Court File No. CV-09-8122-00CL

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 INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD. 6326765 CANADA INC. and NOVAR INC.

the Applicants

BOOK OF AUTHORITIES
(MOTION RETURNABLE APRIL 8, 2009)

April 8, 2009

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
199 Bay Street, Suite 2800
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9

Linc Rogers LSUC No. 43562N
Tel: (416) 863-4168
Fax: (416) 863-2653

Katherine McEachern LSUC No. 38345M
Tel: (416) 863-2566
Fax: (416) 863-2653

Lawyers for the Applicants

TO: **McMILLAN LLP**
Barristers & Solicitors
Brookfield Place, Suite 4400
181 Bay Street
42nd Floor
Toronto, On M5J 2T3

Wael Rostom
Tel: (416) 865-7790
Fax: (647) 722-6736
E-mail: wael.rostom@mcmillan.ca

Larry Crozier
Tel: (416) 865-7178
Fax: (416) 865-7048
E-mail: lawrence.crozier@mcmillan.ca

Lawyers for **JPMorgan Chase Bank, N.A.**

AND TO: **STIKEMAN ELLIOTT LLP**
Barristers & Solicitors
Suite 5300, Commerce Court West
199 Bay Street
Toronto, On M5L 1B9

Ashley Taylor
Tel: (416) 869-5236
Fax: (416) 947-0866
E-mail: ataylor@stikeman.com

Lawyers for **the Monitor, FTI Consulting Canada ULC**

AND TO **WEIRFOULDS LLP**
The Exchange Tower, Suite 1600
Box 480, 130 King Street West
Toronto, ON M5X 1J5

Paul D. Guy
Tel: (416) 947-5045
Fax: (416) 365-1876
E-mail: pguy@weirfoulds.com

Lawyers for **Alcoa**

AND TO **GREAT-WEST LIFE**
330 University Ave.
Suite 400

Toronto, ON M5G 1R8

Attn: **Geoff Maier**
Tel: (416) 552-5575
E-mail: geoff.maier@gwl.ca

LIST OF PPSA REGISTRANTS

AND TO: **Woodbine Truck Centre Ltd. o/a Woodbine Indealease**
8240 Woodbine Avenue
Markham, ON L3R 2N8

Attn: Greg Kearns
E-mail: gkearns@woodbinetruck.com

AND TO: **NRB Inc.**
115 South Service Road West, P.O. Box 129
Grimsby, ON L3M 4G3

Attn: Richard DiAngelo
E-mail: richarddiangelo@nrb-inc.com

AND TO: **De Lage Landen Financial Services Canada Inc.**
100-1235 North Service Road West
Oakville, ON L6M 2W2

Attn: Jacqueline Perron
E-mail: jperron@leasedirect.com

AND TO: **GE Canada Equipment Financing G.P.**
123 Front Street West, 16th Floor
Toronto, ON M5J 2M2

Attn: Syenny Jeliana
Fax: (416) 947-5303

AND TO: **Penske Truck Leasing Canada Inc./Locations de Camions Penske Canada Inc.**
RT 10 Green Hills, PO Box 791
Reading, PA 19603

Attn: Denise Sanford
Tel: (905) 564-2176
E-mail: denise.sanford@penske.com

AND TO: **Citicorp Vendor Finance, Ltd.**
123 Front Street West, 16th Floor
Toronto, ON M5J 2M3

Attn: Syenny Jeliana
Fax: (416) 947-5303

AND TO: **GE Canada Leasing Services Company**
2300 Meadowvale Boulevard, Suite 100
Mississauga, ON L5N 5P9

Attn: Dean Langley
Tel: (905) 858-4916

AND TO: **VFS Canada Inc.**
73 Industrial Parkway North
Aurora, ON L4G 4C4

Attn: Murielle Graff
E-mail: murielle.graff@vfsco.com

AND TO: **Mr. Forklift**
191 Caldari Road, Unit 4
Concord, ON L4K 4A1

AND TO: **PHH Vehicle Management Services Inc.**
2233 Argentia Road, Suite 400
Mississauga, ON L5N 2X7

Attn: Dominic Monaco
E-mail: dominic.monaco@phh.com

AND TO: **CIT Financial Ltd.**
5045 South Service Road
Burlington, ON L7R 4C8

Attn: Anne Neuert
Tel: (888) 563-4321
E-mail: anne.neuert@cit.com

AND TO: **Liftcapital Corporation/Corporation Liftcapital**
300 The East Mall, Suite 401
Toronto, ON M9B 6B7

Attn: Doug Chau
Tel: (416) 621-5522 ext. 224 or 225
E-mail: dchau@liftcapital.ca

AND TO: **IKON Office Solutions Inc.**
2300 Meadowvale Boulevard, Suite 200
Mississauga, ON L5N 5P9

Attn: Darlene Milligan
Tel: (905) 858-6289
E-mail: Darlene.milligan@ge.com

LIST OF UNIONS

AND TO: **United Steelworkers – District 3**
150 – 2880 Glenmore Trail S.E.
Calgary, AB T2C 2E7

Attn: Keith Turcotte, Area Supervisor
Tel: (403) 279-9397
E-mail: kturcotte@usw.ca

AND TO: **United Steelworkers 2952**
Suite 202 9292 – 200th Street
Langley, BC V1M 3A6

Attn: Steve Dewell
Tel: (604) 513-1850
E-mail: sdewell@usw.ca

and

Attn: R. Gatzka
E-mail: rgatzka@usw.ca

AND TO: **Syndiat des Metallos**
2350, avenue De LaSalle
Quebec, QC H1V 2L1

Attn: Pierre Arseneau
Tel: (514) 599-2006
E-mail: parseneau@usw.ca

AND TO: **United Steelworkers**
1158 Aerowood Drive
Mississauga, ON L4W 1Y5

Attn: Terry Bea, Staff Representative
Tel: (905) 629-4991 ext. 27
E-mail: tbea@usw.ca

and

Attn: F. Falbo
E-mail: ffalbo@usw.ca

AND TO: **United Steelworkers**
25 Cecil Street
Toronto, ON M5T 1N1

Attn: Lawrence Hay, Staff Representative
E-mail: lhay@usw.ca

AND TO: **United Steelworkers (Counsel)**

Rob Champagne
E-mail: rchampagne@usw.ca

AND TO **United Steelworkers (Counsel to Local 7785 and 7785-01)**

Attn: P. Lalonde
E-mail: plalonde@usw.ca

INDEX

Court File No. CV-09-8122-00CL

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 INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD. 6326765 CANADA INC. and NOVAR INC.

Applicants

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2.	*United Used Auto & Truck Parts Ltd., Re*, 1999 CarswellBC 2673, (B.C. S.C. [In Chambers]); affirmed 2000 CarswellBC 414, (B.C. C.A.); leave to appeal granted 2000 CarswellBC 2132 (S.C.C.), but appeal dismissed
3.	*Skydome Corp., Re*, 1998 CarswellOnt 5922 (Ont. Gen.Div.(Comm. List))
4.	*Re Intertan Canada Ltd. and Tourmalet Corporation*, (January 23, 2009), 08-CL-7841 (S.C.J. (Comm.List))
5.	*Re Temple City Housing Inc.* (2007), 2007 CarswellAlta 1806; appeal dismissed *Minister of National Revenue v. Temple City Housing Inc.* (2008), 2008 CarswellAlta 2 (Alta. C.A.)
6.	*Re A & M Cookie Co. Canada*, 2008 CarswellOnt 7136 (Ont. S.C.J. [Commercial List]).
7.	*Re Smurfit-Stone Container Canada Inc.*, (January 27, 2009), CV-09-7966-00CL (S.C.J. (Comm. List))
8.	*Re Pliant Corporation of Canada Ltd. et al*, (March 24, 2009), 09-CL-8007, (S.C.J. (Comm. List))

TAB 1

2006 NBQB 6, 18 C.B.R. (5th) 182, 294 N.B.R. (2d) 95, 765 A.P.R. 95, 145
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C
2005 CarswellNB 781

Simpson's Island Salmon Ltd., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, C. c-36
as Amended
In the Matter of a Plan of Compromise or Arrangement of the Applicants,
Simpson's Island Salmon Ltd., and Tidal Run Aqua Inc.
New Brunswick Court of Queen's Bench
Glennie J.
Heard: December 19, 29, 2005
Judgment: December 29, 2005
Docket: S/M/69/05

Counsel: Rodney J. Gillis, Q.C., John C. Gillis for Applicants

Raymond P. Gorman, Q.C. for Monitor

Catherine A. Lahey, Lee C. Bell-Smith for Heritage Salmon Limited

R. Gary Faloon, Q.C. for Farm Credit Corporation, Bank of Nova Scotia

John B.D. Logan for Province of New Brunswick

Robert M. Creamer for 047759 N.B. Ltd.

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Application for debtor in possession financing -- Debtor companies, salmon farms, were under protection of Companies' Creditors Arrangement Act ("CCAA") -- Pursuant to provisions of CCAA, initial order was issued in December 2005 staying all proceedings against farms -- Farms were growing salmon and expected to harvest them in spring or summer of 2006 -- Farms wished to continue to grow salmon to maturity in order to maximize value, and required funding to pay for feed, wages, insurance and operating costs until regular harvest time -- Farms brought application seeking order permitting Debtor in Possession ("DIP") Financing Facility in amount of $350,000 -- Application granted -- Order issued authorizing farms to enter into arrangements to obtain revolving credit facility in maximum amount of $350,000 in accordance with DIP facility term sheet and for purposes set forth in cash flow statements -- Farms had viable basis for restructuring -- Amount of DIP facility had been restricted to what was necessary to meet short-term needs until harvest -- Monitor had advised court that there was reasonable prospect that farms would be able to make arrangements with their creditors and rehabilitate themselves -- Benefits of DIP financing would allow debtors to bring salmon to full harvest and obtain best market price which would clearly outweigh any potential prejudice to secured creditors -- DIP financing was

only means for farms to continue operating as going concerns.

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Effect of arrangement -- Stay of proceedings

Debtor companies, salmon farms, were under protection of Companies' Creditors Arrangement Act ("CCAA") -- Pursuant to provisions of CCAA, initial order was issued in December, 2005 staying all proceedings against farms, which stay was to expire in January, 2006 -- Farms brought application seeking order to extend stay termination date as stipulated in initial order on basis that they required time to review their creditors' security, formulate plan and to continue ongoing negotiations with their secured lenders and other potential investors to formulate plan for benefit of all stakeholders -- Application granted -- Order issued extending stay termination date and date for filing plan of arrangement to February 20, 2006 -- Circumstances existed that made extension order appropriate -- Monitor had advised court that fish farming sites were considered to be superior aquaculture sites, and opined that there was reasonable prospect that farms would be able to file plan of reorganization under CCAA -- Farms acted and were continuing to act in good faith and due diligence.

Cases considered by Glennie J.:

> Juniper Lumber Co., Re (2000), 2000 CarswellNB 130, 226 N.B.R. (2d) 115, 579 A.P.R. 115 (N.B. C.A.) -- considered
>
> Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- considered
>
> United Used Auto & Truck Parts Ltd., Re (1999), 1999 CarswellBC 2673, 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) -- referred to
>
> United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) -- referred to

Statutes considered:

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

> Generally -- referred to

APPLICATIONS for Debtor in Possession financing and order extending stay termination date.

***Glennie J.* (orally):**

1 Pursuant to the provisions of the *Companies' Creditors Arrangement Act* (the "CCAA") an Initial Order was issued by this Court on December 5th, 2005 staying all proceedings against Simpson's Island Salmon Lid. ("Simpson's Island") and Tidal Run Aqua Inc. ("Tidal Run"). The stay period expires on January 4th, 2006.

2 Simpson's Island and Tidal Run now seek an order permitting a Debtor in Possession Financing Facility ("DIP Facility") in the amount of $350,000.00 and also an order to extend the Stay Termination Date.

3 Pursuant to the Initial Order, A.C. Poirier & Associates Inc. was appointed as the Court Monitor (the "Monit-

or").

4 Simpson's Island and Tidal Run are operating companies conducting business as aquaculturalists and each holds an aquaculture site license granted by the New Brunswick Department of Agriculture, Fisheries and Aquaculture.

5 At the present time, Simpson's Island is growing Atlantic Salmon at its site located in the Bay of Fundy and expects that it will harvest approximately 197,000 salmon in the spring to early summer of 2006. Each of the Companies also owns a barge. In the case of Simpson's Island, it is the Atlantic Bay Harvest Barge and in the case of Tidal Run it is the Fundy Navigator Barge.

6 In projected cash flow statements prepared for each company for the time period December 2005 to May 2006, Simpson's Island is projecting sales for April 2006 in the amount of $2,534,000.00 and for May 2006 in the amount of $2,517,000 for a total of $5,061,000.00.

7 Simpson's Island is projecting net positive cash flow in the amount of $4,493,700.00 for the time period December 2005 to May 2006. Tidal Run is projecting a negative cash flow in the amount of $94,800.00 for that time period.

8 Simpson's Island currently has approximately 1.5 million pounds of salmon in its cages. The Company wants to continue to grow these salmon until they reach maturity in the spring of 2006.

9 The going price of salmon during the week of December 12th, 2005 was $2.25 per pound (net of processing charges). The President of Simpson's Island calculates the total value of the salmon to be $3,582,000.00.

10 He says that if the salmon continue to be closely monitored and fed appropriately, the average weight of each salmon will be 10 pounds in May of 2006. As a direct result of the additional weight, their total value in May of 2006 will be $4,477,500.00 an increase of $895,500.00.

11 It is the Monitor's view that Simpson's Island must be operated in order to preserve and grow the 2004 class of fish in order to maximize value. The Monitor points out that while harvesting may be done now, considerable additional value "will likely be available by continuing to grow the fish through to the normal harvest time in the spring and early summer of 2006".

12 Simpson's Island and Tidal Run require funding to pay for feed, wages, insurance and operating costs in order to continue the harvesting of the salmon until the spring or summer of 2006.

13 To this end, Simpson's Island and Tidal Run have been offered debtor in possession financing from 047759 N.B. Ltd. by way of a revolving credit facility. The maximum total amount of the revolving credit facility applied for is $350,000.00.

14 Such DIP financing would be granted a priority secured position on all assets of Simpson's and Tidal in priority to all existing security and subordinate only to the Administrative Charge created by the Initial Order.

15 The Monitor recommends that the DIP financing be put in place. The Monitor states that the requested DIP financing is critical for the Companies to continue to operate and to successfully restructure their affairs. The Monitor also believes that the benefit of the DIP financing clearly outweighs the potential prejudice to lenders whose security would be subordinated by the DIP financing.

Analysis

16 In order for DIP financing with super-priority status to be authorized pursuant to the CCAA, there must be cogent evidence that the benefit of such financing clearly outweighs the potential prejudice to secured creditors whose security is being eroded. See *United Used Auto & Truck Parts Ltd., Re* , [1999] B.C.J. No. 2754 (B.C. S.C. [In Chambers]), affirmed [2000] B.C.J. No. 409 (B.C. C.A.)

17 DIP financing ought to be restricted to what is reasonably necessary to meet the debtors urgent needs while a plan of arrangement or compromise is being developed.

18 I am satisfied on the evidence before me that Simpson's Island and Tidal Run have a viable basis for re-structuring. The amount of the DIP facility has been restricted to what is necessary to meet short-term needs until harvest.

19 A Court should not authorize DIP financing pursuant to the CCAA unless there is a reasonable prospect that the debtor will be able to make an arrangement with its creditors and rehabilitate itself. In this case the Monitor has advised the Court that there is a reasonable prospect that Simpson's Island and Tidal Run will be able to make such arrangements with their creditors.

20 I am satisfied that the benefits of DIP financing in this case will allow the debtors to bring the salmon to full harvest and obtain the best market price which will clearly outweigh any potential prejudice to secured creditors. It is a balancing act.

21 DIP financing is the only means for Simpson's Island and Tidal Run to continue operating as going concerns. The object is to keep the lights of the Companies on especially during the initial sorting out period. Both Companies are now on life support and they need oxygen in the form of cash to keep them going.

22 In the result, the application for Debtor in Possession financing is allowed. An order will issue authorizing Simpson's Island and Tidal Run to enter into arrangements to obtain a revolving credit facility from 047759 N.B. Ltd. in the maximum amount of $350,000.00 and in accordance with the DIP Facility term sheet presented to this Court and for the purposes set forth in the cash flow statements.

Extension of Stay Termination Date

23 Simpson's Island and Tidal Run have also applied for an Order Extending the Stay Termination Date as stipulated in the Initial Order.

