 16 of the grounds section of the Notice of Motion. It reads as follows:

> "The continued evasion of disclosure requirements by the Defendant Harris about important documents relevant to this case amounts to bad faith and abuse of the legal and judicial process. It would represent such an abuse from any defendant. But it is submitted what when the defendant is a public official in the highest position in our province, charged with the responsibility of acting in the best interests of the province's citizens, the Court should act firmly and decisively to protect the rights of citizens."

11 This length and, more importantly, the content of the grounds section of the Notice of Motion are to be compared with the supporting Affidavit which is relatively short and contains little more than a description of the exhibits attached to the Affidavit, most of which are simply documents relating to previous interlocutory matters. I mention the stark difference between the length and content of the Notice of Motion and Ms. Goldman's Affidavit not because this difference alone gives rise to a concern but to support the conclusions I have reached as to the strategy of counsel for the plaintiffs in preparing the materials in support of the main motion.

12 With respect to the impropriety of the grounds section of the Notice of Motion, Ms. Cronk, counsel for Mr. Harris, contends that the impugned paragraphs are scandalous, vexatious and an abuse of process. For this and other reasons they offend the rules and should be struck. She identifies a number of offensive aspects of the impugned paragraphs. Some contain pure argument and are therefore scandalous. Some contain factual allegations unsupported by the evidence. Many of the allegations are inflammatory and inserted only for colour. Some of the impugned paragraphs raise specifically or implicitly the suggestion that documents have been deliberately put out of the reach of the plaintiffs and therefore draw in the unresolved confidential source issue. Further, the submission has been made that the impugned paragraphs were included in the Notice of Motion for reasons other than moving the case forward before the Courts and therefore amount to an abuse of process.

13 According to Ms. Cronk it was never intended that a Notice of Motion would contain facts and argument let alone facts that are sheltered from testing and may be included for purposes other than to inform the other side as to the basic foundation of the relief sought. An approach such as that adopted by the plaintiffs in this case would allow a party to make an ad hominem attack on another party with no supporting evidence and no opportunity for the affected party to defend any of the allegations let alone those of improper conduct.

14 Mr. Brown, counsel for other provincial government defendants, supported the cross-motion. In his brief submissions he focussed on what he said was the impropriety of the impugned paragraphs raising implicitly or explicitly the concern about the removal of documents in the face of my earlier order concerning the confidential source issue. The deliberate removal of documents has been inserted in the Notice of Motion rather than in Ms. Goldman's Affidavit for an obvious reason. By tucking these allegations into a Notice of Motion that not only is a public document but also has become the subject of a press release, the plaintiffs have created a protected manner in which to cast serious aspersions against several of the defendants and that wash over other individuals as well. This is blatantly unfair.

15 Before turning to the main part of Mr. Klippenstein's argument I will first comment upon one preliminary submission to the effect that given the nature of the attack on the Notice of Motion I am to start with the position that the factual allegations contained in the impugned paragraphs are true. Mr. Klippenstein's submission is based on what he says is a similarity between a motion of this nature and a motion under rule 21 to strike out a pleading as disclosing no cause of action or defence. Counsel could find no authority to support this proposition. The reason is, of course, that the proposition simply makes no sense. It is patently absurd to assume something is proper as a basis for determining whether it is improper. I do not accept the submission that the starting point for this cross-motion is that the factual allegations in the impugned paragraphs are true.

16 Mr. Klippenstein defended the contents of the Notice of Motion in the following way. He says that he drafted the document in a detailed fashion so as to be helpful to counsel for the defendants. In his submission, each of the 34 paragraphs in the grounds section of the Notice of Motion is there to convey why the plaintiffs are entitled to the rather extreme form of relief sought; namely, an order requiring Mr. Harris to present himself for cross-examination on his Affidavit of Documents or at least deliver a further and better Affidavit of Documents.

17 The submission is that as far as the content of the rather prolix grounds is concerned, each of the impugned paragraphs is grounded in facts that are before the Court, that are relevant and that are connected to the relief sought. In the words of Mr. Klippenstein, what is set out in the Notice of Motion may well be harsh but they reflect a harsh reality. While Mr. Harris may not like what is being said about him in the Notice of Motion such a reaction does not warrant an order striking out the impugned paragraphs. The Notice of Motion while long and detailed does conform to the rules and ought to be allowed to stand.

Analysis

18 Rule 25.11 provides as follows.

> The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
> (b) is scandalous, frivolous or vexatious; or
> (c) is an abuse of the process of the court.

19 There is no issue over whether a Notice of Motion comes within the category of document that falls within the reach of this rule. The term "other document" has been interpreted broadly in the context of motions to strike the contents of a variety of court documents. See: British Colum-

bia (A.G.) v. Mount Currie Indian Band (1991), 85 D.L.R. (4th) 416 at 421 (B.C.C.A.); Welch v. Reeh (1982), 29 C.P.C. 228 at 230 (Ont. S.C. - 7 Master); Edwards v. Ontario (Minister of Finance), [1998] O.J. No. 4376 (Gen. Div.) and Lawson v. Bajpai (1989), 35 C.P.C. (2d) 304 at 309 (B.C.S.C.).

20 The next step is to consider the meaning of "scandalous", "frivolous" or "vexatious". There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety. See: ACIC (Canada) Inc. v. Merck & Co. (1995), 62 C.P.R. (3d) 362 (F.C.T.D.); Solid Waste Reclamation Inc. v. Philip Enterprises Inc. (1991), 49 C.P.C. (2d) 245 (Ont. Ct. (Gen. Div.)); Innovation and Development Partners/IDP Inc. v. Canada, [1993] F.C.J. No. 6-02 (F.C.T.D.) and Waverly (Village) v. Nova Scotia (Acting Minister of Municipal Affairs) (1993), 16 C.P.C. (3d) 64 (N.S.S.C.), aff'd (1994), 30 C.P.C. (3d) 205 (C.A.), leave to appeal to Supreme Court of Canada refused March 23, 1995.

21 From the decision in Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd. (1991), 3 O.R. (3d) 684 (Gen. Div.) it is also clear that headings used by a party in a document that are "unnecessarily conclusive" are equally vulnerable to attack based on improper content.

22 The contents of the grounds section of the Notice of Motion is also criticized as constituting an abuse of process. The concept of abuse of process is best understood by considering its purpose. It is designed to protect the public interest in the integrity and fairness of the judicial system. It does so by preventing the use of judicial proceedings for purposes that the law considers improper. These improper functions include harassment and oppression of other parties by multifarious proceedings that are brought for purposes other than the assertion or defence of a litigant's legitimate rights. See: Foy v. Foy (No. 2), (1979), 102 D.L.R. (3d) 342.

23 The importance of a factual base for any allegation contained in a Court document is heightened when such allegations constitute personal attacks. In the case of Region Plaza Inc. v. Hamilton-Wentworth (Regional-Municipality) (1990), 12 O.R. (3d) 750 (H.C.J.) certain of the defendants moved to strike out paragraphs of the Statement of Claim. In granting the relief sought the motions judge dealt with the impropriety of pleading conclusions baldly and without any supporting facts. At page 757 Justice Rosenberg said "if the plaintiff does not at the outset have knowledge of facts that give rise to the conclusions of malice, breach of duty, conspiracy to intentionally injure, etc., then it is inappropriate to make these allegations in the statement of claim." In my view the same can be said about any Court document.

24 There is no dispute between the parties as to the applicable principles established by the rules and the corresponding jurisprudence. There also can be no doubt as to the purpose behind these principles. Within the confines of the Rules of Civil Procedure, construed in such a way as to secure the just, most expeditious and least expensive determination of the proceeding on its merits, the litigation process should proceed in such a way as to ensure that all parties are treated fairly and equally. The point of departure is that Ms. Cronk says that the impugned paragraphs

violate the rules and constitute an unfair attack on her client. Accordingly, they have no place in the Notice of Motion and should be struck. Mr. Klippenstein maintains that they constitute a legitimate attempt to set out the plaintiffs' position and are validly part of the Notice of Motion.

25 In my view all of the impugned paragraphs ought to be struck. As the reasoning behind my decision to strike each of the challenged portions may affect the argument of the main motion, I will address each paragraph set out in Schedule "A" to the Notice of Motion individually, albeit briefly.

Re Paragraph 2:

26 The words "deliberately avoids disclosing the status of documents that were formerly in the Premier's Office" are objectionable. They contain inflammatory and unsupported attacks on the integrity of Mr. Harris and as such are scandalous. Mr. Klippenstein argues that there are facts before the Court that support this assertion. I disagree. What the plaintiffs have done here is they have examined Mr. Harris's Affidavit of Documents, interpreted it and then used that interpretation as evidence. The distinction is between stating what the facts are on the one hand and putting in evidence and argument as to inferences on the other hand. The former is permissible and the latter is not. The words quoted will be struck.

Re Paragraph 3:

27 The words "manipulated the form and content of his Affidavit of Documents and" and the words "using four concealment techniques" are equally objectionable and will be struck for the same reasons as those in paragraph 2.

28 Subparagraphs (a) to (c) inclusive, are problematic in two respects. First, through the language used they implicitly convey the same misconduct as that alleged more directly in the words I have determined should be struck in paragraph 2 and in the opening words of paragraph 3. Secondly, they contain pure argument. Mr. Klippenstein submits that there is nothing wrong with a party making its case in the Notice of Motion, such an argument is ill-conceived. The Notice of Motion is to contain the grounds to be argued. I take this to mean the foundation of the relief sought, not an argument. While the rule does not say "without argument" that, to me, is not the point. If it had been the intention of the drafters of the rules to permit argument in the Notice of Motion, such would have been clear in the wording. I note that in rule 37.10 even factums delivered in support of motions are to contain a "concise statement, without argument, of the facts and law relied upon by the party". Against that background I cannot imagine that the drafters of the rules intended that the grounds section of a Notice of Motion would contain argument. For both of these reasons subparagraphs 3(a), (b) and (c) are struck.

Re Paragraph 4

29 The words "let alone to the great degree of departure characterizing this Affidavit. It is submitted that the Court should query as to why this deviation exists, to this extent, in this case" are conclusory and argumentative. They therefore should be struck as being scandalous.

Re Paragraph 6

30 This paragraph contains the same flaws as appear in subparagraphs 3(a), (b) and (c). In addition to containing the clear innuendo of deliberate interference with the process of the Court, the paragraph, in its totality, is pure argument. It makes conclusions as to procedural requirements that are within the jurisdiction of the Court. This paragraph is struck.

Re Paragraph 7

31 This paragraph contains nothing but argument and is conclusory. Further, it contains factual assertions not supported by the record before me. The paragraph is struck.

Re the Heading between Paragraphs 11 and 12

32 The heading which reads "Deliberateness of Documentary Disclosure Evasions by the Defendant Harris" is clearly inserted for colour. It is also objectionable as being evidence unsupported by the record and protected from any challenge other than by way of the relief sought in this motion. It is struck.

Re Paragraph 12

33 This entire paragraph is inflammatory. It speaks of "evasions and deliberate gaps" as though the Court had already determined such. Not only is this not the case but the so called "facts" that Mr. Klippenstein points to as being supportive of such assertions are not facts at all but are conclusions drawn by the plaintiffs themselves based on their perception of the situation. While the plaintiffs may have strongly held beliefs that Mr. Harris has been evasive and has deliberately held back documents, such assertions have no place in the grounds section of a Notice of Motion, a location that protects them from cross-examination. These words are struck.

Re Paragraph 14

34 This paragraph is virtually the same as paragraph 12. It is equally inflammatory and will be struck for the same reasons.

Re the Heading between Paragraphs 14 and 15 that reads "Apparently Inaccurate Statements by the Defendant Harris Regarding Documents".

35 This heading contains the same defect as the other impugned heading and will be struck for the same reason.

Re Paragraph 15

36 This is a highly inflammatory factual allegation. The facts alleged are, at least to some extent, taken out of context. Even if this were not the case, they have no place in a Notice of Motion where they are protected from being tested. The entire paragraph is scandalous and will be struck.

Re Paragraph 16

37 The first two sentences which read "The continued evasion of disclosure requirements by the defendant Harris about important documents relevant to this case amounts to bad faith and abuse of the legal and judicial process. It would represent such an abuse from any defendant" is, again, pure argument and will be struck for the reasons set out earlier.

Re Paragraph 18

38 The words "in hampering or preventing the disclosure of the truth in this litigation" again, contain conclusions and then argument on those conclusions. They are offensive and improper and will be struck.

Re Paragraph 19

39 The words "As a result of the apparently deliberate nature of the important omissions in the Affidavit of Documents of the Defendant Harris and the apparently inaccurate statements made by the Defendant Harris in the past pertaining to documentary evidence" are objectionable for the same reasons as those contained in paragraph 19.

Re Paragraph 23 (b)

40 The serious problem that emerges from the allegation that "that the Defendant Harris is and has been acting in calculated breach of the Rules on the specific issue raised by the anonymous source" is obvious. It is inflammatory and based on conclusions of the plaintiffs disguised as facts. In addition, according to the submissions of Mr. Klippenstein in the course of the refusals motion, the entire issue surrounding the confidential source is irrelevant. If that is the case, then it should be struck on that basis. If it is relevant, it should be open to challenge by Mr. Harris and the other defendants, something with which the plaintiffs continue to take issue. For all of these reasons the paragraph is objectionable and is struck.