24 The Applicants say that they require the extended Stay Termination Date and extended time for filing a Plan to review their creditors' security, formulate a plan and to continue ongoing negotiations with their secured lenders and other potential investors to formulate a Plan for the benefit of all stakeholders.

25 The required insurance coverage has now been reinstated. The Monitor states that there is considerable support to restructure and to continue the Companies as going concerns. The Companies have equity in their assets.

26 In *Juniper Lumber Co., Re*, [2000] N.B.J. No. 144 (N.B. C.A.), Justice Turnbull writes:

> The principal purpose of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the

> "CCAA"), "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 ... 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." See Arrangements Under the Companies' Creditors Arrangement Act by Goldman, Baird and Weinszok (1991), 1 C.B.R. (3d) 135 at p. 201 where the authors cite Thackray; J. approvingly quoting Gibbs, J.A. from the cases cited on that page. In New Brunswick, the Court of Queen's Bench is defined by the CCAA as the Court to play the "kind of supervisory role." The CCAA has a remedial purpose and, therefore, must be interpreted in a broad and liberal fashion. See pages 137-138 in the article previously cited. More often than not time is critical. And, in order to maintain a status quo while attempts are made to determine if a successful compromise or arrangement can be reached, the courts are granted certain powers in s. 11 to hold creditors at bay.

27 In *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]), Justice Farley writes:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has a great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA ...

28 In *The 2006 Annotated Bankruptcy & Insolvency Act*, Houlden & Morawetz state at page 1191:

> To obtain an extension, the applicant must establish three pre-conditions:
>
> (a) that circumstances exist that make the order appropriate;
>
> (b) that the applicant has acted and continues to act in good faith; and
>
> (c) that the applicant has acted and continues to act with due diligence.

29 The Monitor has advised the Court that the two fish farming sites owned by the Companies are considered to be superior aquaculture sites.

30 The Monitor has opined that there is a reasonable prospect that the Companies will be able to file a Plan of Reorganization under the CCAA. I am satisfied that circumstances exist that make an extension order appropri-

2006 NBQB 6, 18 C.B.R. (5th) 182, 294 N.B.R. (2d) 95, 765 A.P.R. 95, 145
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ate.

31 I am also satisfied that the Applicants have acted and are continuing to act in good faith and with due diligence.

32 In the result, an order will issue extending the Stay Termination Date and the date for filing a Plan of Arrangement to February 20th, 2006 at 4 p.m. Reporting requirements to Heritage Salmon Limited will continue during the extension period.

Applications granted.

END OF DOCUMENT

TAB 2

12 C.B.R. (4th) 144

1999 CarswellBC 2673

United Used Auto & Truck Parts Ltd., Re
In the Matter of the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36
In the Matter of the Company Act R.S.C. 1996, c. 62
In the Matter of United Used Auto & Truck Parts Ltd., VECW Industries Ltd., Seiler Holdings Ltd., United Used Auto Parts (Storage Div.) Ltd., Petitioners
British Columbia Supreme Court [In Chambers]
Tysoe J.
Judgment: November 19, 1999
Docket: Vancouver A992950

Counsel: William E.J. Skelly, for Petitioners, United Group of Companies.

Douglas I. Knowles, for Ernst & Young LLP.

Martin L. Palleson, for Canadian Western Bank.

Shelley C. Fitzpatrick, for Century Services Inc.

E. Jane Milton, for Royal Bank of Canada.

John I. McLean, for Aziz Group.

Bonita Lewis-Hand, for Clarica Life Insurance Company.

R.G. Hildebrand, for City of Surrey.

Donnaree G. Nygard, for Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada (Revenue Canada).

Michael W. Watt, for International Union of Operating Engineers, Local 115.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Miscellaneous issues

Petitioners owned large amounts of land and operated auto-wrecking business -- Petitioners were granted ex parte stay order under Companies' Creditors Arrangement Act -- Stay order allowed conduct of sale by bank and C to continue and granted charge, up to $500,000, for professional fees of monitor and its legal counsel and petitioners' legal counsel -- Petitioners brought application for authorization of debtor-in-possession financing and

priority charge against lands -- Secured creditors brought application to set aside stay order -- Petitioners' application dismissed and secured creditors' application granted in part -- It was not demonstrated that financing was critical for business to continue to operate or for petitioners to successfully restructure affairs -- It was not clear that benefit of financing clearly outweighed potential prejudice to secured lenders -- Stay order was not to be set aside in its entirety -- Petitioners met realistic standard of disclosure and stay order was not to be set aside on basis of non-disclosure -- Petitioners acted in good faith -- Stay order was to be amended to stay conduct of sale by bank and C and to direct monitor to list lands and to receive and negotiate all offers for lands while considering input and interests of petitioners and security holders -- It was appropriate for monitor to be given priority charge for its fees and disbursements, including legal fees -- It was also appropriate to create priority charge in respect of petitioners' legal fees, to extent that expenses were reasonably incurred in connection with restructuring -- Amount of administrative charge to be reduced to $200,000.

The petitioners owned or had agreements for sale of 32 contiguous parcels of land totalling 150 acres. The petitioners operated an auto-wrecking business on part of the lands and employed 75 people. The petitioners experienced financial difficulties, and the petitioners entered into a series of forbearance agreements with the principal secured creditors. The agreements expired and a number of foreclosure actions were commenced. The bank and C obtained an order for conduct of sale with the consent of the petitioners. The parcels were listed for sale at a price in excess of the amount of the debt secured against the land. The petitioners made arrangements for debtor-in-possession financing and proposed that the financing be charged against the lands in priority ahead of all secured creditors except the Federal Crown and the holders of agreements for sale. The financing was alleged to be necessary to allow the petitioners to acquire new inventory for the auto-wrecking business and to retain professionals required for restructuring and bringing the operating business back to life. The court granted an ex parte stay order in favour of the petitioners under the Companies' Creditors Arrangement Act. The court allowed the conduct of sale to continue but directed the listing agents to deal with the petitioners or the monitor appointed under the stay order. The stay order also granted a charge, up to $500,000, for the professional fees and disbursements of the monitor and its legal counsel and the petitioners' legal counsel. The court declined to deal on an ex parte basis with the petitioners' application for authorization of the debtor-in-possession financing and the charge on the financing. Notice was given to the affected creditors and the petitioners requested that the court proceed with the application. A group of secured creditors brought an application to set aside the ex parte order.

Held: The petitioners' application was dismissed and the secured creditors' application was granted in part.

The inherent jurisdiction of the court to subordinate existing security should be exercised only in extraordinary circumstances. It must be shown that the benefit of the debtor-in-possession financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated. While the financing in the circumstances at the time would have a beneficial effect on the operating business, it was not demonstrated that it was critical for the business to continue to operate or for the petitioners to successfully restructure their affairs. It was not clear that the benefit of the financing clearly outweighed the potential prejudice to the secured lenders.

The provisions in the forbearance agreements by which the petitioners purportedly contracted out of the provisions of the Act were ineffective in view of s. 8 of the Act. The petitioners' failure to disclose the true status of refinancing efforts or restructuring advice that they had received, was not a material omission. The petitioners met a realistic standard of disclosure and the stay order was not to be set aside on the basis of non-disclosure. The petitioners acted in good faith. The petitioners' failure to abide by the terms of the forbearance agreements and the fact that they obtained restructuring advice did not demonstrate a lack of good faith in bringing the proceedings. The petitioners had substantial land holdings and an operating business. The petitioners had a legitim-

ate concern that an en bloc sale of the lands in the foreclosure proceedings could bring an end to the operating business. It was not an act of bad faith for the petitioners to seek the protection of the Act in order to attempt to save the operating business. The stay order was not to be set aside in its entirety.

The secured creditors did raise legitimate concerns that the petitioners might thwart any sale of the lands unless the price met with their approval and that the petitioners might not act reasonably in that regard. The evidence suggested that the petitioners had not acted reasonably in the attempts to sell the lands over the preceding two years. The stay order was to be amended so that the conduct of sale was also stayed and the listing agreement could not be acted upon by the bank and C. The amendment was to direct the monitor to list the lands on the same basis as the existing listing agreements, and the monitor was to receive and negotiate all offers for the lands or any part of the lands. The monitor was to consider the input of the petitioners and the security holders and to take into account the interests of the parties, but the petitioners and holders were not to interfere with any negotiations undertaken by the monitor. The offers were to be subject to court approval. The monitor was an officer of the court and had an obligation to act independently and to consider the interests of all parties. The potential continuation of the operating business was one of the considerations to be taken into account by the monitor in assessing offers on the land.

It was appropriate for the monitor to be given a priority charge for its fees and disbursements, including legal fees. The monitor acted on behalf of the court to provide information and monitoring for the benefit of all parties. It was also appropriate for the court to create a priority charge in respect of the petitioners' legal fees. The cash-flow projections of the petitioners did not provide for the payment of any legal expenses if there was no injection of working capital by way of the debtor-in-possession financing. The petitioners required legal advice in order to successfully restructure their affairs. A priority charge was to be given in respect of the petitioners' legal expenses, but only to the extent that the expenses were reasonably incurred in connection with the restructuring. The $500,000 maximum amount of the administrative charge in the stay order was too high and was to be reduced to $200,000.

Cases considered by Tysoe J.:

> 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 (B.C. C.A.) -- applied
>
> Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (B.C. C.A.) -- referred to
>
> Mooney v. Orr (1994), 33 C.P.C. (3d) 31, [1995] 3 W.W.R. 116, 100 B.C.L.R. (2d) 335 (B.C. S.C.) -- considered
>
> Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352, 57 O.A.C. 241 (Ont. C.A.) -- referred to
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> Royal Oak Mines Inc., Re (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) -- applied
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> Royal Oak Mines Inc., Re (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) -- considered
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> Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) -- applied

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) -- considered

Statutes considered:

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

Generally -- referred to

s. 8 -- referred to

APPLICATION by petitioners for authorization for debtor-in-possession financing and priority charge against lands; APPLICATION by secured creditors to set aside stay order.

***Tysoe J.*:**

1 *THE COURT*: On November 8, I granted an ex parte stay Order under the *Companies' Creditors Arrangement Act* (the "CCAA") in favour of the Petitioners. In granting the Order, I indicated that I was not creating any burden on creditors who wished to apply to set aside the Order. I declined to deal on an ex parte basis with the request of the Petitioners that I authorize debtor-in-possession ("DIP") financing in the amount of $1.1 million and create a charge for such financing in priority to all existing security except the charge in favour of the Federal Crown and the holders of agreements for sale.

2 After giving notice to the affected creditors, the Petitioners are now asking me to deal with the request for the DIP financing. One of the groups of the secured creditors has concurrently applied to set aside the November 8 Order, in whole or in part, and all of the other secured creditors support the application.

3 The Petitioner, VECW Industries Ltd., commenced business in 1958 in Victoria as the seller of English car parts. The business grew and VECW established an auto wrecking business in Surrey in 1963. The Victoria operation was closed in 1990. Over the years the Petitioners acquired additional land in Surrey and they now own or have agreements for sale on 32 contiguous parcels aggregating approximately 150 acres. At the present time, the auto wrecking business operates on approximately 40 acres of land and employs approximately 75 people.

4 The Petitioners first ran into financial difficulty in 1989 when they suffered significant losses. The Petitioners have only been profitable in two or three years since that time, the most recent profitable year being 1996. The accumulated losses have essentially been financed by mortgaging of the real estate. The gross revenues of the auto wrecking business have decreased from $14 million in 1996 to $6.5 million in 1998, and the projected revenue figure for 1999 is $3 million.

5 The Petitioners entered into a series of forbearance agreements with the principal secured creditors, but when they expired a number of foreclosure actions were commenced in late 1998 or early 1999. Orders Nisi were granted and redemption periods ran their course. On July 28, 1999, an order for Conduct of Sale was granted to Royal Bank of Canada and Century Services Inc. The Order was granted with the consent of the Petitioners. The 32 parcels were listed for sale with Colliers Macaulay Nicholls Inc. and J.J. Barnicke Vancouver Ltd. by a listing agreement dated October 12, 1999. The parcels are individually listed at an aggregate price of $49.6 million and an en bloc price of $32 million.

6 The aggregate amount of the debt secured against the real estate is approximately $24 million.

7 There is disagreement as to the appraised value of the real estate. There have been two recent appraisals conducted by Burgess Austin, which was commissioned by the Royal Bank and Century Services, and by Grover Elliot, which was commissioned by the Petitioners. The range of the two appraisals for the sale of the land on a lot-by-lot basis, before making any allowance for carrying costs, selling expenses and developer profit, is $44.4 million to $48.5 million. The selling period for the land on a lot-by-lot basis has been estimated from 3 to 4 years to 7 to 8 years. Grover Elliot did not provide an en bloc valuation for the land. The final en bloc valuation of Austin Burgess was $23 to $25 million but an earlier draft of its appraisal valued the land on an en bloc basis at $30 million.

8 The Petitioners have made arrangements for DIP financing in the amount of $1.1 million, with $200,000 being withheld for fees and an interest reserve. It is proposed that the financing be charged against the real estate in priority ahead of all of the secured creditors except the Federal Crown which is owed monies for unremitted source deductions and GST and except for the holders of agreements for sale. The President of the Petitioners had deposed that the DIP financing is essential for the purpose of allowing the Petitioners to acquire new inventory for the auto wrecking business, retain the professionals required for the restructuring and to generally bring the operating business back to life. The Petitioners have provided cash flow statements showing the effect of this injection of working capital.

9 In granting the stay Order, I allowed the conduct of sale to continue but I directed that the listing agents were to deal with the Petitioners or the Monitor appointed under the stay Order, rather than dealing with the Royal Bank and Century Services. The stay Order also granted a charge, up to $500,000, for the professional fees and disbursements of the Monitor and its legal counsel and the Petitioners' legal counsel.

10 The secured creditors attack the stay Order on two main grounds. First, they say that the Petitioners did not make full and frank disclosure when obtaining the ex parte order. Second, they say that the Petitioners are not acting in good faith and are abusing the CCAA by using this proceeding to delay a sale of the real estate.

11 Numerous non-disclosures were alleged but I need only address the three main complaints. First, it was asserted that the Petitioners did not disclose the existence of provisions in the forbearance agreements by which the Petitioners purportedly contracted out of the provisions of the CCAA. As I advised during the course of submissions, these provisions were disclosed to me on November 8 and I was of the view that they were ineffective in view of s. 8 of the CCAA.

12 Second, it is said that the Petitioners failed to disclose the true status of the refinancing efforts of Remington Financial Group, Inc. If there was any non-disclosure in this regard, I do not consider it to be material. In granting the stay Order, I did not rely on any imminent prospect of refinancing.

13 Third, the secured creditors point to the non-disclosure of the fact that the Petitioners sought advice from Deloitte & Touche Inc. in February 1998 and were provided with a report advising them to consider a restructuring. I do not consider this omission to be material. Knowledge of this report would not have affected my decision to grant the stay Order.

14 As was pointed out in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C. S.C.), the standard of disclosure must be realistic. In my view, the Petitioners met a realistic standard of disclosure and I decline to set aside the stay Order on the basis of non-disclosure.

15 I am also not persuaded by the submissions of the secured lenders that the Petitioners are not acting in

good faith. The facts that the Petitioners failed to abide by the terms of the forbearance agreements and that they obtained restructuring advice from Deloitte & Touche Inc. in February 1998 does not, in my view, demonstrate a lack of good faith in bringing these proceedings.

16 The Courts have consistently recognized the broad public policy objectives of the CCAA. The purpose of the legislation was described in the following passage from *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.):

> 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.

17 In the present case, the Petitioners have substantial land holdings and an operating business. It is their intention to reorganize their affairs in order to save the auto wrecking business. They have a legitimate concern that an en bloc sale of the lands in the foreclosure proceedings could bring an end to the operating business. In my view, it is not an act of bad faith to seek the protection of the CCAA in order to attempt to save the operating business. The arguments of the secured lenders in this regard would have been more persuasive if the only business of the Petitioners was land holdings, but the Petitioners do have an active business which must be considered.

18 Accordingly, I decline to set aside the stay Order in its entirety.

19 As I indicated during the course of submissions, I appreciate the concerns of the secured creditors that the Petitioners may thwart any sale of the lands unless the price meets with their approval and that the Petitioners may not act reasonably in this regard. There is evidence to suggest that the Petitioners have not acted reasonably in the attempts to sell the lands over the past two years. I also agree with Mr. McLean's comment that the Court probably does not have the jurisdiction to amend the current listing agreement. Therefore, I set aside paragraph 33 of the stay Order and I order the following in its place:

> (a) the stay of proceedings contained in paragraph 2 of the stay Order applies to the foreclosure proceedings, with the result that the Order for Conduct of Sale dated July 28, 1999 is also stayed and the listing agreement cannot be acted upon by the Royal Bank and Century Services;
>
> (b) the Monitor is directed to list the lands with Colliers Macauly Nicholls Inc. and J.J. Barnicke Vancouver Ltd. on the same basis as the current listing agreement, provided that the Monitor may apply for further directions if it believes that there should be any changes in the listing arrangements;
>
> (c) the Monitor is to receive and negotiate all offers for the lands or any part thereof;
>
> (d) the Monitor is to provide copies of all offers to the Petitioners and the holders of the mortgages and

agreements for sale and is to consider their input with respect to any offers, provided that the Monitor may accept an offer or make a counter-offer one full business day after providing a copy of the offer to these stakeholders;

(e) the Petitioners and the secured creditors are not to interfere with any negotiations undertaken by the Monitor and while they may answer any unsolicited inquiries from prospective purchasers, they are not to initiate contact with them;

(f) all offers are subject to court approval in this proceeding;

(g) in dealing with offers, the Monitor is directed to take into account the interests of the Petitioners and the interests of the secured creditors, as well as the unsecured creditors, and the Monitor is to give consideration to en bloc offers while weighing the viability of the continued operation of the auto wrecking business;

(h) in the event that any of the secured creditors believe that the Monitor is acting unreasonably in dealing with offers, there is liberty to apply to replace the Monitor with another party with respect to the sale of the lands or to seek directions with respect to any offer not accepted by the Monitor.

20 When I suggested during submissions that the Monitor be given conduct of the sale of the lands, counsel for the secured creditors argued that another chartered accounting firm be appointed as the party designated to have conduct of the sale. They submitted that the Monitor is seen to be in the camp of the Petitioners and that the party having conduct of the sale should give no consideration to the continuation of the operating business. I do not accept these submissions. The Monitor is an officer of the Court and has an obligation to act independently and to consider the interests of the Petitioners and its creditors. If the secured lenders can satisfy the Court that the Monitor is not performing its functions independently, there is liberty to apply for a replacement. With respect to the second point, it is my view that the potential continuation of the operating business is one of the considerations to be taken into account when assessing offers on the lands.

21 I now turn to the Petitioners' request for a priority charge in respect of the proposed DIP financing.

22 The first case in which a court in Canada created a charge against the assets of a company in CCAA proceedings was *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), where the Court created a charge to secure credit extended by suppliers of Westar Mining Ltd. during the period of the stay. The Court created the charge against unencumbered assets and it was not necessary to postpone any existing security.

23 In the *Westar Mining Ltd.* case, Macdonald J. distinguished the CCAA situation from the situation where a receiver-manager requests the Court to exercise its inherent jurisdiction to create a charge, such as occurred in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 52 C.B.R. (N.S.) 271 (B.C. C.A.)

24 While I agree with Macdonald J. that there are considerations in a CCAA situation which do not exist in relation to a receivership, it is my view that the inherent jurisdiction of the Court to subordinate existing security should only be exercised in extraordinary circumstances.

25 A somewhat similar situation arises when a request is made for a charge against trust assets. The jurisprudence suggests that the Court's jurisdiction to create such a charge should be sparingly exercised: for example, see *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 14 C.B.R. (3d) 6 (Ont. C.A.).

26 The extraordinary nature of superpriority for DIP financing in the context of CCAA proceedings was acknowledged by Blair J. in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at paragraph 24:

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

Those comments continue to have force on an application for priority financing after the initial Order.

27 Farley J. expressed his views in the subsequent application in the same proceedings at item 22 of paragraph 6 of *Re Royal Oak Mines Inc.* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]):

> Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the $8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in *Re Skydome Corporation* released Nov. 27, 1998 where Blair J. stated at p. 7:
>
> > This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the parties which is inherent in these situations - have been asked to make such a sacrifice. Cases such as ***Re Westar Mining Ltd.*** (1992), 14 C.B.R. 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. See also ***Re Lehndorff Gen Partner*** (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); ***Olympia & York Developments Limited v. Royal Trust Co.*** (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).
>
> Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. It would seem to me that Holden J.A. in his endorsement in ***Re Dylex Limited*** released January 23, 1995 implicitly engaged in this balancing of prejudices act where he observed:
>
> > I do not believe that the Bank of Montreal will be adversely affected by the making of this order. As a result of the bridge financing, new receivables will be generated which will assist in re-paying or securing the bridge financing.

> Better and more timely information will be of assistance in minimizing the momentum effect in the future. My conclusion as to the appropriateness of the superpriority granted the DIP financing is of course limited to the Initial Order $8.4 million amount and is based upon the conditions now determined to be prevailing as of the authorization date. Each subsequent DIP financing authorization and the priority to be attributed to it will have to be determined on the merits and circumstances then existing.

28 While I do not disagree that it is an exercise of balancing interests, it is my view that there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated. For example, in *Westar Mining Ltd.*, the charge was necessary to keep the business in operation and there was no prejudice to any secured lenders.

29 In the present situation, while the DIP financing would obviously have a beneficial effect on the operating business, I am not satisfied that it is critical for the business to continue to operate or for the Petitioners to successfully restructure their affairs. Nor do I have sufficient confidence in the cash flow projections and the appraised values of the realty that I can conclude that the benefit of the DIP financing clearly outweighs the potential prejudice to the secured lenders.

30 In the result, I dismiss the Petitioners' application for a priority charge to secure DIP financing.

31 The secured lenders also object to the priority charge for the professional fees and disbursements of the Monitor, its legal counsel and the legal counsel for the Petitioners. The jurisdiction of the Court in this regard was considered in the case of *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]), where Saunders J. said the following at paragraphs 48 and 49:

> This court, in previous cases which postdate ***Fairview Industries Ltd., Re***, has acted to give priority for payment of accounts. For example, in ***Westar Mining Ltd., Re*** (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.) Mr. Justice Macdonald exercised his discretion to create a "first charge" to secure monies advanced to permit operations to continue. Considering this authority, and the genesis of the office of monitor, I conclude that this court does have jurisdiction to create a priority for fees charged by the monitor.
>
> Further, in my view the order sought is appropriate. The monitor acts on behalf of the court to provide information and monitoring for the benefit of all parties. An order protecting the fees, as first granted in the *ex parte* order, shall continue.

32 I agree with these comments and I believe that it is appropriate for the Monitor to be given a priority charge for its fees and disbursements, including disbursements incurred for legal counsel. I will return shortly to the appropriate amount of the charge.

33 In *Starcom International Optics Corp.*, Saunders J. concluded that the Court had the jurisdiction to create a priority charge in respect of other professional fees but she declined to do so because the evidence was that they could be paid from cash flow. In this case, the cash flow projections prepared by the Petitioners do not provide for the payment of any legal expenses if there is no injection of working capital by way of the DIP financing.

34 I am satisfied that some priority should be given at this stage for the Petitioners' legal expenses because they will require legal advice in order to successfully restructure their affairs. However, in the event that the restructuring is not successful and there is a shortfall in the recovery for the secured lenders, it would not be fair to require those lenders to bear all of the burden of the expense of the lawyers for the Petitioners in acting against

them. The secured lenders should not be expected to underwrite the expenses of lawyers who act unreasonably or who act on unreasonable instructions to frustrate them in the recovery of the monies owed to them.

35 Hence, I am only prepared to give a priority charge in respect of the Petitioners' legal expenses to the extent that they are reasonably incurred in connection with the restructuring. As an example, if the Court were to conclude that the position of the Petitioners' on an application was unreasonable, the Petitioners' counsel would not have the benefit of the priority charge and would have to look to other sources for payment.

36 After hearing full submissions on this matter, I have also concluded that the $500,000 maximum amount of the administrative charge in paragraph 30 of the November 8 stay Order is too high without a requirement for further justification. I reduce the amount to $200,000, subject to further order of the Court.

37 Two creditors asked to be excluded from these proceedings because of their unique situation. Both R.I.C. Lands Ltd. and Western Canadian Bank submitted that their security relates to isolated parcels and there is no reason why they should be part of the CCAA proceeding. I do not agree because the parcels of land against which they hold security form part of the collective land holdings of the Petitioners. There is no principled reason to exempt them from the stay Order.

38 Subject to the variations which I have ordered, the stay Order is to continue in force pending further Court application. When these applications initially came before me on November 15, I directed that the Monitor was not to take any steps under the stay Order except answering inquiries from creditors until further order. I now direct the Monitor to act under the stay Order.

Order accordingly.

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2000 BCCA 146, 73 B.C.L.R. (3d) 236, [**2000**] 5 W.W.R. 178, 16 C.B.R. (4th) 141,
135 B.C.A.C. 96, 221 W.A.C. 96, [**2000**] B.C.J. No. 409, 5 W.W.R. 178

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United Used Auto & Truck Parts Ltd., Re
In the Matter of the Companies' Creditors Arrangement Act R.S.C. 1985, C. c-36
In the Matter of the Company Act, R.S.B.C. 1979, c. 59
In the Matter of United Used Auto & Truck Parts Ltd. VECW Industries Ltd.,
Seiler Holdings Ltd. and United Used Auto Parts (Storage Div.) Ltd.
United Used Auto & Truck Parts Ltd. VECW Industries Ltd. Seiler Holdings Ltd.
and United Used Auto Parts (Storage Div.) Ltd., Petitioners (Respondents) and
Rashid Aziz, Respondent (Appellant)
British Columbia Court of Appeal
Rowles, Prowse, Mackenzie JJ.A.
Heard: January 25, 2000
Judgment: February 28, 2000
Docket: Vancouver CA026591

Proceedings: affirming (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers])

Counsel: *B.J. Brown*, for Appellant.

S.C. Fitzpatrick, for Respondent Century Services.

C.W. Caverly, for Respondent Ernst & Young.

W.E.J. Skelly, for Respondent United Group of Co.

R.G. Hildebrand, for Respondent City of Surrey.

B. Lewis-Hand, for Respondent Clarica Life Insurance Co.

D.G. Nygard, for Respondent Attorney General of Canada.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Miscellaneous issues

Petitioners owned large amounts of land and operated auto-wrecking business -- Petitioners were granted stay order under Companies' Creditors Arrangement Act -- Stay order allowed conduct of sale by bank and C to continue and granted charge for professional fees of monitor and its legal counsel and petitioners' legal counsel -- Petitioners' application for authorization of debtor-in-possession financing was dismissed -- Secured creditors'

application to set aside stay order was granted in part -- Stay order was ordered amended by motions judge to stay conduct of sale by bank and C and to direct monitor to list lands and to receive and negotiate all offers for lands -- Appeal by secured creditors dismissed -- Equity permitted orders granting super-priority for monitor's fees and expenses in appropriate circumstances as well as for debtor's legal expenses related to restructuring plan -- Nothing precluded exercise of equitable jurisdiction to supplement statute and effect object of Act -- Jurisdiction under Act could not be restricted to circumstances where secured creditors approved appointment of monitor, monitor is appointed to preserve and realize assets for benefit of all interested parties, or monitor has expended money for necessary preservation or improvement of property -- Super-priority for petitioners' legal fees was substitute for debtor in possession financing -- Jurisdiction to grant super-priority for petitioners' legal expenses rested on same equitable foundation as monitor's fees and disbursements -- Adequate security for monitor's reasonable costs of administration was necessary -- Cash flow from operations was insufficient to assure payment of monitor's fees and expenses, and asset values exceeding secured charges were in doubt -- Granting of super-priority was only practical means of securing payment of monitor's fees and expenses -- Priority for reasonable restructuring fees and disbursements could have been allowed as part of debtor in possession financing -- Immaterial that fees and disbursements were allowed as part of administration charge -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Mackenzie J.A.*:

Bank of America Canada v. Willann Investments Ltd. (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.) -- referred to

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515 (S.C.C.) -- considered

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.) -- considered

Canadian Asbestos Services Ltd. v. Bank of Montreal, 16 C.B.R. (3d) 114, [1992] G.S.T.C. 15, 11 O.R. (3d) 353, 93 D.T.C. 5001, 5 C.L.R. (2d) 54, [1993] 1 C.T.C. 48, 5 T.C.T. 4328 (Ont. Gen. Div.) -- considered

Dylex Ltd., Re (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.) -- considered

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) -- not followed

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 (B.C. C.A.) -- applied

Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (B.C. C.A.) -- considered

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146 (B.C. S.C.) -- considered

Reference re Companies' Creditors Arrangement Act (Canada), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75 (S.C.C.) -- applied

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (Ont. C.A.) -- considered

Royal Oak Mines Inc., Re (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) -- referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]) -- referred to

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

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) -- considered

Statutes considered:

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

Generally -- referred to

s. 11 [rep. & sub. 1997, c. 12, s. 124] -- considered

s. 11.7 [en. 1997, c. 12, s. 124] -- considered

s. 11.8 [en. 1997, c. 12, s. 124] -- referred to

s. 11.8(1) [en. 1997, c. 12, s. 124] -- considered

s. 11.8(2) [en. 1997, c. 12, s. 124] -- considered

APPEAL by secured creditors from judgment reported at(1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), granting super-priority to fees and expenses of monitor and petitioners' legal fees related to restructuring plan.

The judgment of the court was delivered by *Mackenzie J.A.*:

1 This appeal raises the issue of "super-priorities" under the *Companies' Creditor Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Can a court grant a priority for the fees and expenses of a court appointed monitor ahead of secured creditors without the consent of those creditors? A subsidiary issue is whether legal fees of the debtor in possession related to a proposed restructuring can be granted a similar priority. For the reasons that follow, I have concluded that equity underpins the court's *CCAA* jurisdiction and permits orders granting super-priority for the monitor's fees and expenses in appropriate circumstances as well as for the debtor's legal expenses related to a restructuring plan.

2 Following the hearing of the appeal we advised counsel through the Registry that the appeal was dismissed and that reasons would follow. We have been advised by counsel that this is the first time the issues have come before an appellate court. We are indebted to counsel for their thorough and comprehensive submissions.

Background

3 In brief, Mr. Justice Tysoe granted an *ex parte* order under the *CCAA* on 8 November 1999 staying all execution and enforcement proceedings against the debtor/petitioners. Ernst & Young Inc. was appointed monitor and its reasonable fees and disbursements were ordered to be paid in priority to secured charges. The court also ordered that the reasonable fees and disbursements of counsel for the debtors related to the plan of restructuring should be included with the monitor's fees and disbursements in the defined "administrative charge" and be granted the super-priority over the charges of the secured and other creditors. On 19 November 1999, Tysoe J. dismissed an application by the secured creditors to set aside the stay order and the priority granted for the administrative charge. Tysoe J. reduced the maximum amount of the administration charge from $500,000 to $200,000. The secured creditors have appealed the super-priority granted to the administration charge. They did not appeal the stay of proceedings.

The facts

4 The debtor/petitioners have carried on an auto wrecking business in Surrey, British Columbia since 1963. They gradually acquired 32 parcels of land aggregating some 150 acres. The business operates on 40 acres employing about 75 people.

5 The petitioners' financial difficulties started in 1989. Over the years since they have financed losses by mortgaging the real estate.

6 Foreclosure actions were commenced in late 1998. The mortgagees obtained orders *nisi* and the redemption periods expired. On 28 July 1999 two of the mortgagees were granted conduct of sale. The 32 parcels have been listed at individual prices aggregating $49.6 million or an en bloc price of $32 million. Appraisals of the property range from $23 million to $48.5 million. The higher estimates are for lot-by-lot sales with no allowance for carrying costs, selling expenses, or developers' profit.

7 The aggregate debt is $24 million.

8 The stay order granted by Tysoe J. allowed the conduct of sale to continue but directed that the listing agents were to deal with the petitioners and the monitor rather than with the two mortgagees earlier granted conduct of sale. Tysoe J. summarized the reasons for granting a stay under the *CCAA* in these terms at para. 17:

> In the present case, the Petitioners have substantial land holdings and an operating business. It is their intention to reorganize their affairs in order to save the auto wrecking business. They have a legitimate concern that an en bloc sale of the lands in the foreclosure proceedings could bring an end to the operating business. In my view, it is not an act of bad faith to seek the protection of the CCAA in order to attempt to save the operating business. The arguments of the secured lenders in this regard would have been more persuasive if the only business of the Petitioners was land holdings, but the Petitioners do have an active business which must be considered.

9 The petitioners asked for Debtor in Possession ("DIP") financing in the amount of $1.1 million. Tysoe J. refused that request but he did allow a super-priority for legal expenses reasonably incurred in connection with the effort to successfully restructure the petitioners' affairs. He concluded that the cash flow from the business would be insufficient to pay those expenses in the absence of DIP financing. In the result, the allowance for the petitioners' restructuring legal expenses was a limited substitute for DIP financing. The petitioners' counsel's

reasonable restructuring legal fees and disbursements for the restructuring were included within the administration charge as defined in the order and subject to the cap on the amount of the administration charge.