Re Paragraph 24

41 The reference to the confidential source is objectionable for the reasons given. The rest of the paragraph is argumentative and conclusory. It is struck.

Re Paragraph 25

42 This paragraph is objectionable for the same reasons as paragraph 24 and is therefore struck.

Re Paragraph 27

43 In this paragraph the Court is asked to draw an inference; moreover, it is asked to draw an inference based on unproven and untested facts. It is argumentative and improper in its entirety. It is struck.

Re Paragraph 28

44 This paragraph is problematic for the same reasons as paragraph 27 and will be struck for the same reasons.

Re Paragraph 30

45 The words "The Defendant Harris's failure to disclose any relevant documents that were formerly in the Premier's Office, or to state that there were never any such documents, constitutes concealment of the status of important potential evidence" are offensive again, for the same reasons as set out with respect to paragraph 27 and will be struck.

Re Paragraph 31

46 The allegations contained in this paragraph are inflammatory and argumentative. They are based on the conclusion of the plaintiffs, not on proven fact. They are struck.

47 I will add a general comment about the impugned paragraphs. It is clear that the Notice of Motion was not drafted in the format typically used to advance motions for relief arising out of a concern over the sufficiency of documentary disclosure. Mr. Klippenstein says that the reason he prepared the grounds section in the way he did was to be helpful; so that the responding party and the Court would clearly understand the nature of the concern, the factual context of this concern and the connection between these facts and the relief sought. With respect, I do not accept this submission. What is see is a highly irregular, unsubstantiated, inflammatory Notice of Motion that makes serious allegations against Mr. Harris in a manner that is protected from cross-examination, delivered with a relatively uninformative Affidavit and then put into the public arena. This conduct has to be considered together with the observation that the same relief could be sought and the appropriate arguments ultimately made without including any of the impugned paragraphs. I can only conclude that the Notice of Motion was worded as it was for reasons other

than to advance the plaintiffs' concern over documentary production. It was intended to embarrass Mr. Harris. This constitutes an abuse. Accordingly, in addition to the reasons for striking the paragraphs as detailed above, I would strike them as being abusive.

48 In a previous decision in this action, I expressed the concern that efforts were being made to have this case tried in the press rather than in the courtroom. I regret to say that in my view the way in which the Notice of Motion was drafted serves to fuel this concern. It is most unfortunate that unsubstantiated attacks on the integrity of Mr. Harris have been made in this manner. It is also distressing that plaintiffs' counsel, when asked about why the Notice of Motion was prepared in this fashion attempted to justify his actions by saying that they were designed to assist the defendants. This clearly cannot be the case. Conduct such as this interferes with the business of the Court and tarnishes the image of the administration of justice. Again, I would urge the parties to proceed with this very serious action in a manner that conforms with the rules and in a manner in which the rights of all parties are respected.

Conclusion

49 The motion is allowed. The impugned paragraphs are struck. I note that this result does not in any way interfere with the rights of the plaintiffs to make full proper argument in support of the main motion. In fact, the legitimate portions of the grounds section of the Notice of Motion that remain intact following this order will be quite sufficient for the purposes of proceeding with the main motion.

50 Mr. Harris is entitled to his costs. If counsel are unable to come to an agreement concerning costs, they may make arrangements to make submissions in the course of a conference call arranged through my secretary.

EPSTEIN J.

TAB 4

CANADIAN
BANKRUPTCY
REPORTS

NORCEN ENERGY RESOURCES LIMITED and PRAIRIE OIL ROYALTIES COMPANY LTD. v. OAKWOOD PETROLEUMS LTD.

[Indexed as: **Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.**]

Alberta Queen's Bench,
Forsyth J.

Judgment – November 17, 1988.

Corporations – Arrangements and compromise – Court entitled under s. 11 of Companies' Creditors Arrangement Act to stay proceedings by non-creditors – Interference with contractual rights of non-creditors essential to operation of Act in certain cases – Provision for such stays constitutionally valid under s. 91(21) of Constitution Act as concerning insolvency – Stay to be short – Affected parties entitled to make submissions when company seeking court approval of plan of arrangement.

The respondent was the operator of certain oil and gas properties in which the applicant had working interests. Their relationship was governed by the 1981 Canadian Association of Petroleum Landmen Operating Agreement (the "CAPL Agreement"). That agreement provided for the immediate replacement of the operator if it became bankrupt or insolvent. The respondent encountered financial difficulties and successfully sought the protection of the Companies' Creditors Arrangement Act ("C.C.A.A."). Despite these difficulties, however, the respondent did not owe moneys to its partners under the CAPL Agreement and the applicant was not a creditor. Under s. 11 of the Act, the court ordered a stay of any proceedings taken or that might be taken against the respondent. The applicant applied to vary that order to allow it to replace the respondent as operator arguing that: the CAPL Agreement provided for the automatic removal of the respondent and therefore no "proceedings" were necessary as the respondent had admitted that it was insolvent; a stay could not be made against the applicant under s. 11 of the Act as the applicant was not a creditor; and if s. 11 purported to give the court the authority to interfere with contractual relations between a company seeking protection under the Act and non-creditor third parties, it was unconstitutional because it infringed on the provincial jurisdiction to legislate in the area of property and civil rights under s. 92(13) of the Constitution Act.

Held – Application dismissed.

When the constitutionality of legislation is impugned the court must first deal with the statutory construction issue to determine the meaning and scope of the legislation, and then deal with the constitutional issue.

Insolvency under the CAPL Agreement should be given its normal meaning and should not be construed as meaning "commercial insolvency" such that the respondent only had to establish an ability to meet day-to-day expenses and to pay its joint operators. As the C.C.A.A. only applies to debtor companies, which the Act defines as those being bankrupt or insolvent, and as the respondent's affidavit supporting its application for the Act's protection admitted the respondent's insolvency, it was insolvent. However, cl. 206(a) of the CAPL Agreement provides that a joint-operator "shall" have the right to become operator and contemplates that at some point following insolvency another party may become the operator if appropriate steps are taken. Hence, it could not be said that the CAPL Agreement provides for an operator's automatic replacement upon insolvency.

Under s. 11 of the C.C.A.A., the court has the jurisdiction to stay proceedings which may be brought by non-creditors to enforce contractual rights against a company which has sought the protection of the Act. If this were not the case, the Act could not protect companies whose attempts to restructure could be defeated by non-creditors simply by the companies' recourse to the Act. Continuance of an insolvent company involves more than a consideration of creditor claims.

Finally, the C.C.A.A. itself is valid federal legislation passed under Parliament's jurisdiction over bankruptcy and insolvency under s. 91(21) of the Constitution Act. As an Act promoting the continuance of insolvent companies is constitutionally valid as insolvency legislation, a stay affecting the contractual rights of non-creditors in pursuit of that end is also valid. However, such a stay should be effective only for a short time and affected parties are entitled to make submissions when the debtor company seeks court approval of its plan of arrangement.

Cases considered

Companies' Creditors Arrangement Act, Re; A.G. Can. v. A.G. Que., [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 – referred to.

Duplain v. Cameron, [1961] S.C.R. 693, 36 W.W.R. 490, 30 D.L.R. (2d) 348 [Sask.] – referred to.

Feifer and Frame Mfg. Corp., Re, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) – applied.

Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd., 32 Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) – considered.

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.] – referred to.

R. v. Thomas Fuller Const. Co. (1958) Ltd., [1980] 1 S.C.R. 695, 12 C.P.C. 248, 106 D.L.R. (3d) 193, 30 N.R. 249 (sub nom. *Foundation Co. of Can. v. R.*) [Fed.] – referred to.

Tri-Star Resources Ltd. v. J.C. Int. Petroleum Ltd., 48 Alta. L.R. (2d) 355, [1987] 2 W.W.R. 141 (Q.B.) – considered.

Statutes considered

Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25
s. 11

Constitution Act, 1867
s. 91(21)
s. 92(13)

Authorities considered

Driedger, Construction of Statutes, 2nd ed. (1983), p. 74.
Hogg, Constitutional Law of Canada, 2nd ed. (1985), pp. 334-37.

Words and phrases considered

insolvency

Canadian Abridgment (2d) Classification

Constitutional Law
XIII. 21.
Corporations
XVIII. 2.
XVIII. 8.
XVIII. 6. b. 2.

APPLICATION to vary order staying proceedings against respondent pursuant to s. 11 of Companies' Creditors Arrangement Act.

J.J. Marshall and *J.A. Legge*, for Norcen Energy Resources Ltd. and Prairie Oil Royalties Co.

H.L. Kushner, for Attorney General of Alberta.

E.D. Tavender, Q.C., D. Lloyd and *R. Wigham*, for Oakwood Petroleums Ltd.

K.N. Lambrecht, for Attorney General of Canada.

A.L. Friend, for United Energy Inc.

B.D. Newton and *B. Tait*, for Bank of Montreal.

B. O'Leary, for Royal Bank of Canada.

J.L. Ircandia, for HongKong Bank of Canada and Bank of America, Canada.

(Calgary No. 8801-14453)

November 17, 1988. FORSYTH J.:–

I. THE FACTS

On 7th and 8th November 1988 I heard an application by Norcen Energy Resources Limited ("Norcen") regarding an order that I made on 22nd September 1988, under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 ("C.C.A.A."). It is necessary that I set out the background and the terms of that order in some detail.

The order of 22nd September 1988 was granted declaring that Oakwood Petroleums Ltd. ("Oakwood") is a company to which the C.C.A.A. applies. As might be expected, Oakwood asked that a term of the order be

a provision that stays proceedings by parties against it until it has had time to formulate a plan of compromise under the C.C.A.A. The exact term at issue in the order is:

> 4. AND THIS COURT FURTHER ORDERS that save and except for the matters referred to in paragraph 11 herein:
>
> (a) all proceedings taken or that might be taken by any of Oakwood's creditors under the *Bankruptcy Act*, R.S.C. 1970, c. B-3 and the *Winding-Up Act*, R.S.C. 1970, c. W-10, or either of them shall be stayed until further Order of this Court,
>
> (b) that all further proceedings in any action, suit or proceeding against Oakwood, its assets, property, and undertaking shall be restrained until further Order of this Court,
>
> (c) that no proceedings shall be proceeded with or commenced against Oakwood, its assets, property and undertaking except with leave of this Court with notice to Oakwood and subject to such terms as this Court may impose, and without limitation to any of the foregoing,
>
> i) all persons are enjoined and restrained from realizing upon or otherwise dealing with any security held by that person on the property, assets and undertaking of Oakwood until further Order of this Court, and
>
> ii) *all persons, having rights under the terms of any operating agreements with Oakwood are enjoined and restrained from taking proceedings to remove Oakwood as operator of such petroleum and natural gas properties and facilities, notwithstanding any provision contained in the said Agreements to the contrary, until further Order of this Court.* [emphasis added]

Paragraph 11, which is referred to in para. 4, is irrelevant with respect to this application. It should be noted that Norcen was not present or represented at the C.C.A.A. application by Oakwood.

The crux of the present dispute before me focuses on cl. 4(c)(ii) of the previous passage. Norcen is involved in 20 oil and gas producing properties in the Hays area of Alberta in which Oakwood also has a working interest and is the operator. The terms under which Oakwood performs as operator are contained in the standard Canadian Association of Petroleum Landmen Operating Agreement ("CAPL Agreement"). Some of the properties are covered by agreements under the 1974 CAPL Agreement form while others are dealt with under the 1981 form of the CAPL Agreement. For the purposes of this application, nothing turns on that distinction.

Clause 202 of both forms of the CAPL Agreement deals with the replacement of the operator in certain situations. The two versions are substantially similar and it will suffice to set out a portion of the 1981 wording of cl. 202:

202 REPLACEMENT OF OPERATOR –

(a) The Operator shall be replaced immediately and another Operator appointed pursuant to Clause 206, in any one of the following circumstances:

(i) If the Operator becomes *bankrupt or insolvent or commits or suffers any act of bankruptcy or insolvency,* or makes any assignment for the benefit of creditors, or causes any judgement to be registered against its participating interest.

(ii) If the Operator assigns or purports or attempts to assign its general powers and responsibilities of supervision and management as Operator hereunder. [emphasis added]

Norcen's application in the present matter is an attempt to enforce cl. 202 of the CAPL Agreement and have itself appointed as operator of the 20 wells in the Hays area. A notice of motion dated 4th October 1988 was filed by Norcen, in which the following relief was sought:

(a) varying subparagraph 4(c)(ii) of the Order granted and entered in these proceedings the 22nd day of September, 1988 in order to permit the removal of Oakwood Petroleums Ltd. as operator of certain oil and gas properties as described in the Affidavit of Wayne Newhouse, filed herein;

(b) granting the Applicants leave to file an Originating Notice of Motion in the form attached as Exhibit "D" to the Affidavit of Wayne Newhouse, filed herein;

(c) abridging the time for service of the said Originating Notice of Motion and granting the Applicants leave to proceed with the applications set out therein before the Honourable Mr. Justice G.R. Forsyth immediately after the within applications have been heard and determined; and

(d) granting the Applicants costs of the within application.