The *Companies' Creditor Arrangement Act*

10 The *CCAA* has been controversial since it was first enacted in 1933, in the depths of the Great Depression. It was upheld as constitutional in *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 (S.C.C.), at 2 [C.B.R.] . In an often quoted passage Duff C.J.C. summarized the purpose of the statute:

> ... the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

11 Those observations were reinforced by Gibbs J.A. in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 315-16:

> 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.

Gibbs J.A. concluded (at 320):

> 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. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.); *Re Feifer and Frame Manufacturing Corp.*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.); *Wynden Canada Inc. v. Gaz Métropolitain Inc.*

> (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.); and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, 72 C.B.R. (N.S.) 20, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 149 (Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

12 These comments emphasize that the *CCAA's* effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

The Monitor

13 The *CCAA* originally contained no reference to a monitor. The term "monitor" appears to have originated in a passage from the judgment of Trainor J. in *Re Northland Properties Ltd.* (1988), 69 C.B.R. (N.S.) 266 (B.C. S.C.), as follows (at 277):

> I am satisfied that I have jurisdiction to appoint an interim receiver and spell out the responsibilities of that office such that his true role would be that of a monitor or watchdog during the interim period. The cost would be significant, but is not a factor of great weight considering the total indebtedness of the companies.

The jurisdiction relating to interim receivers is a jurisdiction in equity and Trainor J. implicitly relied upon that equitable jurisdiction to support the order.

14 The term "monitor" was picked up by Parliament in a 1997 amendment to the *CCAA* [S.C. 1997, c. 12, s. 124] and for the first time given statutory recognition. The amendment made appointment of a monitor mandatory. The material portion of the 1997 amendment is as follows:

> **Court to appoint monitor**
>
> 11.7(1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> **Auditor may be monitor**
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> **Functions of monitor**
>
> (3) The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;
>
> (b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,

(ii) at least seven days before any meeting of creditors under section 4 or 5, or

(iii) at such other times as the court may order;

(c) advise the creditors of the filing of the report referred to in paragraph (*b*) in any notice of a meeting of creditors referred to in section 4 or 5; and

(d) carry out such other functions in relation to the company as the court may direct.

Monitor not liable

(4) Where the monitor acts in good faith and takes reasonable care in preparing the report referred to in paragraph (3)(b), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Assistance to be provided

(5) The debtor company shall

(a) provide such assistance to the monitor as is necessary to enable the monitor to adequately carry out the monitor's functions; and

(b) perform such duties set out in section 158 of the *Bankruptcy and Insolvency Act* as are appropriate and applicable in the circumstances.

1997, c. 12, s. 124.

Non-liability in respect of certain matters

11.8(1) Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

Status of claim ranking

(2) A claim referred to in subsection (1) shall not rank as costs of administration. ...

The balance of s. 11.8 deals with liability for environmental matters that are not pertinent to this appeal.

15 The function of the monitor is set out in some detail but the only reference to the cost of carrying out the monitor's function is the oblique reference in s. 11.8(2) that costs of statutory claims on the debtor arising before the monitor's appointment will not rank as a cost of administration. I do not think that it can be inferred that the monitor's costs of administration were otherwise overlooked by Parliament or that Parliament intended that the court have no authority to provide for those costs. The only reasonable conclusion in my opinion is that Parlia-

ment was aware of the court's general jurisdiction in equity and assumed that jurisdiction remained available except as inconsistent with the *Act*. Indeed, by requiring the appointment of a monitor Parliament made a jurisdiction to provide for the monitor's costs of administration even more necessary.

Cases

16 The first attack on the jurisdiction of the court to grant a super-priority to the monitor's costs of administration came in *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.). There Glube C.J. concluded with some reluctance that the court had no authority under the *CCAA* to grant the monitor a super-priority in payment without the secured creditors' consent. While Glube C.J. referred to *Northland Properties Ltd.*, *supra*, in another context in the judgment, there is no reference to Trainor J.'s analogy of that between a monitor and an interim receiver and the common authority to assign a priority flowing from the court's equitable jurisdiction over interim receivers. Glube C.J. appears to have treated the issue solely as one of statutory construction without reference to any broader equitable jurisdiction.

17 Later decisions in Ontario and British Columbia have declined to follow *Fairview Industries Ltd.*. They have held consistently that the court does have jurisdiction to grant a super-priority for the fees and expenses of the monitor; see *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 16 C.B.R. (3d) 114 (Ont. Gen. Div.) *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]). In *Canadian Asbestos* Chadwick J. stated (at 123):

> The fruits of the monitors' efforts is for the benefit of all creditors and therefore the monitor and their legal counsel should be paid in advance and before distribution to the creditors.

18 In *Starcom*, *supra*, Saunders J. advanced a similar rationale at 189:

> [I]n my view the order sought is appropriate. The monitor acts on behalf of the court to provide information and monitoring for the benefit of all parties.

Neither *Canadian Asbestos* nor *Starcom* specifically referred to the source of the jurisdiction. Macdonald J. in *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) , relied on in *Starcom*, referred to the jurisdiction simply as inherent jurisdiction (at 93). Macdonald J. noted that Dickson J., speaking for the Supreme Court of Canada in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), held that inherent jurisdiction with respect to receiver-managers could not be exercised in conflict with a statute. The origins of the receivers' jurisdiction are located in the equitable jurisdiction of the Court of Chancery and while that jurisdiction cannot be exercised contrary to a statute nothing precludes its exercise to supplement a statute and effect a statutory object.

The receivers' jurisdiction

19 The Canadian jurisprudence on priorities for receivers' fees and expenses begins with *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305 (Man. C.A.). There Dickson J.A. for the court rejected an argument that a receiver could only be paid from the debtor's remaining equity in the property. He concluded that such a restriction would frustrate the receiver's function (at 307-8):

> ... The argument is that a receiver can only receive his remuneration and costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the con-

> trary: *Strapp v. Bull, Sons & Co.*; *Shaw v. London School Board*, [1895] 2 Ch. 1: *Re Glasdir Copper Mines Ltd.; English Electro-Metallurgical Co. v. Glassier Copper Mines Ltd.*, [1906] 1 Ch. 365. It would seem to us that if appellant's argument is sound, one would be hard put to find anyone willing to be a receiver; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth of property under administration can rarely be determined at the time of appointment. The Court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property? The argument also appears to proceed on the assumption that when property subject to a mortgage becomes of a value less than the mortgage debt against it, it ceases to belong to the debtor. Property of a debtor, whatever the amount of the mortgage debt against it, remains the property of the debtor until all steps have been taken in law to foreclose the interest of the debtor. All of the debtor's property under administration of the court, and not merely the equity of the debtor in that property is available by order of the court to meet the fees and disbursements of a receiver.

20 The issue of the receiver's priority was next visited by the Ontario Court of Appeal in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.). Houlden J.A. for the court relied on *Clark on Receivers*, 3rd ed., for the proposition that the receiver of a partnership has no power to subject the security of secured creditors of the partnership to liability for the receiver's disbursements. There were, however, exceptions:

> 1) if a receiver has been appointed with the approval of the holders of security;
>
> 2) if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors; or
>
> 3) if a receiver has expended money for the necessary preservation or improvement of the property.

21 Houlden J.A. stated that these three exceptions were not exhaustive. Nonetheless the *Kowal* statement of exceptions has been influential in subsequent cases and they were applied by this Court in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (B.C. C.A.). But as Macdonald J. observed in *Westar Mining*, *supra* at 93-94, different considerations apply under the *CCAA*. The court is concerned with the survival of the debtor company long enough to present a plan of reorganization. That is a broader interest than that of creditors alone. The jurisdiction must expand from the *Kowal* exceptions to serve that broader interest.

22 Thus the receivers' jurisdiction and the monitors' jurisdiction are analogous to the extent that they are both rooted in equity but they diverge to the extent that the monitors' jurisdiction serves a broader statutory objective under the *CCAA*. In my opinion the jurisdiction under the *CCAA* cannot be restricted to the *Kowal* exceptions.

Priority for reasonable restructuring legal fees and disbursements of the debtors' counsel

23 The legal expenses of the debtor in connection with the restructuring were wrapped up with the monitor's fees and expenses in the administration charge for the purposes of the stay order. However, I think they should be examined separately for questions of jurisdiction. As indicated above, Tysoe J. ordered the priority for the

debtors' legal expenses as part of the administration charge only after he had refused to order more debtor in possession priority financing. The super-priority for the debtors' legal fees was a substitute for DIP financing and in my opinion, the jurisdictional issue turns on the power of the court to allow a super-priority for DIP financing.

24 The subject of DIP financing has recently been examined in a trenchant paper by H.A. Zimmerman, *Financing the Debtor in Possession*, (Insolvency Institute of Canada, 19 November 1999). According to Mr. Zimmerman, the first case authorizing super-priority DIP financing under the *CCAA* was *Bank of America Canada v. Willann Investments Ltd.* (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.) . In *Re Dylex Ltd.* (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.) super-priority DIP financing was granted for the first time over the objection of a secured creditor. According to Mr. Zimmerman the scope of super-priority DIP financing has been extended in recent, as yet unreported, cases including *Re Skydome Corp.* (November 27, 1998), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List]) [reported at 16 C.B.R. (4th) 118] and *Re Royal Oak Mines Inc.* (March 14, 1999), Doc. 99-CL-3278 [reported at(1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]).

25 In *Canadian Asbestos Services Ltd. v. Bank of Montreal*, *supra*, Chadwick J. granted super-priority for the advancement of additional funds to complete certain specific construction projects, holding that it was for the benefit of all creditors, both secure and non-secure. In *Dylex*, *supra*, Houlden J.A. recognized a broader interest, including that of 12,000 employees, as justification for super-priority bridge financing over a secured creditor's objections. The jurisdiction to grant a super-priority for the debtors' restructuring legal expenses, whether separately or as a part of DIP financing rests on the same equitable foundation as the monitor's fees and disbursements and stands or falls on the same considerations.

Conclusions

26 The petitioners left it very late in the day to apply for *CCAA* relief. The secured creditors opposed a stay of proceedings and failed. No appeal was taken from that part of the order which involved discretion of the chambers judge. Once the decision to grant relief was made, the monitor is required and I conclude that adequate security for the monitor's reasonable costs of administration necessarily follows. The question then becomes simply whether a super-priority ahead of secured creditors is necessary to provide that security in the circumstances of any particular case.

27 The secured creditors contend that the super-priority for the monitor can only be supported if the case falls within the second *Kowal* exception, circumstances where the appointment is "to preserve and realize assets for the benefit of all interested parties, including secured creditors". Here it is contended that the objective is to effect a partial sale of the real estate assets for a price sufficient to pay the creditors and still leave sufficient land to permit the active business to continue. That would benefit other parties but not the secured creditors who could be paid out from an en bloc sale. The secured creditors have no interest in preserving the active business.

28 The object of the *CCAA* is more than the preservation and realization of assets for the benefit of creditors, as several courts have underlined. In *Chef Ready*, *supra*, Gibbs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed "to monitor the business and financial affairs of the company" for the court. The appointment of a monitor is mandatory when the court grants *CCAA* relief.

29 Dickson J.A. pointed out in *Braid Builders*, *supra*, that receivers will not accept an appointment without

reasonable assurance that they will be paid. That is equally true for monitors. When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over *CCAA* relief. I do not think that Parliament intended that the objects of the *Act* could be indirectly frustrated by secured creditors.

30 In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the *CCAA*. It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring. That determination is largely a matter of judgment for the judge at first instance and appellate courts normally will be slow to interfere with an exercise of discretion.

31 In my opinion, super-priority for DIP financing rests on the same jurisdictional foundation in equity. Priority for the reasonable restructuring fees and disbursements could have been allowed as part of DIP financing. It is immaterial that they have been allowed here as part of the administration charge.

32 I would dismiss the appeal for these reasons.

Appeal dismissed.

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261 N.R. 196 (note), 149 B.C.A.C. 160 (note), 244 W.A.C. 160 (note), **2000** **CarswellBC** 2133, [**2000**] S.C.C.A. No. 142

H

2000 CarswellBC 2132

United Used Auto & Truck Parts Ltd., Re
Rashid Aziz v. United Used Auto & Truck Parts Ltd., VECW Industries Ltd., Seiler Holdings Ltd. and United Used Auto Parts (Storage Div.) Ltd., Ernst & Young Inc., Canadian Western Bank, Century Services Inc., Royal Bank of Canada, Clarica Life Insurance Company, City of Surrey, Her Majesty the Queen in Right of Canada, International Union of Operating Engineers and Local 115
Supreme Court of Canada
Bastarache J., L'Heureux-Dubé J., LeBel J.
Judgment: September 14, 2000
Docket: 27824

Proceedings: Leave to appeal allowed 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.); Affirmed 1999 CarswellBC 2673, 12 C.B.R. (4th) 144, [1999] B.C.J. No. 2754 (B.C. S.C. [In Chambers])

Counsel: None given.

Subject: Corporate and Commercial; Insolvency

Corporations.

Bastarache J., L'Heureux-Dubé J., LeBel J.:

1 The application for leave to appeal is granted.

END OF DOCUMENT

TAB 3

16 C.B.R. (4th) 118

C
1998 CarswellOnt 5922

Skydome Corp., Re
In the Matter of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.
In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36 as Amended
In the Matter of the Business Corporations Act, R.S.O. 1990, c. B.16, as Amended
In the Matter of a Proposed Plan of Compromise or Arrangement of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.
Ontario Court of Justice, General Division (Commercial List)
Blair J.
Judgment: November 27, 1998
Docket: 98-CL-3179

Counsel: David E. Baird, Michael B. Rotsztain and Richard A. Conway, for Applicants.

R.G. Marantz, Q.C., and Andrew Diamond, for Respondents Province of Ontario and Stadium Corporation.

Derrick Tay and John Porter, for Trustee for Bondholders and Bondholder.

James Dube and Craig Thornburn, for Respondents The Toronto Blue Jays Baseball Club.

Alex Ilchenko, for Respondent Ticketmaster Canada Ltd.

Ronald Slaght, for Respondent McDonald's Restaurants.

Subject: Insolvency; Corporate and Commercial

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- "Fair and reasonable"

Three related corporations were involved in operation of sporting and entertainment facility -- Corporations became insolvent because of changes in sporting, entertainment and economic environment, non-payment of disputed municipal taxes, competition from other facilities, heavy debt load, and costly negotiations with sports team that was facility's primary user -- Corporations brought application for protection under Companies' Creditors Arrangement Act -- Corporations sought as part of declaration court's approval of interim lease, and authorization of super priority loan from sports team in order to finance necessary operating expenses and essential capital expenditures -- Corporations also sought authorization to withdraw sum from capital reserve account that was held as part of security arrangements regarding outstanding indebtedness to group of bondholders -- Applic-

ation granted -- Facility held large number of functions that drew millions of people to city throughout year and employed large number of employees -- Substantial economic and financial effects would result to city, merchants, suppliers, entertainers and employees in tourist industry if facility were shut down -- Broader public dimension was required to be considered in determining application -- Authority existed in case law for granting of super priority -- Proposed interim lease and super priority were so closely integrated that one could not be approved without other -- Interim lease was key to ability of corporations to pursue attempt to put forward plan that would be acceptable to creditors -- Importance of stability in situation in connection with presence of sports team and ability to attract other functions outweighed other concerns that could arise in relation to negotiation and execution of interim lease -- Corporations proposed to make appropriate use of withdrawn reserve funds, and bondholders would not be prejudiced as many of proposed expenditures were for matters that had priority over bondholders -- It is acceptable under Act for creditor's security to be weakened as part of balancing of prejudices between parties -- Circumstances existed to make initial order under Act appropriate, and it was fair and reasonable to grant order requested -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by Blair J:

Anvil Range Mining Corp., Re (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) -- applied

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) -- referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. Olympia & York Developments Ltd., Re) 12 O.R. (3d) 500 (Ont. Gen. Div.) -- referred to

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) -- considered

Statutes considered:

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

Generally -- referred to

s. 8 -- considered

s. 11 [rep. & sub. 1997, c. 12, s. 124] -- referred to

s. 11(6) [en. 1997, c. 12, s. 124] -- considered

APPLICATION by related corporations for protection under Companies' Creditors Arrangement Act.