The basic effect is that leave to take appropriate steps to remove Oakwood as operator is sought and the originating notice of motion referred to above is designed to secure a declaratory order that Oakwood is not entitled to remain as operator.

Oakwood is not in default on any payments due to Norcen under the operating agreement as a result of carrying on operations for approximately two years under a mixed trust fund account, nor is Oakwood indebted to its trade creditors with respect to its operatorships. I would note that there is an ongoing action between the two parties regarding Norcen's entitlement to the benefits of a settlement wherein Oakwood succeeded in arriving at a compromise of some of its debts with its trade creditors. However, the act of default relied on by Norcen for the purpose of this application is Oakwood's alleged insolvency resulting in the bringing into play of cl. 202(a)(i) of the CAPL Agreement.

II. THE ARGUMENTS

The starting point of Norcen's argument is that it is urged that the mere fact that Oakwood has been found to be a company to which the C.C.A.A. applies means that it is insolvent within the meaning of the CAPL Agreement. As a result, it is argued that cl. 202 is triggered and that Oakwood either has automatically been removed as operator of the Hays properties, or in the alternative, it is now liable to be removed.

From that premise, Norcen argues that, firstly, if removal has already occurred, then a "proceeding" is not required to remove Oakwood as operator and, consequently, it merely seeks declaratory relief to that effect. If the removal has not occurred automatically, Norcen further submits that the current stay in place is not of a type that falls within the ambit of the provisions of s. 11 of the C.C.A.A. Accordingly, the argument follows that I did not have the jurisdiction to include cl. 4(c)(ii) in my order of 22nd September 1988. In the further alternative, it is argued that if the C.C.A.A. purports to confer on me the jurisdiction to stay Norcen's attempts to remove Oakwood as operator, then s. 11 is unconstitutional in a division of powers sense as a federal intrusion into the provincial legislative field of property and civil rights under s. 92(13) of the Constitution Act, 1867. Of course, the arguments and their ramifications were flushed out in much greater detail than this, as will become apparent in my resolution of the issues, but I believe that I have fairly set out their basic propositions.

In opposition to Norcen's application Oakwood is supported by certain of its lenders and creditors that would be involved in any proposed reorganization plan under the C.C.A.A. Submissions were made by Oakwood, the Bank of Montreal and the Royal Bank of Canada and many of Oakwood's other lenders went on the record as opposing Norcen's application. Varied attacks on the merits of the application were made.

Oakwood's submissions, as well as those of the lenders supporting its position, focused on an argument suggesting that the purpose of the C.C.A.A. is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations, including those involving non-creditor third parties. It is argued that the federal insolvency legislative power under s. 91(21) of the Constitution Act, 1867, includes the power to interfere with contractual relations and consequently, it is submitted, no constitutional issue arises.

Supporting lenders also focused on the meaning of insolvency under the CAPL Agreement, arguing that Oakwood is commercially solvent with respect to day-to-day matters and that it is only commercial insolvency which is contemplated by the agreement.

Finally, helpful submissions were made by both the Attorney General of Canada and the Attorney General of Alberta. These submissions were of assistance in delineating the constitutional issue before the court. The provincial position supported a narrow reading of s. 11 of the C.C.A.A. and, as a result, the Attorney General of Alberta supported Norcen's interpretation while federal submissions were supportive of Oakwood's construction of s. 11.

III. THE ISSUES

It is necessary that I begin by dealing with preliminary issues under the CAPL Agreement to determine whether the circumstances surrounding this application are such that cl. 202 is applicable. In effect I must deal with the question of whether Oakwood is insolvent in the context of this particular application. If I arrive at the conclusion that Oakwood is insolvent, I must then consider the parties' statutory construction and constitutional arguments.

In that regard, this application raises a most interesting problem that is analogous to the traditional "chicken or the egg" scenario. It must be decided whether one should approach the constitutional issue or the statutory construction issue first. In my opinion, the constitutional issue cannot be approached in a vacuum. It can be helpful to use the constitutional issue as an aid to statutory construction in borderline cases, but it must first be decided whether we are dealing with such a case. If the meaning of s. 11 of the C.C.A.A. can be determined without resort to constitutional aids to construction, that meaning must then be scrutinized for its constitutional validity. Embarking on a constitutional inquiry too early in the analysis clouds the issues and detracts from the proper construction of the statute.

Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or in the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on such notice to any other person, or without notice as it may see fit, make an order staying until such time as the court may prescribe or until further order all proceedings taken or that might be taken in respect of such company under the *Bankruptcy Act* and the *Winding-up Act* or either of them,

> and the court may restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit, and the court may also make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

I accordingly must embark on a two-step analysis in considering the section. The first step involves a rigorous construction of s. 11. If the section has a narrow meaning as contended by Norcen, it follows that I did not have the jurisdiction to include cl. 4(c)(ii) in my order of 22nd September 1988 because s. 11 of the C.C.A.A. would then entitle me only to interfere with debtor and creditor relationships in the terms of my stay order. Norcen, as a non-creditor, would then be free to take whatever steps it feels are necessary to have Oakwood removed as operator if Oakwood is insolvent within the terms of the CAPL Agreement. Of course, it is possible that equitable relief of some sort might be available to Oakwood in such circumstances but that issue was not argued directly before me in this application. If the section, properly construed, is to be given a wider meaning, then Norcen would be stayed in its attempts to have Oakwood removed as operator as a result of my order of 22nd September 1988. This interpretation would involve my finding that s. 11 of the C.C.A.A. is broad enough in its terms to affect the contractual rights of non-creditors. In that case, it would then be necessary to carefully consider the constitutional validity of s. 11 of the C.C.A.A. in that it would purport to affect the contractual rights of parties that are not creditors of Oakwood. That analysis constitutes the second step in the inquiry.

Only if I cannot arrive at a clear meaning for s. 11 will the presumption of constitutionality enter into the picture. If that is the case, I may then turn to the so-called "presumption of constitutionality" to assist me in my interpretive task: see *Duplain v. Cameron*, [1961] S.C.R. 693 at 709, 36 W.W.R. 490, 30 D.L.R. (2d) 348 [Sask.]. I hesitate, however, to rely on that assistance too early in my interpretation of s. 11 lest it taint the proper meaning of the words of the section on their face.

With that approach in mind, I now turn to consider the issues before me.

IV. RESOLUTION OF THE ISSUES

A. *Preliminary issues under the CAPL agreement*

I begin with the broad issue of whether a default has occurred under the terms of the CAPL Agreement which might entitle Norcen to relief.

In that regard, the first issue is whether Oakwood is "insolvent" within the meaning of the CAPL Agreement. I am of the opinion that it is. In *Tri-Star Resources Ltd. v. J.C. Int. Petroleum Ltd.*, 48 Alta. L.R. (2d) 355, [1987] 2 W.W.R. 141 (Q.B.), Chief Justice Moore held at p. 146:

> In my view there is no issue to be tried on the question of "insolvency". The company, by Mr. Cole's own admission as stated in his affidavit of 22nd July, was unable to meet its obligations and was insolvent. Black's Law Dictionary defines "insolvency" as an "inability to pay one's debts". Surely when the president of the company under oath states the company is unable to pay its debts there can be no further argument on the question.

In the present case, the affidavit of Douglas Nolan Blades, executive vice-president of Oakwood, dated 21st September 1988, contains numerous admissions that Oakwood is unable to pay its debts. In addition, the C.C.A.A. applies only to a "debtor company" and that term as defined in the Act amounts essentially to insolvency. It reads in part as follows:

> "debtor company" means any company that is bankrupt or insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or is deemed insolvent within the meaning of the *Winding-up Act* . . .

It seems difficult to me to argue on one date that you are insolvent and that you deserve the protection of the C.C.A.A. for one purpose yet argue on another day, for another purpose, that you are not insolvent within the meaning of the CAPL agreement.

The Royal Bank in its submissions argues that Oakwood is commercially solvent even though it may be legally insolvent and it further asserts that the CAPL Agreement contemplates commercial solvency in cl. 202. In my opinion, the CAPL Agreement requires that insolvency be given its normal meaning. It cannot be interpreted as relating only to the meeting of day-to-day expenses and paying the joint operators as contended by the Royal Bank. Under cl. 306 of the CAPL Agreement, one of the duties of the operator is to pay all trade debts. Under cl. 605 there is an obligation placed on the operator to distribute income from the well to parties entitled to it. Both requirements are functions and duties of the operator. Under cl. 202(*b*)(ii) the operator is liable to be removed for default on any of its duties or obligations under the CAPL Agreement. The particular situations cited and relied upon by the Royal Bank as indicia of "commercial insolvency" are specifically dealt with under these other provisions in the CAPL Agreement. The state of insolvency stands alone as a reason for removal. For that reason, I am accordingly of the

view that "insolvency" in the context of the CAPL Agreement should be given its normal meaning and not the more restricted meaning urged by counsel for the Royal Bank. It follows on the facts of this case that by the bringing of its C.C.A.A. application, Oakwood has declared itself insolvent and thus cl. 202 of its operating agreement comes into play.

This brings me to the second preliminary issue. That issue is whether insolvency creates an automatic ejection of Oakwood from its operatorship or whether some further action is required on Norcen's part.

Norcen argues that the terms of the CAPL Agreement provide a formula for the automatic ejection of Oakwood and that they select Norcen as the operator by default and, in that regard, it relies upon cl. 206. The clause is a lengthy one but, since the issue is critical to the disposition of this application, it is essential that I set it out in full:

> 206. APPOINTMENT OF NEW OPERATOR –
>
> (a) If an Operator resigns or is to be replaced, an Operator shall be appointed by the affirmative vote of two (2) or more parties representing a majority of the participating interests, provided if there are only two (2) Joint-Operators to this Operating Procedure and the Operator that resigned or is to be replaced is one (1) of the Joint-Operators, then, notwithstanding the foregoing, *the other Joint-Operator shall have the right to become the Operator.*
>
> (b) No party shall be appointed Operator hereunder unless it has given its written consent to the appointment; provided that if the parties fail to appoint a replacing Operator or if any appointed Operator fails to carry out its duties hereunder, the party having the greatest participating interest shall act as Operator pro tem, with the right, should a similar situation re-occur after a new Operator has been appointed, to require the party having the next greatest participating interest to act as Operator pro tem and so on as occasion demands.
>
> (c) No provision of this Article shall be construed to re-appoint as next-succeeding Operator an Operator who has been replaced under Clause 202, except with the unanimous consent of the parties.
>
> (d) Except as provided in Subclause (a) of Clause 202 (*in which case the Operator shall be replaced immediately*), every replacement of Operator shall take effect at eight (8:00) o'clock a.m. on the first (1st) day of the calendar month following the expiration of any period of notice effecting a change of Operator, notwithstanding anything hereinbefore contained. [emphasis added]

Norcen relies on the italicized portion of cl. 206(d) in its argument that Oakwood has already been removed as operator. In my opinion, however, that portion of the clause simply provides for a situation where a party is not forced to wait a period of time, which could be up to a month less a day, for replacement in circumstances of insolvency.

I have chosen to emphasize the words in italics. In particular, I note that cl. 206(a) reads in part "shall have the right to become the Operator". It appears to be worded in the future tense suggesting that at some point following insolvency another party may become the operator if appropriate measures are taken. There is some positive election required on Norcen's part indicating that it wants to exercise its right to become the operator.

Oakwood has functioned as operator for approximately two years since its difficult financial situation began. It has performed its duties and responsibilities over that entire period of time. It seems to me to be difficult to now assert that Norcen has been the operator for the last two years. It may have had a right to become the operator, but until that right is exercised, Oakwood remains in control.

In summary, Oakwood is an insolvent operator as that term is used in the CAPL Agreement. The present set of circumstances is one in which cl. 202 is applicable.

The final preliminary point that I must deal with is the argument made by Norcen that their action should be permitted because insolvency under the CAPL Agreement is not curable and consequently an action to remove Oakwood as operator under the Hays agreements is inevitable in any event. In the alternative, it is suggested that if insolvency is curable, a current stay may be permanently affecting Norcen's future right to become operator in that if Oakwood becomes solvent, Norcen's right to remove it as operator will have been defeated as a result of my order.

The point of whether or not insolvency is a curable state under the CAPL Agreement is not directly before me on the facts of this case at this time. I do recognize the possibility that Norcen's rights may be permanently affected by the current stay. However, the issue of curability is one that is better decided when a fact situation comes before the court in which insolvency has actually been cured. I emphasize that although I do not decide the issue here, I am cognizant of the potential for future prejudice to Norcen's rights and, accordingly, I must interpret the situation as something more than a mere suspension of its rights as contended by the Bank of Montreal.

With these conclusions regarding the effect of the relevant provisions of the CAPL Agreement in mind, I now consider the statutory construction and constitutional arguments raised by the parties.

B. *The proper construction of s. 11 of the Companies' Creditors Arrangement Act*

The wording of s. 11 is extraordinarily broad. It is quite capable of sustaining both meanings argued by the parties to this application. For example, the long title of the C.C.A.A. can be used to support either meaning. One can argue that "An Act to facilitate compromises and arrangements between companies and their creditors" suggests that the C.C.A.A. is only designed to affect creditors. One can equally argue that the use of the word "facilitates" means that the Act encompasses a broader scope that includes potentially affecting all parties that may threaten a compromise arrangement.