Endorsement. ***Blair J*****:**

1 Skydome Corporation, Skydome Food Services and SAI Subco Inc. -- all related and presently insolvent companies -- apply for the protection of the Court available in appropriate circumstances under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 Once considered to be the Crown Jewel of the sports and entertainment facility world the Skydome, it seems, has developed a few financial fissures. It has insufficient funds or sources of funds to meet all of its on-

going liabilities as they become due. The same is true for all 3 Applicants, which I shall refer to generically in this endorsement as "The Skydome" unless the context requires otherwise. Various reasons are put forward for this in the materials, but in summary they are the following:

> 1. Changes in the sporting, entertainment and economic environment in recent years have place financial strains on the operations of the facility. These changes include, but are not limited to, declining revenues as a result of a significant downturn in attendance at Blue Jays games since the halcyon World Series days of the early 1990's, and the cost of competing for entertainment providers in an environment where the entertainers must be paid in U.S. dollars but the revenue is received in weakened Canadian dollars.
>
> 2. Non-payment of Municipal taxes of approximately $3.6 million (Skydome contests its liability for such taxes in the sense that it has been engaged in a lengthy battle with the taxing authorities over the proper assessment base for its municipal taxes);
>
> 3. The Skydome now faces competition from other entertainment facilities in this City and elsewhere.
>
> 4. The Applicants carry a very heavy debt load, which is the legacy of the construction of the domed stadium and the initial development and marketing of the Skydome.
>
> 5. In connection with the latter, there are various outstanding executory contracts which provide benefits to those who were involved in supporting the initial Sydome venture, in continuing consideration of that support, but which as a result reduce the benefits provided by revenues that can be generated by the Skydome now.
>
> 6. Because renters of Skyboxes were called upon to pay first and last years rent in advance, there are no revenues coming in for the last year of the 10 year leases which are now about to expire; and,
>
> 7. The Skydome faces a major negotiating battle with its primary source of financial life, the Blue Jays, over the Blue Jays sub-lease (or, more accurately, license) of the premises.

3 This latter problem has been resolved, subject to approval and granting of CCAA protection, through the execution of an Interim Licensing Agreement (which I will call the Interim Lease, since everyone else does), under which the Blue Jays will remain in the Skydome for a further one year period (subject to a right to renew for a further one year period) on the same terms as those contained in the present lease which expires at the end of this year. There is also an agreement *in principal only* between Skydome and the Baseball Club with respect to a long-term 10 year arrangement; but this arrangement has not yet been finalized and, indeed, its negotiation and acceptance is proposed to be made the subject of the Plan of Arrangement which the Applicants are hoping to be able to put forward.

4 The Applicants seek the usual declaratory relief that is sought on these applications; namely, an order declaring that they are corporations to which the Act applies; and a broad stay order which, although there are quibbles with certain provisions in it, is more or less of the sort generally sought and granted when Initial Orders are made under s. 11 of the CCAA. They also ask for the appointment of PricewaterhouseCoopers Inc. as monitor. In addition, however, and as part of the package, the Applicants ask the Court to approve the Interim Lease and authorize the parties to enter into it, and they ask the Court to authorize a "Super Priority" loan of up to $3.5 million from the Blue Jays in order to finance their necessary operating expenses, and certain capital expendit-

ures which they say are essential, and as well the costs of restructuring. Finally, they seek additional authorization to withdraw the sum of $1,260,000 from a capital reserve account with Montreal Trust Company of Canada -- which reserve fund is held as part of the security arrangements regarding $58 million of outstanding indebtedness to a group of Skydome Bondholders. The withdrawal would be for the purpose of making necessary capital expenditures with respect to YK2 compliance enhancements, improvements to the Skydome sound system and renovation regarding the Skydome Hotel.

5 No one seriously submits that it is in anyone's interests for the Skydome to be shut down or, indeed, for the Blue Jays not to continue to play ball from that facility. It would be folly to suggest otherwise, at least for the moment. The Skydome is a popular facility which draws about 4 million people to its various functions throughout the year -- there have been 270 such events in 1998. It has 160 full-time employees and 1100 part-time employees who work there during the baseball season. Without going into to them in detail, there are very substantial economic and financial ripple effects for merchants, suppliers, entertainers, people working and employed in the tourist industry in Toronto, and Governments in the form of tax revenues of various sorts from the continued operation of the Skydome. It is said, for instance, that Skydome related activities generate $326 million in revenues for the economy of the GTA and $45 million in sales taxes for the Province of Ontario.

6 Thus there is a broader public dimension which must be considered and weighed in the balance on this Application as well as the interests of those most directly affected: see *Re Anvil Range Mining Corp.*, unreported decision of Ontario Court of Justice General Division August 20, 1998 [reported at(1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List])]. As was stated in that case:

> The Court in its supervisory capacity has a broader mandate. In a receivership such as this one which works well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

7 The Anvil Range case concerned a CCAA proceeding which had been turned into a receivership, but the same principles apply in my view to a case such as this. While it may be engaging a trifle in hyperbole to raise the interests of Blue Jays fans to the level of "the social and economic fabric" of the region, they too can't be ignored altogether and the true economic ramifications of a failed Skydome are surely something that must be considered.

8 The two issues that raised the most concern were those dealing with the "Super Priority" loan and with the use of the capital reserve fund for the purposes requested. What is at stake here is protection of the Bondholders (who say their outstanding loan, with default ramifications taken into account is about $70 million) and the Province of Ontario (which has secured loans behind that of the Bondholders totalling about $24 million) with regard to a potential $3.5 million loan and the reduction of the Bondholders' security by less than $1.3 million. While these numbers are large numbers to the ordinary person they are really not very significant numbers relevant to the overall numbers involved.

9 There is ample authority in previous decisions of the Court for the granting of a Super Priority in CCAA situations -- even to shareholders who are advancing funds -- and I see no reason in principle why such a Super Priority should not be approved here. Although the Bondholders oppose the Interim Lease -- indeed it is really at the heart of their objections -- the Province does not. The two are so closely integrated in the proposal being put

forward by the Applicants that I do not see how one can be approved (the Interim Lease) and the other (the Super Priority Loan) not.

10 The Interim Lease is key to the ability of the Skydome to pursue its attempt to put forward a Plan that will be acceptable to its creditors, including the Bondholders who will have the opportunity to vote and to approve or reject that Plan. The proposed Plan, as I have indicated, will include a Long-Term Lease component. The Bondholders main complaint, it seems to me, is that they have been excluded from the negotiation process -- as they see it -- to this point, and that their consent was not sought with respect to the Interim Lease. Mr. Tay did not say what the response would have been had the consent been sought. The Bondholders are also suspicious that the object of this exercise is to solidify the position of the major shareholders of the Skydome -- Labatts and the CIBC -- who are also part owners of the Blue Jays, by putting in place an Interim Lease that will be binding for up to two years regardless of whether the CCAA proceedings succeed or not, and which will in any event put them under subtle pressures to approve a final Plan with a final lease that they might otherwise have been able to resist.

11 There is no evidence to support such a suggestion. Whether there is anything in it or not I do not know, but one of the characteristics of a CCAA restructuring is that by nature, it leaves the debtor company in possession and in charge of the show while it attempts to work out an acceptable arrangement with its creditors. If there are underlying business agenda in that process, they are not precluded; whether they ultimately succeed or fail will depend upon the dynamics of the negotiating game that will follow.

12 In weighing all of these factors, I am satisfied that the importance of stability in the situation at the Skydome for the next year or two in connection with not only the Blue Jays presence but also the ability to attract other revenue generating functions, outweighs other concerns that may arise in relation to the negotiation and execution of the Interim Lease.

13 As to the use of the funds in the capital reserve held by Montreal Trust, it makes sense in my view for them to be used for the purposes suggested by the Applicants. The Capital reserve fund withdrawal will be used for the YK2 enhancements, the improvements in the sound system, and the Hotel renovation -- all of which will preserve the overall security. A significant portion of the total funds to be advanced, including the super-priority loan -- which were deposited in the first place in order to -- will be used to pay Municipal taxes and Rent which are matters that have priority over the Bondholders in any event. Thus there is little overall prejudice in that regard. I am satisfied that the Court has the authority either under s. 8 of the CCAA or under its broad discretionary powers in such proceedings, to make such an order. This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors -- in the exercise of balancing the prejudices between the parties which is inherent in these situations -- have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

14 What subsection 11(6) of the CCAA requires for purposes of an Initial Order is that the applicant satisfy the court "that circumstances exist that make such an order appropriate". I am satisfied that such circumstances exist here and that it is fair and reasonable to grant the Order requested, although the detailed terms of the Order may require further clarification which the lateness of the day precludes for the present.

15 Mr. Tay raised a substantial issue when he pointed out that the Order as presently drafted, when read in conjunction with the Term Sheet reflecting the agreement between the Skydome and the Blue Jays for the Super Priority loan, could lead to a situation where, if the CCAA proceeding fails, the Blue Jays (called in that context "the CCAA Lender") could move to put in a receiver and to realize upon their security without further court order. I would not have approved such a provision in the circumstances, but it is not necessary to make such a determination because Mr. Dube undertook to the Court on behalf of the Blue Jays that they would not seek to do so without approval of the Court.

16 Mr. Slaght argued on behalf of Macdonalds that the super priority should not extend to his client's lease regarding the food outlets. While I agree that the position of Macdonalds is somewhat different than that of other secured creditors -- because Macdonalds must continue to pay a percentage of revenue as rent, and thus pour new monies in -- I don't think that that circumstance is in itself sufficient to make distinctions from the position of other secured creditors.

17 As to other matters respecting the form of the Order, I will make the change suggested by Mr. Marantz and accepted by Mr. Baird regarding the necessity of consent of all secured creditors to any out of ordinary course disposition by the Skydome during the CCAA period. Other details I leave to counsel to agree to and to come back for a variation of the Order at a later date.

18 Accordingly, an Initial Order is granted as sought, subject to the foregoing.

Application granted.

END OF DOCUMENT

TAB 4

COURT FILE NO.: 08-CL-7841
DATE: 20090123

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INTERTAN CANADA LTD. AND TOURMALET CORPORATION

APPLICANTS

BEFORE: MORAWETZ J.

COUNSEL: Edward Sellers and Jeremy Dacks, for the Applicants

Orestes Pasparakis and Mario Forte, for Bank of America N.A. (Canadian Branch), DIP Lender and Canadian Agent

Fred Myers, Jay Carfagnini and L. Joseph Latham for Alvarez & Marsal Canada ULC, Monitor

Paul MacDonald, for Rothschild Canada

Keven McElchern and J. Salmas, for the Cadillac Fairview Corporation Limited

Alexandra Lev-Farrell and Antonio Dimilta, for Monarch Construction Limited et al

Linda Gallessiere, for OMERS Realty Management Corporation, Ivanhoe Cambridge 1 Inc., Morguard Investments Limited and 20 VIC management Inc. on behalf of OPB Realty Inc., Retrocom Limited Partnership and 920076 Ontario Limited o/a The Southridge Mall

E. Patrick Shea, for Unsecured Creditors' Committee in Chapter 11 Proceedings

H. Garman, for Garmin International, Inc.

J. Davis-Sydor, for FotoSource

Margaret Sims, for VFC Inc.

Natalie Renner, for Star Choice Communications Inc.

HEARD: **JANUARY 14 and 16, 2009**

ENDORSEMENT

[1] Alvarez & Marsal Canada ULC (the "Monitor" or "A&M") brings this motion for directions. In particular the Monitor requests an order extending the order of this court made December 24, 2008, (the "Status Quo Order") so that the Applicants shall not:

(i) distribute or otherwise permit the payment of any of the Applicants' property to any of their affiliates or lenders, provided that nothing prevents the distribution or payment of such proceeds to the DIP Lenders in accordance with the Amended and Restated Initial Order dated November 10, 2008, and the DIP Agreement (defined therein) on account of direct indebtedness owing by the Applicants to the DIP Lenders; or

(ii) make any advances to any of its U.S. affiliates.

[2] The Monitor also requests an order directing that, notwithstanding the Amended and Restated Initial Order, no amount shall be paid to the DIP Lenders pursuant to the DIP Lenders' Charge listed as item number "six" in paragraph 44 of the Amended and Restated Initial Order (the "Sixth Charge") unless this court is satisfied that the DIP Lenders have exhausted all recourse they may have to realize proceeds from all other sources of recovery that may be available to them from the property and assets of the borrowers other than the property and assets of the Applicants.

[3] Further, an order that the claims of the DIP Lenders under the Sixth Charge shall be reduced by the amount of the proceeds of the furniture, fixtures and equipment ("FF&E") of the U.S. Debtors and by an amount equal to the value or proceeds of any assets of the U.S. Debtors that were encumbered in the initial proposed DIP Facility which may be no longer subject to the DIP Facility approved in the U.S. Bankruptcy Court proceedings by order dated December 23, 2008.

[4] Finally, the Monitor requests an order pursuant to the Second Amendment to the Senior Secured Super-Priority Debtor-in-Possession Credit Agreement dated as of December 19, 2008 and, in particular, paragraph 7(b) thereof, that until such time as this court orders otherwise, this court has made no determination to allow any payment to be made pursuant to the Sixth Charge to be paid directly or indirectly to the estates of any of the U.S. affiliates of the Applicants or to any of the creditors of those entities.

[5] The position of the Monitor is set forth in a very detailed Third Report. The Monitor is of the view that the circumstances under which the Initial Order was made, as amended by the Amended and Restated Initial Order and, in particular, the extraordinary nature of the relief granted in favour of the DIP Lenders have subsequently been determined to have changed and warrant the protection of the interests of the Applicants and their creditors by the relief sought.

[6] The Monitor relies upon paragraph 53 of the Amended and Restated Initial Order which provides that the Applicants or the Monitor may from time to time apply to the court for advice and directions in the discharge of their powers and duties. In addition, reference was made to s.11 of the *CCAA*, Rules 37.14 and 59.06 as well as the inherent jurisdiction of this court to control its own process. I recite the grounds for bringing the motion as the Applicants have raised a concern that this is not a proper motion for directions.

[7] Counsel for the Applicants questioned whether this was a proper motion to set aside or vary an order or to amend same. In my view, it is not necessary to consider whether there is technical compliance with Rules 37.14 and 59.06. I am satisfied that this court has the inherent jurisdiction to consider this motion. The Court of Appeal in the recent decision of *TeleZone Inc. v. Attorney General (Canada)*, 2008 ONCA 892 made reference to a previous decision of the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al*, [1972] 2 O.R. 280 (C.A.) where at p. 282, Brooke J.A. stated:

> As a superior Court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters.

Borins J.A. stated, after referring to this quotation, as follows: "Brooke J.A. was of the view that no cause should fail for want of remedy".

[8] In this case, I am of the view that this motion should be heard. I am satisfied that it is appropriate for the Monitor to bring a motion of this type, in fulfillment of its obligations as court-appointed Monitor under s.11 of the *CCAA*. In my view, in these particular circumstances, in view of the fact that InterTAN Canada Ltd. (InterTAN") does not have a functioning Board of Directors, the intervention of the Monitor is certainly appropriate. On October 7, 2008, InterTAN, Inc., in its capacity as sole shareholder of InterTAN, executed a Unanimous Shareholder Declaration ("USD") pursuant to the *Business Corporations Act (Ontario)* wholly relieving the Board of Directors of InterTAN of its directorial powers and assuming those powers unto itself. Members of the Board of Directors of InterTAN have been functioning in a managerial role since that time.

[9] In view of the decision-making process of the Applicants, I am of the view that it is entirely appropriate for the Monitor to bring forth this motion in the interests of the Applicants and their creditors and, I might add, I find it surprising that the Applicants would in any way question the authority of the Monitor to bring forth such a motion.

[10] The Monitor, as a court officer, has a role to play in these proceedings and, in my view, it would be remiss if it did not bring forth its concerns to the court.

[11] The Monitor is of the view that circumstances warrant the protection of the interests of the Applicants and their creditors by the requested relief. The concerns of the Monitor relate directly to arrangements entered into in the Chapter 11 proceedings of *Circuit City Stores Inc. et al* (the "Chapter 11 Proceedings"). The Chapter 11 debtors are hereinafter referred to as (the "U.S. Debtors"). InterTAN, Inc. is directly or indirectly involved in the Chapter 11 Proceedings.

[12] On November 10, 2008, the U.S. Debtors filed a motion for interim and final Orders of the U.S. Court authorizing post-petition financing under the DIP Facility (the "DIP Motion"). The U.S. Court granted an interim order approving the DIP Facility on November 10, 2008, with a view to hearing additional objections with respect to the DIP Facility before granting a final order with respect to the DIP Motion at a later date.

[13] The Monitor reports that a number of objections to the final approval of the DIP Facility were subsequently filed in the Chapter 11 Proceedings. The Monitor understands that the Unsecured Creditors' Committee in the Chapter 11 Proceedings (the "UCC") raised a number of objections to final approval of the DIP Facility.

[14] The Monitor further reports that on December 20, 2008, counsel for the U.S. Debtors advised the Monitor's U.S. counsel that the UCC's objections to the DIP Motion had been settled. On December 21, 2008, the Monitor was provided with the Draft Second Amendment dated as of December 19, 2008 intended to be executed by the U.S. Debtors, the DIP Lenders and InterTAN.

[15] Paragraph 5 of the Draft Second Amendment provides, in part, as follows:

> 5. Amendment to DIP Orders and Initial Orders - The Borrowers and the Required Lenders hereby agree that the terms of the DIP Orders and the Initial Order may be amended as follows:
>
> ...
>
> (b) to provide that the Liens granted under the Initial Order with respect to the Property may be limited to provide that after payment of clauses one through five of Section 44 of the Initial Order, fifty (50%) percent of the remaining proceeds of such Property shall be used to pay the DIP Lenders' Charge set forth in clause six of Section 44 of the Initial Order, and the balance shall be available to be distributed to the Domestic Loan Parties (to the extent allowed by the Canadian bankruptcy court) and retained by the estate and not applied in reduction of the Obligations.
>
> (c) to permit the proceeds from the Domestic Loan Parties' furniture, Fixtures and Equipment to be retained by the estate and not applied in reduction of the Obligations.

[16] After an initial review, the Monitor concluded that the Draft Second Amendment would impact the Canadian proceedings and Canadian stakeholders.

[17] As a result of the Monitor's concerns, a scheduling motion was heard by me at 9:30 a.m. on December 23, 2008. This court was advised that amendments were being contemplated to the Draft Second Amendment. A further hearing was held on December 24, 2008, at which time this court was provided with an unsigned copy of the Final Second Amendment and a copy of the final U.S. DIP Order. This court then scheduled the hearing of this motion and indicated an intention to make an order prohibiting the distribution of proceedings of the Applicants' Property and any inter-company advances from the Applicants to any of its U.S. affiliates. This resulted in the Status Quo Order.

[18] On December 23, 2008, the U.S. Bankruptcy Court granted final approval of the Applicants' DIP borrowing. Paragraph 2(c) of this order provides, in part:

> Notwithstanding the grant of the DIP Liens (a) the net proceeds, if any, realized after the date of this Final Order from the disposition of the Debtors' Equipment and Fixtures shall be paid to the Debtors' estates and not applied in reduction of the DIP Obligations or the Pre-Petition Debt; and (b) fifty percent (50%) of the net proceeds, if any, received by the DIP Lenders under the DIP Lenders' Charge set forth in clause six of Section 44 of the Initial Order (as amended and in effect) entered into in the CCAA proceedings of InterTAN Canada Ltd. (as ameded [sic] and in effect, the "CCAA Initial Order") shall be paid to the Debtors' estates and not applied in reduction of the DIP Obligations or the Pre-Petition Debt. For the avoidance of doubt, nothing in this Final Order, the DIP Credit Agreement, or any amendment thereto, including without limitation, the prior DIP Amendments, shall amend or modify the terms and conditions of the CCAA Initial Order in any respect. In the event of any inconsistency between the terms and conditions of the Final Order and the CCAA Initial Order with respect to (i) InterTAN Canada Ltd. and any other Canadian Subsidiary of Circuit City Stores, Inc., which are debtor companies in the Canadian Bankruptcy Case (collectively, the "Canadian Debtors") or (ii) the assets of the Canadian Debtors, the CCAA Initial Order shall control. (emphasis added)

[19] A copy of the executed, finalized Second Amendment to the Senior Secured, Super-Priority, Debtor-in-Possession Credit Agreement (the "Final Second Amendment") has been filed with this court. Although InterTAN is recited as a party to the Final Second Amendment, it is not a signatory to the document.

[20] Paragraph 7 of the Final Second Amendment provides, in part:

> 7. Amendment to DIP Orders - The Borrowers and the Required Lenders hereby agree that the terms of the DIP Orders may be amended as follows:
>
> ...
>
> (b) to provide that fifty percent (50%) of the net proceeds, if any, received by the DIP Lenders under the DIP Lenders' Charge set forth in clause six of Section 44 of the Initial Order (as amended and in effect) entered into [sic] the CCAA proceedings of InterTAN Canada Ltd. shall be paid to the Debtors' estates (to the extent allowed by the Canadian bankruptcy court) and not applied in reduction of the DIP Obligations or the Pre-Petition Debt,
>
> (c) to permit the proceeds from the Domestic Loan Parties furniture, Fixtures and Equipment to be retained by the estate and not applied in reduction of the Obligation. (emphasis added)

[21] Prior to these proceedings, the Applicants were not liable to their secured lenders for the indebtedness of the U.S. affiliates. Neither the secured nor the unsecured creditors of the U.S. Debtors had any entitlement to share in the proceeds of the Applicants' assets as a means to realize their claims against the U.S. Debtors, other than through the U.S. Debtors as equity holders after payment of all creditors of the Applicants.

[22] The Applicants moved for approval of the DIP Facility at its initial hearing in these proceedings on November 10, 2008. Court approval of the DIP Facility was granted on that day with reasons to follows, which were released on November 26, 2008.

[23] The Monitor reports at paragraph 65 of its Third Report that the DIP Lenders' Charge (as defined at paragraph 37 of its Amended and Restated Initial Order) was extraordinary because it was broader in scope (i.e. it charges more assets) than the lenders' pre-existing security and because it gave priority claims to the DIP Lenders against assets of the Applicants in respect of amounts owed by the U.S. Debtors ahead of the pre-existing claims of unsecured creditors of the Applicants. It was recognized, at the time of the hearing, that the DIP Lenders' Charge was potentially prejudicial to pre-existing trade creditors.

[24] In an effort to address this issue of prejudice, the Applicants proposed a structure under which the DIP Lenders would have priority for the repayment of direct borrowings by InterTAN, followed by the Canadian Creditor Charge, which was to provide certain protection to pre-existing trade creditors of InterTAN in the amount of $25 million, and thereafter the DIP Lenders would have priority for any remaining DIP borrowings.

[25] Under paragraph 37 of the Amended and Restated Initial Order, the DIP Lenders were entitled to and were granted the benefit of a DIP Lenders' Charge on the "Property" of the Applicants. Property covered the Applicants' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds.

[26] Subsequently, the extent of the Canadian Creditor Charge was revised on the basis that the Directors' Charge may not be fully required. The amendment to the Canadian Creditor Charge was incorporated at paragraph 43 of the Amended and Restated Initial Order. This amendment was made on or about December 5, 2008.

[27] At paragraph 70 of the Third Report, the Monitor reports that, from the Final Second Amendment, it now appears that the UCC raised concerns with respect to, among other things, the widening of the scope of the security covered by the DIP Facility to include assets that were not previously encumbered under pre-existing security. The Monitor goes on to report that unlike the situation in Canada, the DIP Lenders and the U.S. Debtors effectively agreed with the UCC to exclude the pre-petitioned unencumbered FF&E from the scope of the DIP security in the U.S. The Monitor's concluding comments in paragraph 70 are as follows:

- The Final Second Amendment provides that:

  (a) the proceeds from the furniture, fixtures and equipment of the U.S. Debtors are to be retained by the U.S. estate for the benefit of the U.S. unsecured creditors rather than being used by the DIP Lenders to reduce the obligations owing to them by the U.S Debtors; and

  (b) half of all amounts paid under the Sixth Charge, if any, are to be paid to the U.S. estate for the benefit of the U.S. unsecured creditors and will not reduce amounts owing to the DIP Lenders.

[28] The Monitor's conclusions are set out at paragraphs 71-78 of the Third Report which provide as follows:

> 71. Therefore, the security that the Monitor and this Court were advised was a non-negotiable condition precedent to the DIP Lenders' provision of the DIP Facility, without which the Applicants and the U.S. Debtors would fail, has been bartered away by the U.S. Debtors and the DIP Lenders to unsecured creditors of the U.S. Debtors to settle their complaints as to the proposed terms of the DIP Facility. That is, rather than simply supporting the need for the DIP Lenders to be re-paid amounts advanced to the U.S. Debtors, the Sixth Charge has been used as a form of value or currency in negotiations with the UCC.
>
> 72. By enabling the DIP Lenders to share half of the Sixth Charge with the unsecured creditors of the U.S. Debtors, the Final Second Amendment makes proceeds of the assets of the Applicants available to unsecured creditors of the U.S. Debtors without any assurances that the unsecured creditors of the Applicants will be paid in full. This was not what the Monitor understood to be the purpose of the granting of the Sixth Charge to the DIP Lenders and is not consistent with the purposes of the accommodation that the Court was asked to grant. Rather than protecting the DIP Lenders' ability to be re-paid from Canadian assets for U.S. lending while protecting Canadian unsecured creditors and supporting the North American operations, the Final Second Amendment

potentially allows unsecured creditors of the U.S. Debtors, which have no claims against the Applicants, to have access to the Applicants' assets and achieve recoveries ahead of the unsecured creditors of the Applicants. Therefore, the Monitor is of the view that the Final Second Amendment could have an unfair and inequitable impact on the unsecured creditors of the Applicants.

73. The Monitor notes that paragraph 7(b) of the Final Second Amendment provides that any proposed sharing of the Sixth Charge is only available "to the extent allowed by the Canadian bankruptcy court". The Monitor submits that it would be appropriate, fair and reasonable for this Honourable Court to make directions to govern the determination whether this Honourable Court is willing to allow any such sharing of the Sixth Charge.

74. The Monitor had been advised by the U.S. Debtors that the purpose of negotiations with the UCC was to obtain further credit that would decrease the likelihood of claims being made into Canada. In fact, by allowing the U.S. estate to access the value of the furniture, fixtures and equipment of the U.S. Debtors, the Final Second Amendment would potentially reduce the recoveries by the DIP Lenders in the Chapter 11 Proceedings and thus *increase* the likelihood that the DIP Lenders will need to have recourse to the Sixth Charge. Accordingly, the Monitor submits that, to the extent that any proceeds of the U.S. Debtors' assets are ultimately not used to repay the DIP Lenders, the equivalent amount ought to be deducted from the obligations owing by the Applicants to the DIP Lenders and the Sixth Charge should be likewise reduced.

75. During the 9:30 hearing on December 23, 2008 this Honourable Court was advised that the intention of parties to the Draft Second Amendment was that it would not allow a "double dip" (i.e. to the extent the DIP Lenders either shared the proceeds of the DIP Lenders' Charge or did not claim the proceeds of the U.S. Debtors' furniture, fixtures and equipment, there would be a corresponding reduction in the DIP Obligations) and that the DIP Lenders were prepared to confirm this in writing. However, the Final Second Amendment and the U.S. Court Order of December 23, 2008 (which are quoted above in paragraphs 60 and 62 above) do not reflect this, nor does the letter dated January 8, 2009 from Canadian counsel for the DIP Lenders to the Monitor's counsel. A copy of this letter is attached as Appendix "G".

76. Until Canadian creditors' recovery is better particularized and until there is better clarity as to whether access to Canadian realization is required to protect the DIP Lenders from suffering a shortfall on their advances to the U.S. Debtors, if ever, the Monitor recommends that the Court make the following directions:

(i) An Order extending the Status Quo Order so that, until further Order of this Court, the Applicants shall not:

(a) distribute or otherwise permit the payment of any of the Applicants' property, assets and undertaking to any of their affiliates or lenders, provided that nothing herein prevents the distribution or payment of such proceeds to the DIP Lenders in accordance with the Initial Order and the DIP Agreement (defined therein) on account of direct indebtedness owing by the Applicants to the DIP Lenders; or

(b) make any advances to any of its U.S. affiliates;

(ii) An Order directing that, notwithstanding anything contained in the Initial Order, no amount shall be paid to the DIP Lenders pursuant to the DIP Lenders' Charge listed as item number "six" in paragraph 44 of the Initial Order (the "Sixth Charge") unless and to the extent that this Honourable Court is satisfied that the DIP Lenders have exhausted all recourse that they may have to realize proceeds from all other sources of recovery that may be available to them from the property and assets of the borrowers other than the property and assets of the Applicants;

(iii) An Order that the claims of the DIP Lenders under the Sixth Charge shall be reduced by the amount of the proceeds of the furniture, fixtures and equipment of the U.S. Debtors and by an amount equal to the value or the proceeds of any assets of the U.S. Debtors that were encumbered in the initial proposed DIP Facility which may be no longer subject to the DIP Facility approved in the U.S. Bankruptcy Court by Order dated December 23, 2008; and

(iv) An Order pursuant to the Final Second Amendment (as defined herein) and, in particular, paragraph 7(b) thereof, that, until such time, if ever, as this Honourable Court orders otherwise, this Honourable Court has made no determination to allow any payment to be made pursuant to the Sixth Charge to be paid directly or indirectly to the estates of any of the U.S. affiliates of the Applicants or to any of the creditors of those estates.

77. In effect, the Monitor proposes that the property and assets of the U.S. Debtors should be applied first to repay direct advances by the DIP Lenders to the U.S. Debtors and only once this is completed would the Court determine the extent to which resort would be had to the Applicants' property and assets under the Sixth Charge. At that time, in accordance with the right given to this Court by the parties in paragraph 7(b) of the Final Second Amendment, the Court can determine if it will allow any sharing under the Final Second Amendment. With respect, it is the Monitor's view that this recommendation is consistent with the pre-filing state of affairs between Canada and the U.S. and their respective creditors; respects the basic concepts of the Initial Order; is responsive to the present circumstances; and allows the Sale Process and restructurings both in Canada and the U.S. to proceed with the least amount of disruption.

> 78. Finally, in light of: (a) the fact the U.S. Debtors do not anticipate requiring advances from InterTAN; (b) there have been no discussions with the U.S. Debtors since November 19, 2008 as to the nature of the security to be provided to ensure the re-payment to InterTAN of any such advances in the event that they do seek to borrow from InterTAN; and (c) the concerns expressed above that access by creditors of the Applicants' affiliates to Canadian distributions should await realization on the property of all of the affiliates in any event, the Monitor therefore recommends that the Status Quo Order be extended pending further Order of this Honourable Court.

[29] The position of the Monitor is supported by counsel to Cadillac Fairview, the OMERS/Ivanhoe landlord Group, BFC, Garmin and Monarch Construction.

[30] Not surprisingly, the motion is opposed by the DIP Lenders, on the basis that if the motion is granted it would have significant ramifications:

> (a) the Applicants will be in default of the DIP Facility;
>
> (b) the DIP Lenders will have relied to their detriment on the Sixth Charge by making advances through the holiday season and by agreeing to subordinate their security to, *inter alia*, the $19.3 million Directors' Charge; and
>
> (c) significant uncertainty will arise in respect of the protection afforded by Canadian orders to DIP Lenders.

[31] Counsel to the DIP Lenders submits that what really is in issue is that the Monitor does not approve of the manner in which the Sixth Charge has been used in the DIP Lenders' negotiations. Counsel further submits that if the Monitor succeeds, the DIP Lenders (and any future DIP Lenders) will lose their court-ordered protection if they use their rights in a manner that is deemed by some stakeholders to be unfair and, in other words, an unstated condition should be read into DIP orders that any priority is subject to retroactive adjustment if the DIP Lenders' business decisions subsequently displease the court.

[32] Counsel also submits that the DIP Lenders negotiated and struck what they believed to be a principled bargain which was the subject of debate in court, with the Monitor expressing its concerns. Counsel submits that the end result was ultimately accepted by the court and embodied in the Initial Order. Further, as an accommodation, on December 5, 2008, the DIP Lenders consented to an alteration of the waterfall priorities that permitted the Canadian creditors to avail themselves of any unused portion of the Directors' Charge, thereby effectively increasing the pool subject to the Canadian Creditor Charge to $44.3 million. As noted above, this alteration was court approved.

[33] Counsel further submits that the position of the DIP Lenders in the renegotiated deal is that they compromised their position for the benefit of the Canadian creditors and that by compromising on this issue in Canada for the benefit of the Canadian creditors, the DIP Lenders

arguably prejudiced the position of the U.S. unsecured creditors by agreeing to dilute the DIP Lenders priority claim.

[34] The DIP Lenders take the position that the Initial Order established the DIP Lenders' Charge and dictated its parameters and, in reliance on the DIP Lenders' Charge in the Initial Order, and subsequently as amended in the Amended and Restated Initial Order, the DIP Lenders made tens of millions of dollars in advances to the Applicants and hundreds of millions of dollars to the U.S. debtors. Counsel further submits that the DIP Lenders relied on their rights in the Amended and Restated Initial Order both in making advances and also in their dealings with stakeholders within the Chapter 11 Proceedings.