I note that the debtor and creditor theme is recurrent throughout the C.C.A.A. In fact the only place that the theme is conspicuously absent is in the wording of s. 11 itself. I do not, however, regard this absence of the C.C.A.A.'s general theme from s. 11 as conclusive in any way as to the types of relations that may be interfered with in a stay under the section. The conclusion that I do draw, however, is that at least the wording of s. 11 itself is capable of sustaining the broad meaning that is argued by Oakwood and its supporters.

Norcen argues that its rights are affected without it being given the same vote concerning a plan of compromise that is granted to creditors. Surely, however, third parties whose rights are affected by the compromise agreement are entitled to make submissions when the time comes for the debtor company to seek the approval of the court for its plan. In addition, it should be emphasized that the stay power under s. 11 is a discretionary one. There is much room in the terms of s. 11 to refuse a stay when third party rights will be seriously prejudiced by its terms.

In construing a statute, one must always keep in mind the objects that the piece of legislation is designed to achieve. This principle is emphasized in Driedger, Construction of Statutes, 2nd ed. (1983), at p. 74:

> The comprehension of legislation is, in a sense, the reverse of the drafting process. The reader begins with the words of the Act as a whole and from a reading of these words in their setting, deduces the intention of Parliament as a whole, the legislative scheme, and the object of the Act, and then makes construction of the particular enactment harmoniously with the words, framework and object of the Act.

The authorities are of some assistance in arriving at a determination of the purpose of the C.C.A.A. Illustrative are the words of Wachowich

J. in *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.*, 32 Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109 at 114, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.):

> 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.

Re Feifer and Frame Mfg. Corp., 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.), must also be considered because it involves a fact situation that can at least be analogized to the present one. The facts were that a lease of premises contained a clause permitting eviction on insolvency. The debtor tenant availed itself of the protections offered by the C.C.A.A. After the compromise proposed by the company was approved by the court, the landlord sought to rely on its eviction clause. As was illustrated during arguments on this case, that case is a difficult one from which to extract a ratio. The difficulty arises in part from the fact that four different judgments were rendered. The general holding was that the landlord was not permitted to rely on the eviction clause.

I must rely on an English translation of the decision of the Quebec Court of Appeal that was included in the briefs of several of the parties that made submissions. At p. 11 of the translation, St-Germain J., in his judgment, held:

> In effect, if, on the one hand, one must admit that recourse by a debtor to this law of arrangement constitutes in itself an act of bankruptcy, and if, on the other hand, a termination clause like that which is the subject of the present action permits a lessor to terminate his lease with a lessee, what good is it to the lessee to have recourse to this Act to make an arrangement with its non-secured creditors, if he must by that very act expose himself to the chance of his lease being terminated?

It seems to me that that line of thinking is particularly relevant in the case at bar. The affidavit of Douglas Nolan Blades, dated 4th November 1988, deposes that the effect of the removal of Oakwood as operator would likely be fatal to attempts to restructure the company. A temporary stay of proceedings must apply to working partners in addition to creditors if the C.C.A.A. is to be of any protection at all.

This particular application may relate to only 20 wells but the evidence is that Oakwood is the operator in approximately 800 wells when its entire undertaking is considered. It would be difficult to grant Norcen's application without granting similar orders in the future to other

holders of working interests of which Oakwood is the operator with the result being a marked reduction in the probability of success for Oakwood in its efforts to negotiate an acceptable plan of compromise with its lenders.

Attempts to distinguish the *Feifer* case were made on several grounds. The first is that there was a wartime ordinance in effect at the time of *Feifer* which made eviction clauses of the type considered in *Feifer* illegal. Clearly that fact materially affects the ratio of the case, but even if the passages regarding the scope of the C.C.A.A. are obiter, they are nevertheless supportive of a broad interpretation of s. 11. The second ground on which Norcen seeks to distinguish the case is on the basis that there are references in *Feifer* to the landlord as a creditor and in the present case Norcen is clearly not claiming in a capacity as a creditor. The difficulty, however, is that the purported eviction in *Feifer* took place after a binding compromise had been made. My reading of the decision is that the reference to the landlord as a "creditor" was perhaps merely a recognition of its former status. The fact is that both *Feifer* and the case at bar deal with situations under a federal statute where the company availing itself of the protections of the C.C.A.A. does not owe the party claiming contractual rights money at the time of the court hearing. It is irrelevant whether the claiming party is given the name "creditor" or some other label. The critical point is that the applicant is not owed money in either case.

Norcen also relies on the decision of Chief Justice Moore in *Tri-Star Resources Ltd. v. J.C. Int. Petroleum*, supra. While that case is very helpful on the issue of insolvency, it is readily distinguishable on the stay issue. In *Tri-Star*, the operator of certain oil and gas properties filed a proposal under the Bankruptcy Act, R.S.C. 1970, c. B-3. Another party having a working interest successfully brought an application to have the operator removed summarily notwithstanding the stay provision in s. 49 of the Bankruptcy Act. The *Tri-Star* case is clearly distinguishable because of the fact that it was concerned with a proposal under the Bankruptcy Act. The stay power under s. 49 refers only to a stay against claims provable in bankruptcy while the C.C.A.A. provision, as already noted, is worded in a much broader fashion.

For these reasons, I am drawn to the conclusion that s. 11 must be interpreted in the fashion suggested by Oakwood and its supporting creditors in order that the C.C.A.A. be permitted to accomplish its legislative purpose. The section grants the jurisdiction to a court to stay pro-

ceedings such as those contemplated here by Norcen. This type of action is a proceeding within the terms of s. 11.

C. *The constitutionality of a broad interpretation of s. 11*

Given that I am of the opinion that the proper statutory construction of s. 11 of the C.C.A.A. is a broad one, it becomes necessary to consider whether such an interpretation is constitutionally valid under the division of powers set out in ss. 91 and 92 of the Constitution Act, 1867.

Section 91(21) of the Constitution Act, 1867, grants to the Parliament of Canada legislative jurisdiction in the fields of "bankruptcy and insolvency" while s. 92(13) assigns exclusive legislative jurisdiction to the provinces in the fields of "property and civil rights". Clearly, we may be treading on marginal constitutional ground in the case at bar. If we are doing so, there is the possibility of reading the C.C.A.A. in a less offensive fashion by reading the statute down as argued by the province of Alberta and Norcen. I begin my analysis, however, on the footing that the proper statutory construction of s. 11 of the C.C.A.A. is a wide one.

Given that fact, it must be asked whether interference with contractual rights such as Norcen's is constitutionally valid. Although there is no argument made that the C.C.A.A. itself is constitutionally invalid, the basic starting point must be the decision in *Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que.*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75. It was held in that case that the Act was valid as relating to bankruptcy and insolvency rather than property and civil rights. At p. 664, Cannon J. held:

> Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation . . .

The C.C.A.A. is an Act designed to continue, rather than liquidate, companies. In upholding the C.C.A.A., the Supreme Court of Canada must be taken as having extended the meaning of the term "insolvency" to include dealing with insolvent companies outside of a liquidation setting. The critical part of the decision is that federal legislation pertaining to assisting in the continuing operation of companies is constitutionally

valid. In effect the Supreme Court of Canada has given the term "insolvency" a broad meaning in the constitutional sense by bringing within that term an Act designed to promote the continuation of an insolvent company.

Accordingly, if promoting the continuance of insolvent companies is constitutionally valid as insolvency legislation, it follows that a stay which happens to affect some non-creditors in pursuit of that end is valid. Surely a necessary part of promoting the continuance of a company is to give that company some time to stop and gather its faculties without interference from affected parties for a brief period of time. In my opinion, the distinction between creditors' contractual rights and the contractual rights of non-creditor third parties that Norcen asks me to draw is not a helpful one in these circumstances. Continuance of a company involves more than consideration of creditor claims. For that reason, I am of the opinion that s. 11 of the C.C.A.A. can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. I add, however, that in my judgment, such interference in the interest of fairness to all parties should be effective only for a relatively short period of time.

If I am wrong in my conclusion that a wide reading of the C.C.A.A. is permissible as a valid exercise of Parliament's powers in the field of insolvency law, the wide reading can also be supported on the basis of another constitutional argument. The "necessarily incidental" or "ancillary" constitutional doctrine can be used to arrive at the same conclusion: see Hogg, Constitutional Law of Canada, 2nd ed. (1985), pp. 334-37.

On either of the two tests cited by Professor Hogg for use of the ancillary doctrine, it seems that the constitutional validity of a wide reading of s. 11 of the C.C.A.A. can be upheld. Under the "rational, functional connection" test that was approved in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.], there is obviously a clear connection between permitting Oakwood to remain as operator for the time being and continuance of the insolvent company. Under the more restrictive "limited to what is truly *necessary* for the effective exercise of Parliament's legislative authority" test as set out in *R. v. Thomas Fuller Const. Co. (1958) Ltd.*, [1980] 1 S.C.R. 695 at 713, 12 C.P.C. 248, 106 D.L.R. (3d) 193, 30 N.R. 249 (sub nom. *Foundation Co. of Can. v. Can.*) [Fed.], a strong argument can be made that it is necessary to occasionally interfere with contractual rela-

tions in order to pursue the legislative objective of assisting companies in struggling through difficult times.

V. CONCLUSIONS

I emphasize my conclusions here. I have found that a default under cl. 202 of the CAPL Agreement has taken place and as a result Norcen would normally be entitled to pursue the remedies that it is entitled to under its operating agreement. A proper interpretation of s. 11 of the Companies' Creditors Arrangement Act, however, permits that a temporary stay be imposed restraining Norcen from proceeding. I have also concluded that a wide reading of the provisions of the C.C.A.A. is constitutionally valid.

I am mindful that my interpretation of s. 11 is that I still retain a discretion to not grant a stay in circumstances where it would be unfair to stop a party from pursuing its contractual rights. I am unable to grant such relief on these facts. The stay remains in force until only 30th November. During that short period of time, perhaps Oakwood can restructure itself. If it is successful in its restructuring efforts, Norcen still has its incurability argument as well as other CAPL Agreement provisions available to it should it wish to see Oakwood removed as operator. If it is unsuccessful, removal of Oakwood by Norcen may well result in any event. For the time being it is essential that the status quo be maintained in order to give effect to the purpose of the C.C.A.A. Accordingly, my order of 22nd September 1988 shall stand unamended to its present termination date of 30th November 1988, or until further order of this court.

Application dismissed.

Application dismissed.

TAB 5

Therefore, in my opinion the obligation did not arise until after bankruptcy and the Commission's penalty is not a provable claim in this bankruptcy.

47 Given my conclusion that the penalty imposed by the Securities Commission after the date of bankruptcy is not a claim provable in this bankruptcy, I do not have to go on to decide the next issue, that is, if it was a provable claim, whether it would survive any discharge from bankruptcy.

48 The application of the Securities Commission for a declaration that the Penalty is not a claim provable in Mr. Thow's bankruptcy is allowed.

Application granted.

[Indexed as: **Nortel Networks Corp., Re [ERISA Lift Stay Motion]**]

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: June 16, 2009

Judgment: August 18, 2009

Docket: 09-CL-7950

Alan Merskey for Nortel Networks Corp. et al

Lyndon Barnes, Adam Hirsch for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Leanne Williams for Flextronics Inc.

J. Pasquariello for Monitor, Ernst & Young Inc.

B. Wadsworth for CAW-Canada

Thomas McRae for Recently Severed Calgary Employees

A. McKinnon for Former Employees

Mary Arzoymanidis for Bell Canada

Alex MacFarlane for Unsecured Creditors' Committee

Gavin Finlayson for Noteholders
Tina Lie for Superintendent of Financial Services of Ontario
Steven Graff, Ian Aversa for Current and Former Employees

Civil practice and procedure — Disposition without trial — Stay or dismissal of action — Removal of stay — Action was commenced in United States which involved alleged breach by named defendants of their statutory duties under Employee Retirement Income Security Act, 1974 (ERISA) — ERISA litigation was at discovery stage, which entailed review and production of millions of pages of electronic documents and numerous depositions — Stay was contained in Amended and Restated Initial Order (initial order) — Applicants brought motion for order extending stay — Current and former employees of N Inc. who were participants in long-term investment plan sponsored by N Inc. (moving parties) brought motion for order lifting stay of proceedings — Motion by applicants granted — Motion by moving parties dismissed — D&O stay under initial order did cover D&O defendants in ERISA litigation and it was not appropriate to lift stay at this time — Effect of stay would be merely to postpone ERISA litigation — Allegations against named defendants were not restricted to defendants acting in their capacity as fiduciaries — In expanding scope of litigation to include broad allegations as against directors, moving parties had brought ERISA litigation within terms of D&O stay — Restructuring was at critical stage and energies and activities of board should be directed towards restructuring — To permit ERISA litigation to continue at that time would result in significant distraction and diversion of resources at time when that could be least afforded — Further postponement of claim for relatively short period of time would not be unduly prejudicial to moving parties.