[35] The DIP Lenders submit that it was understood that pursuant to the U.S. Bankruptcy process, the U.S. DIP Order would not be finalized until the return date of the first omnibus hearing and it ought to have been clear that there could be alterations to the DIP Facility.

[36] They submit that finding a consensual resolution with the UCC was important for all concerned and that this resolution was embodied in the Final Second Amendment. In Canada, the DIP Lenders compromise took the form of a $44.3 million Canadian Creditor Charge and in the U.S. it involved the DIP Lenders foregoing additional post-petition security on FF&E and agreeing to share 50% of the proceeds of the Sixth Charge received, to the extent received, with the U.S. Debtors' estate.

[37] The DIP Lenders acknowledged that under certain scenarios, the business deal outlined in the Second Amendment could adversely affect Canadian unsecured creditors. They do, however, submit that this is no different from the fact that the Directors' Charge and Canadian Creditor Charge may prove to work to the disadvantage of the U.S. unsecured creditors.

[38] The DIP Lenders take the position that its interests as stakeholders straddles both insolvency proceedings, and it recognizes that any decision it makes in one forum may affect the other. However, it submits it must act, within its rights, to the best of its business judgment.

[39] Counsel submits that the effect of the Monitor's motion would be pernicious as it would effectively allow the DIP Lenders' Charge to be reconsidered after advances made in reliance on the charge, had been made. They argue that the flexibility involved in *CCAA* proceedings cannot extend to re-opening and re-arguing issues that have already been resolved by the court. Further, by relying on the court-ordered charge, the DIP Lenders now retroactively face the prospect that (a) a form of "marshalling" may be imposed; (b) there will be a carve out for U.S. FF&E; and (c) there will be ongoing uncertainty as the "status quo" is frozen until further order of the court.

[40] The DIP Lenders submit that this cannot be the right outcome. They emphasize that once the DIP Lenders were granted the Sixth Charge, they could assign it, sell it or negotiate with it. The rights of the DIP Lenders they submit, have been set out in the materials before the court, and that they are entitled to certain rights. Further, these rights should not be redefined after the deal has been made. Counsel concludes that commercial certainty requires that the order requested by the Monitor should not be made.

[41] Counsel to the UCC supported the position of the DIP Lenders.

[42] Counsel to the Applicants submitted that, if the relief sought by the Monitor is granted, it would constitute the entry of an order which modifies the Initial Order or which otherwise materially adversely affects the effectiveness of the Initial Order without the express written consent of the DIP Lenders. The Applicants point out that it is their understanding that the DIP Lenders do not consent to the relief sought by the Monitor and that the granting of the requested relief would result in an Event of Default under the DIP Facility. Counsel points out that InterTAN still requires access to the DIP Facility and is concerned that such access would be lost if the motion was granted.

[43] Counsel to InterTAN submits that InterTAN should not be put in the position where an Event of Default will occur under its DIP Facility in that the court can just as effectively deal with the issues inherent in the requested relief that only become "ripe" after proceeds of sale have been realized. Counsel submits that any consideration of what should happen with respect to the priority of the Sixth Charge only becomes relevant after the five prior charges have been satisfied and that this will not happen until the completion of a transaction involving InterTAN's assets.

[44] In the circumstances, counsel submits that InterTAN cannot consent to an extension of the Status Quo Order. Counsel observes that there is no compelling reason for the court to consider now any of the remaining Sixth Charge relief as the Canadian stakeholders would be protected if the court were to order a continuation of the Status Quo Order. By considering the matter after the completion of a going concern sale or other transaction involving the assets of the Canadian and U.S. estates, the court could avoid (i) putting InterTAN's access (and that of the U.S. Debtors) to the DIP Facility in peril; (ii) impacting the allocation negotiations to come concerning certain assets owned by the U.S. Debtors that are used in the operation of InterTAN's business; and (iii) considering the matter "in the abstract" without knowing whether the recovery issue raised by the Monitor has any relevance in this proceeding.

[45] Counsel also points out that if the DIP Lenders do recover on InterTAN's guarantee first, InterTAN will be subrogated to the position of the DIP Lenders and become entitled to participate in the U.S. estate. A similar submission was also contained in the factum submitted by counsel on behalf the DIP Lenders.

[46] It is clear that there are significant differences of opinion as to the effect of the Final Second Amendment. However, one thing is abundantly clear. The Final Second Amendment has not been considered, let alone approved, by this court.

[47] The starting point of my analysis is to consider the DIP Facility in the context of the Amended and Restated Initial Order.

[48] In the circumstances of this case, the granting of the DIP Facility, in the form requested, was extraordinary relief. I took into account that the creation of the Canadian Creditor Charge provided in theory, a degree of protection to the group of creditors, who could otherwise be detrimentally affected by the DIP Facility.

[49] I have no doubt that the DIP Lenders have relied on the approvals granted in the Amended and Restated Initial Order. I accept the submissions put forward by counsel to this

effect. I also accept the submission that the DIP Lenders should be able to rely on what has been approved by this court.

[50] However, the strength of the DIP Lenders' argument is also its weakness.

[51] These *CCAA* proceedings are obviously separate from the Chapter 11 Proceedings. There is a common DIP Facility, but in order to be effective in the respective insolvency proceedings, the DIP Lenders, as well as the Applicants, recognized that the DIP Facility had to be court approved in both jurisdictions. The difficulty in this case is that there has not been a common approval process. The document that has been approved in the Chapter 11 Proceedings is different than what has been approved in the *CCAA* proceedings.

[52] In considering the relief requested by the Monitor, it is necessary to consider what has been approved in the *CCAA* proceedings. The DIP Lenders, the Applicants and the Monitor participated in the initial hearing. The scope and extent of the DIP Lender's Charge and other charges were before the court and the priority to be afforded to the specific charges was also before the court. This is the package, in essence the bundle of rights, that was approved. Certain rights were subsequently amended as a result of expansion of the size of the Canadian Creditor Charge, but again, this amendment was court approved and was embodied in the Amended and Restated Initial Order.

[53] To the extent that the DIP Lenders entered into an agreement with the UCC which was subsequently incorporated into the Final Second Amendment, these changes may have an adverse impact or a potential adverse impact on the Canadian creditors.

[54] Counsel to the DIP Lenders took the position that the DIP Lenders are entitled to certain rights and, if used in a way that the Monitor does not approve, that is too bad. I have not been persuaded by this submission. In the context of these proceedings, I do not agree that the DIP Lenders have the unilateral ability to discharge portions of the collateral package to the detriment of the Canadian creditors without receiving court authorization to do so. The DIP Lenders' Charge incorporates a charge on the Property of the Applicants. In considering whether it is appropriate to approve such a facility, the court takes into account a number of factors which include benefits that the Applicants will receive from the DIP Facility and the collateral that is charged under the DIP Lenders' Charge. In my view, it is not appropriate to provide court approval to the entire package and then tacitly approve of the unilateral activities of the DIP Lenders in discharging portions of the collateral to the potential detriment of certain stakeholders in the *CCAA* proceedings. In view of the extraordinary nature of the DIP Lenders' Charge, and the balancing of interests that was considered by the court when court approval was provided, a document which purports to amend a portion of the collateral, would not, in these circumstances, be a document that fits within a document contemplated by the DIP Facility or as may be reasonably required by the DIP Lenders under paragraph 36 of the Amended and Restated Initial Order.

[55] The DIP Lenders had an option in this case. They chose to obtain approval of the Final Second Amendment in the Chapter 11 Proceedings and not to obtain such approval in this court. Having elected to proceed in this manner, the DIP Lenders now take the position that they are

entitled to rely on court approval. I agree, but in the context of these proceedings, court approval has not been obtained to incorporate into the DIP Facility the amendments which are contained in the Final Second Amendment and approved in the Chapter 11 Proceedings.

[56] The DIP Lenders point out that there was a *quid pro quo* in that the DIP Lenders made compromises in Canada which is reflected in the increased Canadian Creditor Charge. This submission ignores two important facts. Firstly, the extension of the Canadian Creditor Charge was specifically court approved in Canada and secondly, this amendment was agreed to and incorporated into an Amended and Restated Initial Order on or about December 5, 2008, some two and one-half weeks before the Final Second Amendment was agreed to by certain parties in the U.S. Proceedings. One cannot determine, after the fact, whether there would have been any linkage between the two events.

[57] In my view, to the extent that the DIP Lenders made advances and relied upon the Final Second Amendment having effect in these *CCAA* proceedings, they did so at their peril.

[58] The next issue to consider is the practical implications of the lack of this court's approval of the Final Second Amendment as well as the Monitor's motion. The Monitor has requested that the court make certain orders. If they are made, the DIP Lenders take the position that such orders would be an Event of Default under the DIP Facility. If this, indeed, is the outcome of the Monitor's motion, it is one that defies logic. The crisis has been created by an arrangement as between the DIP Lenders and the UCC and agreed to by the U.S. Debtors. On this issue, it would appear that these parties have, for all practical purposes, ignored the *CCAA* proceedings. Having ignored the *CCAA* proceedings, the DIP Lenders take the position that steps taken by the Monitor to monitor compliance with existing court orders, creates an Event of Default. This should not and cannot be the effect of this endorsement.

[59] The Amended and Restated Initial Order speaks for itself. The DIP Lenders, the UCC and the Applicants are free to do what they want with respect to the Chapter 11 Proceedings, but they have to ensure that a proper accounting is provided in the *CCAA* proceedings. A proper accounting has to ensure that the claims of the DIP Lenders under the Sixth Charge are to be reduced by the amount of the proceeds realized on the Property charged in the DIP Lenders' Charge as approved by Amended and Restated Initial Order. In this context, the accounting will require that the Sixth Charge be reduced by the amount of the proceeds of the FF&E of the U.S. Debtors and by an amount equal to the value or proceeds of any assets of the U.S. Debtors that were encumbered in the DIP Facility approved by this court which may be no longer be subject to the DIP Facility approved in the Chapter 11 Proceedings by order dated December 23, 2008. In my view, this direction is entirely consistent with the terms of the Amended and Restated Initial Order.

[60] Further, in considering whether any payments are to be made pursuant to the Sixth Charge, it is appropriate to take into consideration the ranking of the various charges as set out in paragraph 44 of the Amended and Restated Initial Order. The DIP Lenders' Charge is fourth (with certain restrictions and limitations) and sixth in priority. The Canadian Creditor Charge ranks between these two charges. The priority ranking of charges, other than the DIP Lenders' Charge, should not be dismissed or ignored. It is incumbent upon the Applicants to ensure that

appropriate consideration is given and protection provided, to ensure that these priorities are respected, especially the Canadian Creditor Charge. In view of the USD, the Monitor is directed to report to the court if it is of the view that further direction is required.

[61] In the circumstances, it is, in my view, appropriate to extend the Status Quo Order until such time as the affected parties have had the opportunity to consider the impact of these reasons.

[62] In the result, the Status Quo Order is continued until further order of this court. I decline to make the orders requested at (ii), (iii) and (iv) as set out in the Notice of Motion. However, the claims of the DIP Lenders are to be accounted for in accordance with the foregoing directions.

MORAWETZ J.

DATE: **January 23, 2009**

TAB 5

2007 ABQB 786, [2008] 2 C.T.C. 61, [2008] A.W.L.D. 575, [2008] A.W.L.D. 576, [2008] A.W.L.D. 577, [2008] A.W.L.D. 466, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274

Temple City Housing Inc., Re

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

And In the Matter of Temple City Housing Inc. (Applicant)

Alberta Court of Queen's Bench

Romaine J.

Judgment: December 21, 2007[FN*]
Docket: Calgary 0701-12190

Counsel: Frank R. Dearlove, Chris Simard for Applicant, Temple City Housing Inc.

Howard Gorman for Proposed Debtor-In-Possession Lender, Echo Merchant Fund

Jill Medhurst-Tivadar for Canada Revenue Agency

Subject: Estates and Trusts; Goods and Services Tax (GST); Income Tax (Federal); Insolvency

Tax --- Income tax -- Administration and enforcement -- Withholding of tax -- Trust for monies withheld

Corporate taxpayer owed CRA approximately $870,000 in unremitted source deductions, with an expected GST net tax refund of $150,000 -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA"), including debtor-in-possession ("DIP") charge -- Petition granted -- DIP charge was allowed in amount of $300,000 -- Granting of DIP charge to take taxpayer through first weeks of CCAA process was necessary and in best interests of company's shareholders -- CRA's submission, that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order, was rejected -- CCAA proceeding is able to grant super-priority over existing security interests for DIP financing -- If it were otherwise, protection of CCAA effectively would be denied to debtor company in many cases -- Supreme Court of Canada decision on point held that deemed trust created by s. 227(4.1) had priority, but did not attach specifically to particular assets.

Tax --- Income tax -- Administration and enforcement -- Collection of tax -- Priorities and superpriorities of Minister

Corporate taxpayer owed CRA approximately $870,000 in unremitted source deductions, with an expected GST net

2007 ABQB 786, [2008] 2 C.T.C. 61, [2008] A.W.L.D. 575, [2008] A.W.L.D. 576, [2008] A.W.L.D. 577, [2008] A.W.L.D. 466, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274

tax refund of $150,000 -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA"), including debtor-in-possession ("DIP") charge -- Petition granted -- DIP charge was allowed in amount of $300,000 -- Granting of DIP charge to take taxpayer through first weeks of CCAA process was necessary and in best interests of company's shareholders -- CRA's submission, that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order, was rejected -- CCAA proceeding is able to grant super-priority over existing security interests for DIP financing -- If it were otherwise, protection of CCAA effectively would be denied to debtor company in many cases -- Supreme Court of Canada decision on point held that deemed trust created by s. 227(4.1) had priority, but did not attach specifically to particular assets.

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Corporate taxpayer owed CRA approximately $870,000 in unremitted source deductions, with an expected GST net tax refund of $150,000 -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA"), including debtor-in-possession ("DIP") charge -- Petition granted -- DIP charge was allowed in amount of $300,000 -- Granting of DIP charge to take taxpayer through first weeks of CCAA process was necessary and in best interests of company's shareholders -- CRA's submission, that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order, was rejected -- CCAA proceeding is able to grant super-priority over existing security interests for DIP financing -- If it were otherwise, protection of CCAA effectively would be denied to debtor company in many cases -- Supreme Court of Canada decision on point held that deemed trust created by s. 227(4.1) had priority, but did not attach specifically to particular assets.

Cases considered by Romaine J.:

> First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. Minister of National Revenue v. First Vancouver Finance) 2002 D.T.C. 6998 (Eng.), (sub nom. Minister of National Revenue v. First Vancouver Finance) 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) -- considered
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> Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 964, 94 Alta. L.R. (3d) 389, 27 C.B.R. (4th) 236, [2001] 9 W.W.R. 299, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) -- considered
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> Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. R. v. Royal Bank) 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) -- considered

Statutes considered:

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

> Generally -- considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

> Generally -- referred to
>
> s. 227(4) -- considered

2007 ABQB 786, [2008] 2 C.T.C. 61, [2008] A.W.L.D. 575, [2008] A.W.L.D. 576, [2008] A.W.L.D. 577, [2008] A.W.L.D. 466, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] -- considered

PETITION by taxpayer seeking protection under Companies' Creditors Arrangement Act, including debtor-in-possession charge.

***Romaine J.*:**

Introduction

1 Temple City Housing Inc. ("Temple") filed a petition seeking protection from its creditors under the *Companies' Creditors Arrangement Act*, including an interim stay, the appointment of a Monitor and a Debtor-In-Possession credit facility ("DIPCharge"). Temple's major creditor is the Canada Revenue Agency ("CRA"), which opposed the priority of the DIP Charge sought in the order. I granted an Initial Order which included a super priority DIP Charge in the amount of $300,000 despite the objection of the CRA, and these are my reasons.

Facts

2 Temple produces pre-engineered packaged homes. Its construction facilities are in Cardston, Alberta, and it employs 170 people in its major business, with 25 additional people in a separate truss production facility. Most of Temple's labour staff are members of local First Nations groups, and it is the largest employer in Cardston.

3 The president of Temple deposes that Temple has been seriously impacted by the labour crisis experienced in Alberta over the past year, necessitating a shift in its business model. He states that Temple has made changes to resolve these labour issues and problems it has had with suppliers, and that it proposes to use the stay period and the financing provided by the DIP lender to put its production lines fully into use. Temple's president deposes that if Temple is able to carry on business as a going concern, rather than liquidating its assets, the CRA and its secured creditors will be paid in full and the return to unsecured creditors will be significantly enhanced.