Cases considered by *Morawetz J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185, [1992] O.J. No. 1946 (Ont. Gen. Div.) — referred to

Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc. (2008), 2008 CarswellOnt 1427, (sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.)* 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, (sub nom. *Slater Steel Inc. (Re))* 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.) — distinguished

SNV Group Ltd., Re (2001), 95 B.C.L.R. (3d) 116, 2001 BCSC 1644, 2001 CarswellBC 2662, [2001] B.C.J. No. 2497 (B.C. S.C.) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530, [1993] B.C.J. No. 42 (B.C. S.C.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
s. 11.5 [en. 1997, c. 12, s. 124] — considered
s. 11.5(1) [en. 1997, c. 12, s. 124] — considered
s. 11.5(2) [en. 1997, c. 12, s. 124] — referred to

Employee Retirement Income Security Act, 1974, 29 U.S.C.
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 21 — referred to

MOTION by applicants for order extending stay in action; MOTION by moving parties for order lifting stay of proceedings.

Morawetz J.:

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 – 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

Background

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same.

Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

> It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 – 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order,

and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

(a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;

(b) the bulk of documentary discovery issues have been worked out;

(c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and

(d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law

at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. $30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

Analysis

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

> 11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

> THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay

in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.).) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against Morneau would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

> In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extend that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

Motion by applicants granted; motion by moving parties dismissed.

TAB 6

Under the criminal system, everybody is presumed innocent and the accused has no burden to prove anything. Under the civil system of course, the rules are different and merely pleading a defence does not get very far in the civil courts. If there was a jurisdiction to provide the funding requested, obviously the Court would have to deal with those differences and try and balance the two systems, but as I have indicated, because I find there is no jurisdiction, I will not attempt to do that and I will not attempt to balance the equities that counsel have drawn to the Court's attention.

17 So accordingly for the reasons I have just given, the application of Mr. Lysyk is dismissed.

Application dismissed.

[Indexed as: **Boutiques San Francisco Inc., Re**]

Les Boutiques San Francisco Incorporées, Les Ailes de la Mode Incorporées and Les Éditions San Francisco Incorporées (Debtors) and Ritchter & Associés Inc. (Monitor) and L'Oréal Canada inc. and Make Up For Ever S.A. (Petitioners)

Quebec Superior Court

Gascon J.S.C.

Heard: January 29, 2004

Judgment: February 10, 2004

Docket: C.S. Montréal 500-11-022070-037

Me Serge Guérette, Me Stéphanie Lapierre for Debtors
Me Philippe Buist for Monitor
Me Nicolas Plourde for L'Oréal Canada inc., Make Up For Ever S.A.

Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings — Composed of three retail chains, B Group obtained protection of Companies' Creditors Arrangement Act — Initial order stayed proceedings against B Group — On day of initial order, two cosmetics suppliers of B group were owed sums of money for goods delivered to B Group within 30 days preceding date of initial order — Suppliers each filed motion for stay to be lifted and declared inapplicable to them or for deposit of proceeds of sale of goods in separate trust — Motions dismissed — CCAA is flexible tool seeking to allow debtor corporation to stay in business while attempting to solve financial difficulties and to restructure — Key element of achieving CCAA objectives is maintaining status quo for time necessary to obtain creditors' approval of arrangement — Stay of proceedings is basic component of maintenance of status quo — Suppliers' motions went directly against CCAA objectives and maintenance of status quo during restructuring and would

put suppliers in preferred position — Contemplated arrangement appeared reasonable and was supported by many creditors — Granting motions would provoke avalanche of similar motions by other creditors — No precedents existed in Quebec or elsewhere in Canada to support motions — Possible situations justifying lifting stay did not exist in case at bar and application of CCAA did not of itself constitute sufficiently serious and distinct prejudice to justify lifting stay — Even if art. 1605 C.C.Q. did apply, suppliers' contracts were not resiliated as B Group was not in default, either by suppliers in writing or by operation of law — Prejudice claimed by suppliers was not serious in overall picture of restructuring B Group — As B Group's core business included cosmetics and perfumes, suppliers were within focus of restructuring and would benefit from successful restructuring — B Group did not act in bad faith towards suppliers — Neither lift of stay nor deposit was warranted.

Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues — Composed of three retail chains, B Group obtained protection of Companies' Creditors Arrangement Act — Initial order stayed proceedings against B Group — On day of initial order, two cosmetics suppliers of B group were owed sums of money for goods delivered to B Group within 30 days preceding date of initial order — Suppliers each filed motion for stay to be lifted in respect of suppliers' claims — Supplier L inc. also demanded return of display units provided to B Group — Motions dismissed — Agreement between supplier L inc. and B Group provided that parties would equally share cost of creating, constructing and installing display units and that L inc. would remain owner of units — Agreement was not traditional lease but did have several characteristics usually found in contract of lease — Situation was quite analogous to use of leased property provided after initial order was made — Since B Group was still using displays to sell L inc. products, nothing justified different treatment than that provided by s. 11.3 of CCAA — If B Group intended to continue using display units, B Group had to abide by terms of obligation agreed to, including payment of $28,000 within 90 days of delivery of units as well as $28,000 allowance as "coop-advertising" for 2003-2004 period.

Faillite et insolvabilité — Proposition — Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Effet de l'ararrangement — Suspension des procédures — Groupe B, qui était composé de trois chaînes de magasins, a obtenu la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale a suspendu les procédures contre le Groupe B — En date de l'ordonnance initiale, le Groupe B devait de l'argent à deux de ses fournisseurs en cosmétiques pour des biens qu'ils lui avaient livrés dans les 30 jours précédant l'ordonnance initiale — Fournisseurs ont chacun présenté une requête afin que la suspension soit levée et déclarée inapplicable à eux ou afin que le produit de la vente des biens soit déposé dans un compte distinct — Requêtes rejetées — LACC est un outil flexible ayant pour but de permettre à une compagnie débitrice de demeurer en affaires pendant qu'elle tente de régler ses problèmes financiers et de se restructurer — Maintien du statu quo durant le temps nécessaire pour faire approuver l'arrangement par les créanciers constitue un élément clé de la réussite des objectifs de la LACC — Suspension est un élément fondamental du maintien du statu quo — En plus de les privilégier, les requêtes des fournisseurs allaient directement à l'encontre des objectifs de la LACC et du maintien du statu quo pendant la restructuration — Arrangement envisagé semblait raisonnable et était ap-

puyé par plusieurs créanciers — Accueil des requêtes provoquerait une avalanche de requêtes similaires par d'autres créanciers — Aucun précédent appuyant les requêtes n'existait au Québec ou ailleurs au Canada — Aucune des situations possibles justifiant la levée de la suspension n'étaient présentes en l'espèce, et l'application de la LACC ne constituait pas en soi un préjudice suffisamment grave et distinct justifiant de lever la suspension — Même si l'art. 1605 s'était appliqué, les contrats des fournisseurs n'étaient pas résiliés puisque le Groupe B n'était pas en défaut, que ce soit par écrit par les fournisseurs ou par l'opération de la loi — Préjudice allégué par les fournisseurs n'était pas grave dans le cadre de l'ensemble de la restructuration du Groupe B — Puisque le coeur des affaires du Groupe B incluait les cosmétiques et les parfums, les fournisseurs étaient visés par la restructuration et en profiteraient si elle réussissait — Groupe B n'a agi avec aucune mauvaise foi envers les fournisseurs — Rien ne justifiait la levée de la suspension ou un dépôt.

Faillite et insolvabilité — Proposition — Loi sur les arrangements avec les créanciers des compagnies — Questions diverses — Groupe B, qui était composé de trois chaînes de magasins, a obtenu la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale a suspendu les procédures contre le Groupe B — En date de l'ordonnance initiale, le Groupe B devait de l'argent à deux de ses fournisseurs en cosmétiques pour des biens qu'ils lui avaient livrés dans les 30 jours précédant l'ordonnance initiale — Fournisseurs ont chacun présenté une requête afin d'obtenir la levée de la suspension à l'égard de leur réclamation — Fournisseur L inc. a aussi demandé la remise des présentoirs fournis au Groupe B — Requêtes rejetées — Selon l'entente entre L inc. et le Groupe B, les parties devaient se partager également les coûts de la création, de la construction et de l'installation des présentoirs, et L inc. conserverait la propriété de ceux-ci — Entente ne constituait pas un bail traditionnel, mais comportait plusieurs des caractéristiques se trouvant généralement dans un contrat de location — Situation était très similaire à celle de l'usage d'un bien loué qui a été fourni après le prononcé de l'ordonnance initiale — Puisque le Groupe B utilisait toujours les présentoirs pour vendre des produits de L inc., rien ne justifiait un traitement différent de celui prévu par l'art. 11.3 LACC — Si le Groupe B voulait continuer à utiliser les présentoirs, il devait respecter les termes de l'obligation contractée, y compris faire le paiement de 28 000 $ dans les 90 jours de la livraison des présentoirs en plus du paiement de l'allocation de 28 000 $ à titre de « publicité à frais partagés » pour la période 2003-2004.

Cases considered by *Gascon J.S.C.*:

Agro Pacific Industries Ltd., Re (2000), 2000 BCSC 837, 2000 CarswellBC 1143, 76 B.C.L.R. (3d) 364, 5 B.L.R. (3d) 203, [2000] B.C.J. No. 1069 (B.C. S.C.) — considered

Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169, 1996 CarswellOnt 5053, 22 O.T.C. 247 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 622, 19 C.B.R. (4th) 1 (Alta. Q.B.) — considered

Century Industries Inc. v. Enterprises Union Électrique Ltée (1992), 1992 CarswellQue 1869 (Que. S.C.) — distinguished

Détaillants Shirmax Ltée/Shirmax Retail Ltd. c. 170974 Canada Inc. (1994), 28 C.B.R. (3d) 177, 1994 CarswellQue 18 (Que. S.C.) — considered

Henry Birks & Sons Ltd., Re (1993), 22 C.B.R. (3d) 235, 1993 CarswellQue 38 (Que. S.C.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394, [1990] B.C.J. No. 2384 (B.C. C.A.) — considered

International Wallcoverings Ltd., Re (1999), 1999 CarswellOnt 4933, 28 C.B.R. (4th) 48 (Ont. Gen. Div. [Commercial List]) — referred to

Meridian Development Inc. v. Toronto Dominion Bank (1984), [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576, 1984 CarswellAlta 259 (Alta. Q.B.) — referred to

Mine Jeffrey inc., Re (2003), 2003 CarswellQue 90, 35 C.C.P.B. 71, [2003] R.J.D.T. 23, 40 C.B.R. (4th) 95, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420, [2003] Q.J. No. 264 (Que. C.A.) — considered

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 1988 CarswellAlta 319 (Alta. Q.B.) — considered

Olympia & York Developments Ltd., Re (March 14, 1994), Doc. B125/92, [1994] O.J. No. 1335 (Ont. Gen. Div. [Commercial List]) — considered

Packman Packaging Supplies Inc., Re (1995), 42 C.B.R. (3d) 143, 1995 CarswellQue 84 (Que. S.C.) — referred to

PCI Chemicals Canada Inc., Re (2002), 2002 CarswellQue 831, [2002] R.J.Q. 1093 (Que. S.C.) — considered

People's Department Stores Ltd. (1992) Inc., Re (1994), 37 C.B.R. (3d) 28, [1995] R.J.Q. 224, 1994 CarswellQue 151 (Que. S.C.) — referred to

Philip Services Corp., Re (1999), 1999 CarswellOnt 4495, 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]) — referred to

Place Fleur de Lys c. Tag's Kiosque Inc. (1995), [1995] R.J.Q. 1659, 1995 CarswellQue 651 (Que. C.A.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193, 2 C.B.R. (3d) 291, 1990 CarswellBC 382 (B.C. S.C.) — referred to

Smith Brothers Contracting Ltd., Re (1998), 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264, 13 P.P.S.A.C. (2d) 316, [1998] B.C.J. No. 728 (B.C. S.C.) — referred to

St-Lawrence Chemical Inc. v. A.R.C. Resins Corp. (May 16, 1997), Doc. 505-11-001681-977 (Que. S.C.) — considered

Steinberg Inc. c. Colgate-Palmolive Canada Inc. (1992), 13 C.B.R. (3d) 139, 1992 CarswellQue 22 (Que. S.C.) — considered

Steinberg Inc. c. Gillette Canada Inc. (1992), [1992] R.J.Q. 1602 (Que. S.C.) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530, [1993] B.C.J. No. 42 (B.C. S.C.) — considered

Woodward's Ltd., Re (1993), 77 B.C.L.R. (2d) 332, 100 D.L.R. (4th) 133, 1993 CarswellBC 75 (B.C. S.C.) — considered

Woodward's Ltd., Re (1993), 23 B.C.A.C. 224, 39 W.A.C. 224, 105 D.L.R. (4th) 517, 83 B.C.L.R. (2d) 31, 22 C.B.R. (3d) 25, 1993 CarswellBC 564 (B.C. C.A.) — referred to

166606 Canada inc. c. Bashtanik (1996), 1996 CarswellQue 1797 (Que. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
s. 50.4 [en. 1992, c. 27, s. 19] — referred to
s. 81.1 [en. 1992, c. 27, s. 38(1)] — referred to
s. 81.1(4) [en. 1992, c. 27, s. 38(1)] — referred to
s. 81.1(8) [en. 1992, c. 27, s. 38(1)] — referred to
Code civil du Bas-Canada, S. Prov. C. 1865, c. 41
art. 1543 — considered
Code civil du Québec, L.Q. 1991, c. 64
art. 1597 — considered
art. 1605 — considered
art. 1741 — considered
art. 1851 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
s. 11 — considered
s. 11(3) — considered
s. 11(3)(a) — considered
s. 11(3)(b) — considered
s. 11(3)(c) — considered

MOTIONS by two suppliers for stay of proceedings against corporation protected by *Companies' Creditors Arrangement Act* to be lifted and declared inapplicable to suppliers or for deposit of proceeds of sale of unpaid goods in separate trust.

Gascon J.S.C.:

1) THE ISSUES

1 This judgment deals with the right of unpaid suppliers to repossess their goods still in the hands of a debtor company that availed itself of the protection of the *Companies' Creditors Arrangement Act*[1] (*CCAA*).

2 The facts giving rise to the dispute are simple and can be summarized as follows.

3 On December 17, 2003, Les Boutiques San Francisco incorporées, Les Ailes de la Mode incorporées and Les Éditions San Francisco incorporée (BSF Group) sought and obtained some of the protections available under the *CCAA*. The Initial Order issued on that day provided notably for a stay of the proceedings against the BSF Group.

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

4 A stay of proceedings is a standard conclusion in the initial orders made under the *CCAA* and section 11 (3) specifically provides for such a possibility:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> (Emphasis added)

5 On the date of the Initial Order issued here, one supplier, L'Oréal Canada Inc., was owed $413,557.08 by the BSF Group, $360,395,32 of which represented goods delivered within the 30 days prior to December 17, 2003[2]. After the application of some credits for services rendered, the amount owed was reduced to $299,840.09 on the day of hearing of L'Oréal's motion[3].

6 Similarly, another supplier, Make Up For Ever S.A., was also owed a sum of $67,420.97 on December 17, 2003, $30,015.58 of which represented goods delivered to the BSF Group within the 30 days preceding the date of the Initial Order[4].

7 In early January 2004, L'Oréal and Make Up For Ever each filed a motion by which they claimed that the stay of proceedings should be lifted and declared inapplicable inasmuch as they were concerned. The reason invoked: they each want to exercise their right to revendicate the goods sold and delivered still in the possession of the BSF Group, as any sale which took place is now resolved and resiliated automatically because of the BSF Group's failure to perform its obligations, namely to pay for the goods.

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[2]See "Requête de L'Oréal Canada inc. pour faire déclarer la suspension des procédures inapplicable ou, subsidiairement, pour ordonner le dépôt en fiducie de sommes et pour exiger le paiement de sommes relatives à l'utilisation de biens" dated January 13, 2004, paragraphs 2 and 3, and Exhibits R-1 to R-4.

[3]See "Liste d'admissions" dated January 29, 2004.

[4]See "Requête de Make Up For Ever S.A. pour faire déclarer la suspension des procédures inapplicable ou, subsidiairement, pour ordonner le dépôt en fiducie de sommes" dated January 19, 2004, paragraphs 2 and 3, and Exhibit R-1.

8 They rely upon article 1605 C.C.Q. which states:

> "**1605.** A contract may be resolved or resiliated without judicial proceedings where the debtor is in default by operation of law or where he has failed to perform his obligation within the time allowed in the writing putting him in default."
>
> (Emphasis added)

9 Subsidiarily, if the Court does not agree to lift the stay of proceedings against them, they ask that the proceeds of the sales of their goods be kept from now on in a separate trust account by the BSF Group, in order to protect their future rights and recourses.

10 Finally, in its own motion, L'Oréal asks that the BSF Group be ordered to either pay for the continued use of the display units ("agencements") it recently provided to them or return those immediately to L'Oréal in the absence of payment.

11 Not surprisingly, the BSF Group vigorously contests these requests. In that contestation, it also has the support of many: the Monitor, the Bank Syndicate and the Ad Hoc Committee of Unsecured Creditors.

12 Their position is clear and unanimous. There is no reason to treat these two suppliers any different than the other creditors of the BSF Group. To lift the stay of proceedings for these two suppliers would go against the specific objectives of the *CCAA* and the principles of the status quo that it should protect. Furthermore, the demands of these suppliers are not supported by any of the relevant precedents, be it from the Quebec or the Common Law provinces courts. Finally, they say that not only are the requests unjustified under the circumstances as these two suppliers, in particular, do not suffer any serious prejudice, but granting those would create an impact of such a nature as to put seriously in jeopardy the proposed arrangement of the BSF Group.

13 On the issue of the display units, they reply that nothing is owed at this stage since this debt preceded the Initial Order and should therefore be treated in the same manner as any others.

14 For sake of clarity and as the issues are very distinct from one another, the Court will deal, firstly, with the requests of L'Oréal and Make Up For Ever for the lift of the stay of proceedings and for the deposit of moneys in trust, and secondly, with the claim of L'Oréal pertaining to the display units.

2) THE LIFT OF THE STAY OF PROCEEDINGS AND, SUBSIDIARILY, THE DEPOSIT OF MONEYS IN TRUST

15 On the basis of the applicable statutes, the relevant case law and the evidence adduced, the Court is of the view that neither the lift of the stay of proceedings nor the deposit of moneys in trust should be ordered here, be it for the

benefit of L'Oréal or Make Up For Ever. In reaching this conclusion, the Court relies on the following considerations:

a) The purpose and objectives of the *CCAA*;

b) The precedents in Quebec and Canada; and

c) The absence of a serious and distinct prejudice to the two suppliers involved.

a) The purpose and objectives of the CCAA

16 It has been said often, and rightly so, that the *CCAA* is a remedial legislation. Its purpose is to allow companies in financial difficulties to reorganize themselves. As one judgment of the Quebec Superior Court recently reminded, it should be interpreted and applied as a flexible tool to assist in the restructuring of companies in financial difficulties[5].

17 One of the main goals of the *CCAA* is to allow the debtor company seeking its protection to stay in business as a going concern while attempting to solve its financial difficulties. The Courts indeed recognize that the Act should be given a large and generous interpretation to favour this objective[6].

18 As the Quebec Court of Appeal stated lately, contrary for instance to recourses under the *Bankruptcy and Insolvency Act*[7] (BIA), the objective of the *CCAA* is not to end the operation of a business and distribute its assets to its creditors, but rather to reach an arrangement between the debtor company and its creditors to allow for its survival[8].

19 One of the key elements to achieve these objectives is maintaining a status quo for the necessary time while the debtor company attempts to gain the approval of its creditors for a proposed arrangement[9]. Like the British Columbia Court of Appeal once said[10]:

> "[. . .] 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."

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[5]*PCI Chemicals Canada Inc., Re* (2002), 2002 CarswellQue 831, [2002] R.J.Q. 1093 (Que. S.C.).

[6]*Olympia & York Developments Ltd., Re*, [1994] O.J. No. 1335 (Ont. Gen. Div. [Commercial List]); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.).

[7]R.S.C. 1985, c. B-3.

[8]*Mine Jeffrey inc., Re*, [2003] R.J.Q. 420 (Que. C.A.), par. 30.

[9]*Id.*, par. 31.

[10]*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), 315; see also *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), 114.

(Emphasis added)

20 In a judgment often cited on that subject, Mr. Justice Tysoe of the British Columbia Supreme Court summarized well what is meant by maintaining the status quo when a debtor company seeks the protection of the *CCAA*[11]:

> "It is my view that the maintenance of the status quo is intended to attempt to accomplish the following three objectives:
>
> 1. To suspend or freeze the rights of all creditors as they existed as at the date of the stay Order (which, in British Columbia, is normally the day on which the *CCAA* proceedings are commenced). This objective is intended to allow the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor.
>
> 2. To postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process. The litigation may be resolved by way of the reorganization.
>
> 3. To permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize. This is the objective recognized by *Quintette* and *Alberta-Pacific Terminals*. [. . .]"

(Emphasis added)

21 Therefore, as section 11 of the *CCAA* enacts and these precedents reiterate, in order to allow a debtor company to restructure itself and continue its operations, the stay of proceedings is a basic component of the maintenance of the status quo. Staying the proceedings means to suspend or freeze not only actual or potential litigation, but likewise any type of manoeuvres for positioning amongst creditors. This obviously includes the possibility of creditors seeking to repossess their goods in the hands of the debtor company who, to the contrary, should be allowed to continue operating as a going concern while protected under the *CCAA*.

22 From that standpoint, the motions of L'Oréal and Make Up For Ever are going directly against these objectives and the key element of maintaining the status quo during the course of the restructuring under the *CCAA*. The lift they are seeking is directly opposed to what the Act specifically provides for at sec-

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[11] *Woodward's Ltd., Re* (1993), 100 D.L.R. (4th) 133 (B.C. S.C.), 140.

tion 11 and would place both of them in a preferred position compared to that of the other unsecured creditors.

23 Surely, maintaining the status quo involves balancing the interests of all affected parties and avoiding advantages to some over the others. Under the *CCAA*, the restructuring process and the general interest of all the creditors should always be preferred over the particular interests of individual ones[12].

24 The Court does not believe that it is appropriate to set aside these objectives and principles in this case.

25 In its Initial Amended Order of January 15, 2004, the Court has already indicated that the contemplated arrangement of the BSF Group appeared practical, workable and realistic from an economic standpoint. At this stage, it has very strong support within the creditors of the BSF Group and no one has suggested that there exists a better solution to the problems now faced by the BSF Group.

26 In a situation where there exists a contemplated arrangement which is not doomed to fail but rather appears reasonable, which has the support of a vast majority of the creditors, and which is still being pursued diligently, it is the Court's opinion that the pursuit of the objectives of the *CCAA* should strongly be favoured, not countered.

27 As a result, with a contemplated arrangement such as the one involved here, the solutions should be pursued and the issues resolved within the context of this arrangement, not outside of it.

28 To that end, one must remember that the contemplated arrangement described by the BSF Group already gives consideration to the situation of suppliers such as L'Oréal and Make Up For Ever. One of its guiding principles is indeed expressed as follows by the BSF Group[13]:

> The participation of claims in the baskets could be adjusted so that the first dollars of each claim and sums due for merchandise sold and delivered within 30 days of the Initial Order, could be entitled to a greater participation in the basket than the remaining claims;

29 Since the proposed arrangement is not yet finalized, it is certainly too soon to comment on this potential treatment of the particular situation of the "30 days goods" suppliers. At this stage, it is sufficient to note that proper attention is being given to the situation of these suppliers who may otherwise have had other rights save for the protection afforded by the *CCAA*. Presently, there is no reason to believe that the arrangement that will eventually be submitted to the cred-

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[12]See, on these issues *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.), 11; *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.); and *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 291 (B.C. S.C.), 297.

[13]See Motion for the Extension of the Initial Order dated January 14, 2004, paragraph 17 f).

itors for approval, and thereafter to the Court for sanction if fair and reasonable, will not be governed by similar considerations.

30 Still, L'Oréal and Make Up For Ever argued that the stay of proceedings will potentially deprive them of some of their alleged rights under the Civil Code of Quebec or the *BIA*, particularly if the arrangement fails and a bankruptcy is declared. Even though this possibility exists, when a proposed arrangement is characterized by qualifiers such as "not doomed to failure", "apparently reasonable", "strongly supported" and "diligently pursued", the Court considers that it should assess the situation with an assumption of success, not of failure, of the process.

31 Accordingly, even if these concerns of L'Oréal and Make Up For Ever should the arrangement fails are legitimate, they should not be the guiding criteria of the Court under the circumstances. Especially so when a proper arrangement can eventually alleviate, partially or totally, the loss of the alleged rights that the suppliers may now be denied.

32 To minimize the consequences of their requests, L'Oréal and Make Up For Ever have also argued that their claims represent less than $370,000, while the total accounts payable of the unsecured creditors, including the suppliers, represent more than $31,000,000[14]. The impact, if any, of their motions upon the restructuring of the BSF Group would therefore be, so they say, minimal.

33 Since no similar motions from other suppliers are presently pending, they are saying that the Court should not conclude that granting their requests will have the detrimental impact upon the restructuring process that the other parties are voicing.

34 With respect, the Court cannot agree with this argument.

35 Even though no other similar motions are now pending, the Court cannot simply close the eyes or look in the opposite direction and just pretend not to see the obvious. In a business such as that of the BSF Group, which is involved in the retail sale of men's, women's and children's apparels and accessories, it is clear that there are many other suppliers in a situation similar to that of L'Oréal and Make Up For Ever.

36 It is also clear that if the requests of L'Oréal and Make Up For Ever are granted, there will be many others presented to the Court. Opening this door would create a chaotic situation that will strike at the very heart of the going concern and continued operations objectives that the *CCAA* aims at protecting.

37 The Court does not need to have specific evidence from other suppliers confirming that they will proceed similarly to L'Oréal and Make Up For Ever should the motions be granted. This is self-evident and the Court cannot ignore

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[14]First Report of the Monitor, January 14, 2004, paragraphs 19 and 20.

it. This is exactly what Mr. Justice Lagacé from the Quebec Superior Court relied upon, amongst other things, in refusing to grant a similar request in the context of the restructuring of Steinberg Inc. under the *CCAA*[15]:

> "[. . .] Or le tribunal ne peut ignorer que plusieurs autres créanciers pourraientréclamer le même droit que désire exercer la débitrice-requérante. [. . .]"
>
> (Emphasis added)

38 All in all, when one considers the purpose and objectives of the *CCAA*,there are simply no justifications for the conclusions sought by L'Oréal and Make Up For Ever in their motions.

b) The precedents in Quebec and in Canada

39 That said, the Court notes further that there are no precedents, be it in Quebec or elsewhere in Canada, that support the requests made here by L'Oréal and Make Up for Ever. Indeed, all the judgments that bare any kind of similarity to the situation at hand go against the granting of what is being asked.

i. The Quebec Cases

40 To this date, the cases in Quebec have refused the claims of unpaid suppliers to repossess their goods in the context of a stay of proceedings pursuant to a reorganization or restructuring process, be it under the *CCAA* or the *BIA*.

41 For instance, in the context of the Steinberg Inc. restructuring under the *CCAA*, Mr. Justice Lagacé twice refused motions to authorize an unpaid supplier to seize before judgment the merchandises sold and delivered within the 30 days prior to the Initial Order[16].

42 In the two judgments he rendered, Mr. Justice Lagacé concluded that when faced with an arrangement that appeared serious, the individual interest of a creditor should not be preferred over the general interest of all the creditors. For Mr. Justice Lagacé, granting the requests would have most likely resulted in a number of similar motions by other suppliers and it would have basically led to the failure of the arrangement before it was even submitted to the creditors for approval. This would have been contrary to the objectives of the *CCAA*.

43 It is worth noting that in these two decisions, the suppliers were relying upon article 1543 C.C.B.C. and their corresponding right to revendicate the goods

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[15]*Steinberg Inc. c. Colgate-Palmolive Canada Inc.* (1992), 13 C.B.R. (3d) 139 (Que. S.C.), 141.

[16]*Steinberg Inc. c. Colgate-Palmolive Canada Inc., id.*; *Steinberg Inc. c. Gillette Canada Inc.*, [1992] R.J.Q. 1602 (Que. S.C.).

sold and delivered within the prior 30 days. Since 1994, article 1741 C.C.Q. has replaced article 1543 C.C.B.C. It now states the following:

> **1741.** Except in the case of a sale with a term, the seller of movable property may, within thirty days of delivery, consider the sale resolved and revendicate the property if the buyer, being in default, has failed to pay the price and if the property is still entire and in the same condition and has not passed into the hands of a third person who has paid the price thereof, or of a hypothecary creditor who has obtained surrender thereof.
>
> Where the buyer is in default to pay the price and the property meets the conditions prescribed for resolution of the sale, the seizure of the property by a third person is no hindrance to the rights of the seller.
>
> (Emphasis added)

44 Here, L'Oréal and Make Up For Ever are not relying upon this article which is specific to the situation of an unpaid vendor of movable property in the Quebec Civil Code. As their sales were with a term, they do not meet the conditions necessary for its application. Thus, to justify their requests, they are relying upon the general provisions of obligations applicable to all contracts found at article 1605 C.C.Q.

45 It is difficult to see why the reasoning applicable for a claim made under article 1543 C.C.B.C. (now 1741 C.C.Q.) in cases like the two *Steinberg* decisions would be any different inasmuch as the general provisions of article 1605 C.C.Q. are concerned. At the very least, L'Oréal and Make Up For Ever did not present any convincing argument to that end.

46 Likewise, in the context of the *BIA* this time, Mr. Justice Denis has reached a conclusion similar to that of Mr. Justice Lagacé on a demand by suppliers for the repossession of goods after the filing of a notice of intention to make a proposal[17].

47 In that matter, the suppliers were again invoking article 1543 C.C.B.C. Nonetheless, Mr. Justice Denis concluded that there was no reason not to apply the stay of proceedings to them. He emphasized that sections 81.1(4) and 50.4 of the *BIA* intended to temporarily deny certain rights to creditors in order to allow a company to make a proposal to solve its financial difficulties. The protection that the *BIA* afforded to suppliers of goods in section 81.1 was not applicable in a proposal context, hence the absence of any basis to provide them with a similar protection through article 1543 C.C.Q.

48 The same conclusion was reached by Mr. Justice Halperin in *Henry Birks & Sons Ltd., Re*[18]. On a petition for an order pursuant to section 81.1(8) of the *BIA*,

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[17] *Détaillants Shirmax Ltée/Shirmax Retail Ltd. c. 170974 Canada Inc.* (1994), 28 C.B.R. (3d) 177 (Que. S.C.).

[18] *Henry Birks & Sons Ltd., Re* (1993), 22 C.B.R. (3d) 235 (Que. S.C.).

he denied the request of unpaid suppliers to exercise their remedies as unpaid vendors, as such could have well placed in jeopardy the whole reorganization process of the debtor company. He noted that section 81.1 was clear and only suspended the running of the 30 days period upon the commencement of a proposal proceeding, even though any rights as unpaid vendors in the future would often be illusory if the goods were no longer in the possession of the debtor company once a bankruptcy was finally declared[19].

49 No Quebec courts decisions granting the requests sought by L'Oréal or Make Up For Ever could be found to support their position. The situation was no different in the Common Law provinces.

ii. The Common Law Provinces Cases

50 In proceedings taken under the *CCAA*, the British Columbia Supreme Court has twice denied requests similar to those presented by L'Oréal and Make Up For Ever.

51 In *Agro Pacific Industries Ltd., Re*[20], Mr. Justice Thackray denied an application by suppliers to set aside a stay of proceedings granted under the *CCAA*. He stated notably that ordering that the supplies made to the debtor company within 30 days of the Initial Order be traced and identified and their proceeds put in a trust account would be an attempt to improperly introduce into the *CCAA* proceedings requirements similar to those contained in section 81.1 of the *BIA*. In his reasons, Mr. Justice Thackray had these comments which are worth citing:

> "[52] An order establishing a trust fund in favour of the applicant suppliers would create a class of secured creditors after the fact. It would turn the Court into the author of a new class of creditor. Classes of creditors should be created by the parties on a contractual basis when entering into their business relationships.
>
> [. . .]
>
> [55] Mr. Justice Tysoe in *Re Woodward's* also alluded to the potential that the Court cannot lose sight of legislative intention. He pointed out that the *CCAA* is « silent as to the creation of a trust fund to be held for the benefit of the suppliers in the event that the reorganization is not successful. » Many of the challenges by the suppliers in the case at bar are legislative.
>
> [56] The *CCAA* must be accepted as Parliament's approval of the continued business activities of an insolvent company, to be carried out in as normal a manner as possible while reorganizing. The Court is not

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[19]See also *People's Department Stores Ltd. (1992) Inc., Re* (1994), 37 C.B.R. (3d) 28 (Que. S.C.).

[20][2000] B.C.J. No. 1069 (B.C. S.C.).

> allowed to suggest that the legislative intent is one designed, *per se*, to disadvantage the suppliers. It must, rather, be taken as giving hope that reorganization, rather than bankruptcy, will eventually benefit all interested parties."
>
> (Emphasis added)

52 In this judgment, Mr. Justice Thackray found no basis to justify the requests made by the suppliers under the *CCAA*.

53 In *Woodward's Ltd., Re*[21], Mr. Justice Tysoe reached a similar conclusion. In that case, applications by suppliers of goods for relief under the *CCAA* were also denied. Applications for leave to appeal of that decision were furthermore dismissed[22].

54 For Mr. Justice Tysoe, in addition to the fact that section 81.1 of the *BIA* could not be of any use to the suppliers as the *CCAA* did not contain any similar provision, the creation of any trust fund was not justified as it would not serve to maintain the status quo. He wrote this on the issue[23]:

> "Apart from consideration of s. 81.1 of the *B. & I. Act*, there is no justification for the creation of the trust fund. It would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors of Woodward's. It would not be beneficial to the continuation of Woodward's business during the reorganization period or Woodward's attempt to reorganize. Indeed, it was the position of Woodward's on these applications that the creation of a trust fund in the amount of $30 million would make any reorganization impossible."
>
> (Emphasis added)

55 Finally, and similarly to what the Quebec courts did conclude, in *Bruce Agra Foods Inc.*, Mr. Justice Farley denied a motion made by unpaid suppliers this time within the context of a notice of intention to file a proposal under the *BIA*. In that case, Mr. Justice Farley concluded that in a reorganization scenario, unpaid suppliers could not avail themselves of a protection similar to that of section 81.1 of the *BIA*. He mentioned[24]:

> "2. If Parliament had intended that unpaid suppliers have direct *immediate* rights in a reorganization scenario as envisaged by a Notice of Intention to File a Proposal, then it would seem to me that it would have provided for same to take place in s. 81.1(b) but rather Parliament addressed the Notice of Intention situation by having a suspension during the relevant time period: see s. 81.1(4). Unfortunately for those affected, in order to promote reorgani-

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[21] *Woodward's Ltd., Re*, *supra*, note 11.

[22] *Woodward's Ltd., Re* (1993), 105 D.L.R. (4th) 517 (B.C. C.A.).

[23] *Woodward's Ltd., Re*, *supra*, note 11, p. 141.

[24] *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.), 171-173.

> zations (which is an underlying fundamental of the BIA including the 1992 amendments which puts some teeth or perhaps « life blood » into that part of the BIA), there will be some prejudice to creditors (who may be unpaid sellers). If the rights of unpaid suppliers were to override, then there would have to be an amendment to section 69.1 (a) to that effect. [. . .]
>
> [. . .]
>
> 6. It would seem to me that unpaid supplier rights are truly intended to protect against the unfair consequences in liquidation as seen by Parliament and are not intended to affect or disrupt reorganizations proposed pursuant to Part IV of the BIA. [. . .]"
>
> (Emphasis added)

56 Again, L'Oréal and Make Up For Ever could not refer the Court to any decision from the Common Law provinces which had granted a motion similar to theirs.

iii) L'Oréal and Make Up For Ever reply to the precedents

57 Notwithstanding, to distinguish these decisions, L'Oréal and Make Up For Ever first argued that in the Quebec decisions in *Steinberg* or in *Shirmax*[25], no claims for the deposit of moneys in a trust account similar to what is requested here were apparently made.

58 While it is true that this issue was not specifically dealt with in these three judgments, the Court fails to see on what basis their conclusions would have been any different with respect to the deposit of moneys in a trust account.

59 The protection given to an unpaid supplier under article 1543 C.C.B.C. (now 1741 C.C.Q.) discussed in these decisions was limited to the right to repossess its goods. If the exercise of that right was considered by the Courts as inappropriate in the context of proceedings under the *CCAA* or the *BIA*, it follows that, logically, the exercise of the same right "by equivalent", namely by having the proceeds of the sale of the goods deposited in a trust account, would normally trigger the same answer.

60 Second, L'Oréal and Make Up For Ever further argued that the judgment in *Shirmax*[26] should be distinguished because in that case, the impact upon the restructuring would have been very significant considering the extent of the debt owed to the suppliers involved when compared to the whole debt of the company. This argument cannot be retained because it would require the Court to ignore the obvious consequences of a judgment granting the requests made, namely that it will in all likelihood trigger an avalanche of similar type of requests by the numerous suppliers of the BSF Group.

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[25] *Supra*, note 17.

[26] *Supra*, note 17.

61 Third, L'Oréal and Make Up For Ever argued that the decisions of the Common Law provinces should be distinguished and ignored as there are no recourses similar to that of article 1605 C.C.Q. in those jurisdictions.

62 While that is true, it remains that the decisions rendered in the Common Law provinces are quite relevant and useful to the issues to be decided here.

63 On the one hand, these judgments have correctly emphasized that the *CCAA*, while providing for a stay of proceedings in the context of a restructuring, has made no exceptions for the rights of suppliers as, for instance, the *BIA* has done in some limited circumstances, albeit not for proposals.

64 On the other hand, in denying the requests made, these judgments have also emphasized, again rightfully, that the issues raised by the suppliers were more legislative than judicial in nature, since Parliament had decided to protect specifically the unpaid suppliers rights only in limited circumstances in the *BIA*.

65 These decisions have correctly noted that in situations of reorganizations or restructurings, neither the *CCAA* nor the *BIA* contain provisions addressing these rights, except for the suspension of the running of the 30 day delay of section 81.1 in the case of a proposal under the *BIA*. On that issue, and as it was decided for example in *Woodward's Ltd., Re*, the terms of the Court's Initial Order already include a similar suspension for the benefit of the suppliers.

66 In addition, and again similarly to what this Court did here, these judgments of the other provinces have considered and given weight to the detrimental impact the granting of the motions involved would have had upon the key objectives of the protections offered by the *CCAA*.

67 On the whole, even though provisions similar to article 1605 C.C.Q. do not exist in these other jurisdictions, these decisions can be relied on since their conclusions are based upon reasons that do apply in this case.

68 As a fourth and final point, L'Oréal and Make Up For Ever argue that, notwithstanding all these precedents, in two cases decided in the context of restructurings conducted under the *CCAA* and the *BIA*, the Quebec courts have granted requests to put in a trust account the proceeds of merchandise sold pending the outcome of the reorganization process.

69 In this respect, they refer to the Superior Court judgment of Mr. Justice Archambault in *Century Industries Inc. v. Enterprises Union Électrique Ltée*[27] and to the Court of Appeal decision in *Gestion Max Boutin inc. v. Brasserie Molson O'Keefe*[28].

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[27]C.S. Montreal, nº 500-05-005804-925, 1992-04-29, j. Archambault, 1992 CarswellQue 1869 (Que. S.C.).

[28]J.E. 94-804 (C.A.).

70 However, as it was indicated at the hearing, these decisions can be distinguished easily as the creditors involved had specifically retained by contract their rights of ownership in the goods at issue, which is not the case for L'Oréal or Make Up For Ever.

71 In short, the review of these precedents in Quebec and in Canada confirms the absence of justification for the remedies sought here by these two suppliers.

c) The absence of a serious and distinct prejudice to the two suppliers involved

72 But that is not all. In addition to the fact that the conclusions sought by L'Oréal and Make Up For Ever would be contrary to the applicable case law as well as the purpose and objectives of the *CCAA*, the Court is satisfied that under the circumstances, neither L'Oréal nor Make Up For Ever would suffer a prejudice sufficiently serious as to justify lifting the stay of proceedings.

73 In summary, L'Oréal and Make Up For Ever are alleging that they are suffering a serious and distinct prejudice because the stay of proceedings will result in them losing a right to repossess goods that they have under article 1605 C.C.Q., hence their justification to lift the stay.

74 To emphasize their prejudice, they are also asserting that an arrangement under the *CCAA* must give creditors something more than what they would otherwise receive in the context of a bankruptcy. Since they will end up, in all likelihood, receiving less in the context of an arrangement under the *CCAA* than in a bankruptcy process under the *BIA*, they consider that their motions should be granted.

75 The Court disagrees with these arguments.

76 On the first of these arguments, in *Canadian Airlines Corp., Re*, it was stated that under the *CCAA*, there are simply no statutory tests to guide a court in lifting a stay against a certain creditor. In that case, to give some indications of what could be considered to that end, Madam Justice Paperny referred to the following[29]:

> "20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:
>
> 1. When the plan is likely to fail;
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
> 3. The applicant shows necessity for payment (where the creditors financial problems are created by the order of where the

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[29] *Supra*, note 12, p. 7-8.

failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period."

(Emphasis added)

77 When one considers these situations, none apply here, except potentially the fifth one. However, even in such a situation, the only alleged prejudice suffered by L'Oréal and Make Up For Ever would be one directly caused by the mere application of the Act, namely by the stay of proceedings which the *CCAA* authorizes.

78 On that specific issue, in the decision of *St-Lawrence Chemical Inc. v. A.R.C. Resins Corp.*, Madam Justice Lemelin of the Quebec Superior Court concluded this[30]:

> "Le préjudice de la requérante ne peut être que celui causé par l'application normale de la loi qui suspend les recours de tous les créanciers et fournisseurs. Le juge Trudeau qualifie même ce préjudice "de sérieux" dans l'affaire de faillite Goineau.
>
> La requérante ne peut demander au Tribunal de mettre de côté l'application d'une loi qui dans le vœu du législateur doit favoriser la réorganisation d'entreprises en difficultés en les mettant à l'abri des procédures temporairement. Permettre aux fournisseurs de reprendre les marchandises vendues compromet les opérations de la personne insolvable. La requérante doit satisfaire le Tribunal de ce préjudice sérieux, ce qu'elle ne fait pas."
>
> (Emphasis added)

79 The Court agrees with these comments. Simply stated, the application of the *CCAA* cannot of itself constitute a sufficiently serious and distinct prejudice to justify the lift of a stay of proceedings.

80 Consequently, even though much time was spent in argument by the attorneys for both sides on the right of an unpaid supplier to even invoke the application of article 1605 C.C.Q. in a situation similar to that of L'Oréal and Make Up For Ever, the Court considers that it is not necessary to decide this question.

81 There are sufficient reasons here to deny the motions of L'Oréal and Make Up For Ever without having to decide whether or not an unpaid supplier who

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[30](May 16, 1997), Doc. 505-11-001681-977 (Que. S.C.), J. Lemelin, AZ-97026278, p. 5.

does not meet the conditions of article 1741 C.C.Q. can nevertheless invoke the benefit of the general provision of article 1605 C.C.Q. This question appears to be far from settled in the civil law doctrine or in the case law[31].

82 In any event, on that issue of the alleged right to repossess of these suppliers, the Court notes that the resolution or resiliation of a contract without judicial proceedings as invoked by L'Oréal and Make Up For Ever only applies where the debtor, namely the BSF Group, is in default by writing or by operation of law.

83 The BSF Group was apparently not put in default in writing by these suppliers and article 1597 C.C.Q. describes the situations where a debtor is in default by operation of law:

> "**1597.** A debtor is in default by the sole operation of law where the performance of the obligation would have been useful only within a certain time which he allowed to expire or where he failed to perform the obligation immediately despite the urgency that he do so.
>
> A debtor is also in default by operation of law where he has violated an obligation not to do, or where specific performance of the obligation has become impossible through his fault, and also where he has made clear to the creditor his intention not to perform the obligation or where, in the case of an obligation of successive performance, he has repeatedly refused or neglected to perform it."
>
> (Emphasis added)

84 Here, there is only one instance where the BSF Group would potentially be in default by operation of law towards these two suppliers: because it would have "*made clear to* (these) *creditors* (its) *intention not to perform* (its) *obligations*".

85 However, it does not appear that this is the case yet.

86 When a creditor avails itself of the protection that the law offers, and as result is afforded it with a corresponding stay of proceedings, one cannot conclude that this debtor then makes it clear to its creditors that it intends not to perform its obligations. As a matter of fact, under the *CCAA*, the objective of this debtor is rather to propose an arrangement to these creditors for the compromise of these obligations and this may include a partial and even a total performance of these obligations in some cases.

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[31] See on this issue Jean-Louis BAUDOUIN et Pierre-Gabriel JOBIN, *Les obligations*, 5e édition, Cowansville, Éditions Yvon Blais, 1998, p. 592-593; Pierre-Gabriel JOBIN, *La vente*, 2e édition, Cowansville, Éditions Yvon Blais, 2001, p. 262-264; Denys-Claude LAMONTAGNE, *Droit de la vente*, Cowansville, Éditions Yvon Blais, 1995, p. 146-147; *Place Fleur de Lys c. Tag's Kiosque Inc.*, [1995] R.J.Q. 1659 (Que. C.A.); *Packman Packaging Supplies Inc., Re* (1995), 42 C.B.R. (3d) 143 (Que. S.C.); *166606 Canada inc. c. Bashtanik* (1996), 1997 CarswellQue 1797 (Que. S.C.), J.E. 96-1556.

87 Therefore, it is far from obvious that L'Oréal and Make Up For Ever even qualify here for the application of article 1605 C.C.Q. If this were so, then their position would be even less justified under the circumstances.

88 Concerning now the second argument that in proceedings conducted under the *CCAA*, L'Oréal and Make Up For Ever should not be put in a situation worst than the one they would be in under the *BIA*, the Court considers that if anything, it is the situation of all the creditors collectively that must be looked at.

89 While it is true that one of the objectives of the *CCAA* is to provide a better solution than what a bankruptcy would offer, this is so from the standpoint of the benefit to all the creditors, not to individual ones. L'Oréal and Make Up For Ever are looking at the situation only from their own viewpoint, while in the context of proceedings under the *CCAA*, the prejudice and interest of the parties must in every respect be looked at collectively.

90 Indeed, under the circumstances, the prejudice alleged by L'Oréal and Make Up For Ever, even from an individual standpoint, is far from being serious in the overall picture of the restructuring of the BSF Group.

91 Both companies are involved in the cosmetics and perfumes business and they supply mostly, if not exclusively, Les Ailes de la Mode. In the restructuring business plan submitted to the Court[32], one of the key elements of the repositioning of the BSF Group is to focus upon what it calls its core business, notably with its banner Les Ailes de la Mode. This core business includes for one thing the cosmetics and perfumes.

92 Therefore, these two suppliers, perhaps much more so than many others, are well within the specific business and banner upon which the BSF Group intends to focus for its restructuring. As a result, they appear to be creditors who would definitely benefit, not suffer, from a successful restructuring of the BSF Group.

93 It is in fact striking to note this from the admissions filed in the record[33]. The sales of L'Oréal to the BSF Group totalled $3,609,000 in 2002 and $3,155,000 in 2003, for an average of $281,833 per month over these 24 months. In comparison, the sales of L'Oréal to the BSF Group for the first month immediately following the Initial Order totalled more than $335,000, namely a higher monthly average, even in the context of the restructuring process.

94 Finally, on this issue of the prejudice, it must be remembered that, in this case, there is no evidence of bad faith in the BSF Group's behaviour towards these two suppliers. Notwithstanding what is alleged in their motions, the Court is of the view that the circumstances surrounding the discussions and exchanges

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[32]Exhibit R-5 in support of the Motion for the Extension of the Initial Order dated January 14, 2004.

[33]"Liste d'admissions" dated January 29, 2004.

of cheques in December 2003 indicate that they were carried on in good faith, in the normal course of business of the BSF Group.

95 To sum up, be it from the angles of the lack of serious and distinct prejudice to L'Oréal and Make Up For Ever, of the applicable precedents and their reasoning, or of the purpose and objectives of the *CCAA*, nothing warrants the Court to lift the stay of proceedings or to order the deposit of moneys in trust in the actual situation of these two suppliers.

3) THE CLAIM OF L'ORÉAL CONCERNING THE DISPLAY UNITS

96 Turning now to the claim of L'Oréal concerning the display units it provided to the BSF Group in November 2003, this is what the evidence indicates.

97 Even if the written contract presented by L'Oréal in that month was never signed by the BSF Group, the exchanges of e-mails[34] that were filed in the record nevertheless suggest that the parties had agreed as follows.

98 L'Oréal accepted to provide to the BSF Group some display units that were to be used by the BSF Group to exhibit the products and facilitate their sales. The parties were to share equally in the cost of creating, constructing and installing these display units but at all times, L'Oréal was to remain the owner. For its share, it was agreed that a first amount of $28,000 would be paid by the BSF Group within 90 days of delivery and another amount of $28,000 would be spent by them as « coop-advertising » during 2003-2004.

99 L'Oréal considers that this is covered by section 11.3 of the *CCAA* which indicates in part that:

> "**11.3** No order made under section 11 shall have the effect of
>
> (*a*) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; [. . .]"
>
> (Emphasis added)

100 The BSF Group replies that the agreement at issue is not per se a contract of lease but rather a *sui generis* agreement and that section 11.3 does not apply.

101 Even though this agreement is not a traditional lease, it remains that it shares a lot of the characteristics that one would normally find in a contract of lease (article 1851 C.C.Q.). More specifically, we definitely have here a person, L'Oréal, who provides another, the BSF Group, with the use and enjoyment of display units for a certain period, in exchange for payments that are detailed in the e-mails filed. The display units are also not to be kept by the BSF Group but returned to L'Oréal after their use.

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[34]Exhibit R-10 in support of the motion of L'Oréal.

102 This is certainly closer to a traditional lease for use than, for instance, to some sort of financing agreement[35].

103 With respect to these display units, it is the Court's opinion that we have a situation which is quite analogous to the use of leased property provided after the initial order is made. The BSF Group continues to this day to make use of those display units for the purpose of selling the products of L'Oréal. Similarly to the use of leased premises, these are still being enjoyed and benefited from by the BSF Group in order to help the sale of the products of L'Oréal. It is a continuing benefit that the BSF Group still wants to make use of and the Court fails to see why it should be treated differently than the other situations covered by section 11.3 of the *CCAA*.

104 As a result, with respect to these conclusions of the motion of L'Oréal, the Court considers that if it is indeed the intent of the BSF Group to continue to use these display units, it should abide by the terms of the obligations it agreed to. These include the payment of an amount of $28,000 within 90 days of delivery of the display units and an allowance of $28,000 as "coop-advertising" for the period 2003-2004.

105 Since there has been no indication or evidence suggesting that the BSF Group has yet defaulted on these obligations, the Court will simply issue in this respect a declaration confirming this conclusion.

106 **FOR THESE REASONS, THE COURT:**

WITH RESPECT TO L'ORÉAL CANADA INC.:

107 DISMISSES the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

108 DECLARES that with respect to the display units provided by L'Oréal Canada Inc. to Les Ailes de la Mode pursuant to the terms of the e-mails filed as Exhibit R-10, Les Ailes de la Mode must comply with the obligations agreed upon between the parties, namely to:

- Pay an amount of $28,000 to L'Oréal Canada Inc. within 90 days following the delivery of the display units; and
- Provide for an allowance of $28,000 as "coop-advertising" for the period 2003-2004;

109 WITH COSTS.

WITH RESPECT TO MAKE UP FOR EVER S.A.:

110 DISMISSES the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

111 WITH COSTS.

Motions dismissed.

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[35]See on that issue *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264 (B.C. S.C.); *Philip Services Corp., Re* (1999), 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]); *International Wallcoverings Ltd., Re* (1999), 28 C.B.R. (4th) 48 (Ont. Gen. Div. [Commercial List]).