4 A DIP Charge in the amount of $300,000 was essential in the short term despite the fact that this was the initial application because payroll obligations in the amount of $238,000 gross were due the same day as the application was heard, and a retainer was necessary for the Monitor and legal counsel. The application originally sought approval of DIP financing up to a maximum of $600,000, but counsel conceded that $300,000 was sufficient to allow Temple to continue with its operational plan before creditors received notice of the Initial Order. An order authorizing DIP financing in this amount was justifiable in accordance with the reasoning set out in *Hunters Trailer & Marine Ltd., Re*, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 9 W.W.R. 299 (Alta. Q.B.) at paras. 22 and 23.

5 Counsel for Temple explained that Temple's management had not been aware of the possible availability of the CCAA, and had sought legal advice only a few days before the payroll issue became a crisis.

6 Temple qualifies for protection under the CCAA, and the only contentious issue before me in this application was whether the DIP Charge could rank in priority to the CRA's claim.

7 Temple owes the CRA approximately $870,000 in source deductions which it has failed to remit for about a year. It is likely entitled to a refund of GST in the amount of $150,000, making the CRA claim roughly $720,000 net. The CRA took the position that Temple is undercapitalized, and that its business too unpredictable for the CRA to agree to have its claim subordinated to a DIP lender. The CRA also submitted that its claim for source deductions is a property interest that cannot be subordinated.

2007 ABQB 786, [2008] 2 C.T.C. 61, [2008] A.W.L.D. 575, [2008] A.W.L.D. 576, [2008] A.W.L.D. 577, [2008] A.W.L.D. 466, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274

8 The CRA relied upon s. 227(4) and (4.1) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.):

> **227. (4) Trust for moneys deducted** -- Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to her Majesty in the manner and at the time provided under this Act.
>
> **(4.1) Extension of trust** -- Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

9 The CRA submitted that the deemed trust created by s. 227(4.1) prevents the CRA's claim from being superceded by the super-priority of a DIP order under the CCAA. I was advised that there was no case authority to support this submission.

10 The Supreme Court of Canada considered this provision of the *Income Tax Act* in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, 2002 CarswellSask 318, 2002 D.T.C. 6998 (Eng.), 2002 D.T.C. 7007 (Fr.), [2002] 3 C.T.C. 285, 212 D.L.R. (4th) 615, 288 N.R. 347, [2003] 1 W.W.R. 1, [2002] 2 S.C.R. 720, 45 C.B.R. (4th) 213, [2002] G.S.T.C. 23, J.E. 2002-960 (S.C.C.). In that case, property had come into the hands of a tax debtor after the deemed trust arose, and was then sold to a third party. One of the issue was whether the sale of the trust property released the property from the ambit of the trust. Iacobucci, J. for the Court found that it did.

11 He noted that the deemed trust takes priority in situations where the CRA and secured creditors of a tax debtor both claim an interest in the tax debtor's property. On the issue of whether the deemed trust attached to after-acquired property, Iacobucci, J. found that the language of the relevant section implied that "Parliament has contemplated a fluidity with respect to the assets of the debtor to which the trust attacks": para. 32. He commented that, since the deemed trust is a statutory creation, it is not subject to the "restraints imposed by ordinary principles of trust law"; para. 34. Thus, while conceptually it could be considered that the source deductions themselves are the corpus of the trust, according to the language of the section, "property of the person . . . equal in value to the amount so deemed to be held in trust is deemed" to be held in trust. As the Court noted, this saves the CRA from having to trace specific assets to the funds originally deducted for source deductions. Iacobucci, J. referenced the comments of Gonthier, J. in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) at para. 31 that the "trust is not

in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust. . ."

12 Following logically from this characterization of the statutory trust, Iacobucci, J. found on the issue of whether the deemed trust continued to operate on property that had been sold to third parties that "the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default": para. 40. He thus found that while the trust has priority, it does not attach specifically to particular assets, and that the debtor is thus free to alienate property in the ordinary course of business. The Court noted that, from the language of the section, "it is anticipated that the character of the tax debtor's property will change over time." This interpretation allows the tax debtor to carry on business without the uncertainty that would be created if the CRA's claim was allowed to follow an asset that had been sold to innocent third parties, and prevents a situation where the deemed trust, in effect, freezes the debtor's assets and prevents it from carrying on business, "clearly not a result intended by Parliament": para. 45.

13 This interpretation of the deemed trust provision is inconsistent with the CRA's argument that it creates a property interest that cannot be superceded by a DIP Charge, despite the concluding words of s. 227(4.1). As pointed out by counsel for the proposed DIP lender, the characterization of the deemed trust claim as a security interest, albeit one that takes priority over other secured interests, is supported by the definition of "security interest" in the *Income Tax Act* itself, which includes reference to a "deemed or actual trust."

14 It is clear that a court in a CCAA proceeding is able to grant a super-priority over existing security interests for DIP financing. If it were otherwise, and if super-priority could not be granted without the consent of secured creditors, "the protection of the CCAA effectively would be denied a debtor company in many cases": *Hunters Trailers & Marine Ltd.*, at para. 32. It is also undoubtedly true that, since DIP financing may erode the security of creditors, the Court should be cautious in exercising its inherent jurisdiction to order priority for a DIP Charge over the objection of a secured creditor. I am satisfied that, in this case, Temple requires the protection of the CCAA if there is to be any possibility that it will be able to continue in business for the benefit of its creditors, employees and other stakeholders. I am also satisfied that granting a limited DIP Charge to take the company through the first crucial weeks of the process is necessary and in the best interests of the company's stakeholders generally. For this reason, I allowed a DIP Charge in the amount of $300,000.

Petition granted.

FN*. A corrigendum issued by the court on January 8, 2008 has been incorporated herein.

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SEPARATOR SHEET

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2008 ABCA 1, [2008] 2 C.T.C. 67, 2008 G.T.C. 1128 (Eng.), [2008] A.W.L.D. 582, [2008] A.W.L.D. 690, [2008] A.W.L.D. 691, [2008] G.S.T.C. 2, 422 A.R. 4, 415 W.A.C. 4, 43 C.B.R. (5th) 35

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Minister of National Revenue v. Temple City Housing Inc.
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
And In the Matter of Temple City Housing Inc.
The Deputy Attorney General on Behalf of Her Majesty the Queen in Right of Canada as Represented by the Minister of National Revenue (Appellant / Respondent) and Temple City Housing Inc. (Respondent / Appellant)
Alberta Court of Appeal
Rowbotham J.A.
Heard: December 20, 2007
Judgment: January 3, 2008
Docket: Calgary Appeal 0701-0335-AC

Counsel: Jill Medhurst-Tivadar for Appellant

Chris D. Simard for Respondent

Howard A. Gorman for Proposed Debtor in Possession Lender, Echo Merchant Fund

G. Scott Watson for Monitor, Hardie & Kelly Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Insolvency; Income Tax (Federal)

Tax --- Goods and Services Tax -- Collection and remittance -- GST held in trust

Leave to appeal from debtor-in-possession order -- Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA -- Excise Tax Act, R.S.C. 1985, c. E-15, s.

2008 ABCA 1, [**2008**] **2** C.T.C. 67, **2008** G.T.C. 1128 (Eng.), [**2008**] A.W.L.D. 582, [**2008**] A.W.L.D. 690, [**2008**] A.W.L.D. 691, [**2008**] G.S.T.C. **2**, 422 A.R. 4, 415 W.A.C. 4, 43 C.B.R. (5th) 35

222.

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Leave to appeal from debtor-in-possession order -- Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Tax --- Income tax -- Administration and enforcement -- Collection of tax -- Priorities and superpriorities of Minister

Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Tax --- Income tax -- Administration and enforcement -- Withholding of tax -- Trust for monies withheld

Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had

advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Cases considered by Rowbotham J.A.:

> Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) -- considered
>
> First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. Minister of National Revenue v. First Vancouver Finance) 2002 D.T.C. 6998 (Eng.), (sub nom. Minister of National Revenue v. First Vancouver Finance) 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) -- considered
>
> Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 128, (sub nom. Luscar Ltd. v. Smoky River Coal Ltd.) 237 A.R. 83, (sub nom. Luscar Ltd. v. Smoky River Coal Ltd.) 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) -- followed

Statutes considered:

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

> Generally -- referred to

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

> Generally -- referred to

Excise Tax Act, R.S.C. 1985, c. E-15

> Generally -- referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

> Generally -- referred to
>
> s. 224(1.2) -- referred to
>
> s. 224(1.3)"security interest" -- considered
>
> s. 227(4) -- referred to
>
> s. 227(4.1) [en. 1998, c. 19, s. 226(1)] -- referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47

2008 ABCA 1, [**2008**] **2** C.T.C. 67, **2008** G.T.C. 1128 (Eng.), [**2008**] A.W.L.D. 582, [**2008**] A.W.L.D. 690, [**2008**] A.W.L.D. 691, [**2008**] G.S.T.C. **2**, 422 A.R. 4, 415 W.A.C. 4, 43 C.B.R. (5th) 35

Generally -- referred to

APPLICATION by Canada Revenue Agency for leave to appeal from order under Companies' Creditors Arrangement Act, granting debtor-in-possession charge to corporate taxpayer.

***Rowbotham J.A.*:**

Introduction

1 Canada Revenue Agency (CRA) seeks leave to appeal a provision in an order made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), granting the Debtor in Possession Lender, Echo Merchant Fund (DIP Lender), a charge in priority over the claim of the applicant. Should leave be granted, the applicant also seeks a stay pending appeal.

Background Facts

2 The respondent, Temple City Housing Inc. (Temple) is a small private company that manufactures homes and truss beams for homes in Cardston, Alberta. Temple has almost 200 employees but has suffered from a shortage of skilled trade workers which has slowed its production and lowered its revenues. In September 2007, entire sections of production had to be shut down because of the lack of workers.

3 Temple has debts in excess of $5 million and is unable to meet its current obligations. In November 2007, the respondent sought protection under the CCAA in order to carry on business and restructure as a going concern, rather than liquidating its assets.

4 Temple's largest creditor is the applicant, who has claims for unpaid or unremitted employee source deductions for income tax, Canada Pension Plan and Employment Insurance, as well as GST for 2007, which total approximately $973,000.

5 In order to pay its employees and continue carrying on business, Temple requires additional financing. The DIP Lender made loans of $185,000 and $91,500 on the condition that it obtains a security interest in the property of Temple in first priority or super-priority over all other claims, specifically the claim by CRA.

Decision of the CCAA Judge

6 The CCAA judge considered the sections of the *Income Tax Act*, R.S.C. 1985, c. 1, and the *Excise Tax Act*, R.S.C. 1985, c. E-15, that require employers to deduct and withhold amounts from their employees' wages (source deductions) and remit them to the Receiver General. The source deductions are deemed to be separate and apart from the property of the employer in trust for Her Majesty. A deemed trust attaches to the property of the employer both when source deductions are made and if source deductions are not remitted to the Receiver General by their due date.

7 The applicant submitted to the CCAA judge and again in this application, that the deemed trust overrides all competing security interests.

8 The CCAA judge held that the Supreme Court of Canada's decision in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] G.S.T.C. 23 (S.C.C.), was authority that the deemed trust is similar in principle to a floating charge. Thus, although the property of the employer is subject to

the deemed trust, Her Majesty's interest in the property did not continue, for example, once property was sold to a third party. She also found that her interpretation was further supported by the definition in the *Income Tax Act*, which states that a "security interest" means "any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a ... deemed or actual trust...". Therefore, she held that Her Majesty's security interest could be treated the same way as any other security interest under the CCAA.

9 Exercising the inherent jurisdiction of a CCAA court, the CCAA judge held that in the circumstances, particularly, given the number of employees affected and the spirit of the CCAA, which is to promote the continuation of the corporation so that it can emerge from insolvency protection, she granted the DIP Lender first priority to the extent of $300,000 over any claims by the applicant.

10 The order under which leave is sought is dated November 23, 2007 at para. 41 provides:

> In particular, the DIP Charge to the extent of $300,000.00 shall have priority over any claims by CRA [Canada Revenue Agency] in relation to unpaid or unremitted employee source deductions and GST as defined pursuant to the *Income Tax Act* and the *Excise Tax Act*.

Proposed Grounds for Appeal

11 The applicant seeks leave to appeal para. 41 of the November 23, 2007 order on the basis that the CCAA judge erred in granting the DIP Lender priority over Her Majesty's deemed trust claims arising under sections 224(1.2), 227(4) and 227(4.1) of the *Income Tax Act*.

Test for Leave

12 The test for leave is well known. In *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22, this Court stated that to obtain leave to appeal an order under the CCAA, there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action.

Application

13 The applicant is unable to meet the test for leave. The point which the applicant seeks to appeal will not be of significance to CCAA practice because the legislation has been amended. Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2nd Session, 2007, received Royal Assent on December 14, 2007. The amendments to the CCAA include specific authority to grant super-priority to DIP financing such as the loan in this case. This provision has not yet been proclaimed in force. However, once it has been proclaimed in force, the issue of the CCAA judge's inherent jurisdiction to order such priorities

will not be an issue in future CCAA proceedings. Counsel for the CRA forcefully submitted that despite the amendments, this case is of significance to the practice because, to her knowledge, it is the first time that a court has given priority to the DIP Lender over the CRA's deemed trust. She made several arguments as to why the decision of the CCAA judge was incorrect, assuming that the standard of review is correctness. It seems to me, however, that these arguments, particularly the application of Iacobucci J.'s decision in the *First Vancouver* case, will still have force in future cases where the matter will be largely one of statutory interpretation. I conclude therefore that this particular appeal would not be of significance to the practice.

14 Moreover, the point may not be of significance to the action itself. As counsel for Temple submitted, this is real time litigation. The CCAA judge makes discretionary decisions in a constantly changing situation. Her decision is owed a high degree of deference. The DIP Lender has advanced $300,000 to Temple in reliance on the November 23 order and, in particular, on the lack of a stay of that order. The proceeds have been paid to Temple's employees and suppliers. It is now virtually impossible to "unscramble the egg", as counsel for Temple submitted; in other words to reverse the effect of para. 41 of the November 23 order and to grant the remedy that the applicant now seeks. As was the case in *Canadian Airlines Corp., Re*, 2000 ABCA 238, 266 A.R. 131 (Alta. C.A. [In Chambers]) at para. 32, this appeal may well be moot.

15 Further, an appeal would hinder the CCAA proceedings because without an order giving the DIP Lender first priority over the applicant's claim, the DIP Lender would not advance funds and without the current and future loans, Temple would be unable to restructure under the CCAA and would be forced to close its business.

16 Given that three of the four factors cannot be met, even if the point on appeal is *prima facie* meritorious, the applicant cannot show that there are serious and arguable grounds of real and significant interest to the parties.

Conclusion

17 As the applicant is unable to meet the test for leave, the application is dismissed and therefore, the application for a stay need not be considered.

Application dismissed.

END OF DOCUMENT

TAB 6

49 C.B.R. (5th) 188

C

2008 CarswellOnt 7136

A & M Cookie Co. Canada, Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended; And In the Matter of a Plan of Compromise or Arrangement of A & M Cookie Company Canada
Ontario Superior Court of Justice [Commercial List]
Morawetz J.
Heard: October 14, 2008
Judgment: October 14, 2008
Docket: CV-08-7777-00CL

Counsel: Mr. F. Myers, Mr. L.J. Latham for Wachovia Canada

Mr. T. Reyes for Monitor, RSM Richter Inc.

Ms H. Clarke for A & M Cookie Company Canada

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- "Fair and reasonable"

Debtor company brought application under Companies' Creditors Arrangement Act ("CCAA") seeking authorization for plan of arrangement, stay of proceedings, and approval of debtor in possession financing -- Application granted -- Debtor might have viable stand alone business which could be restructured and union supported restructuring effort -- Debtor reached ratification agreement on interim financing with creditors and affiliated U.S. debtors subject to court approval -- Debtor agreed to guarantee obligations of affiliated U.S. debtors to maximum of U.S. $5 million and this amount might not be available to current creditors if shortfall occurred on realization of U.S. assets which might be detrimental to debtor's creditors -- However, if debtor's business was immediately discontinued and wound down without credit support, unsecured trade creditors would not likely receive any distribution -- Combination of ratification agreement and CCAA protection had potential benefits including allowing debtor to succeed as viable business if cut loose from unsuccessful operations of affiliated U.S. debtors -- Benefits also included preserving 350 manufacturing jobs in distressed Ontario market and preservation of business for customers and suppliers -- Debtor was qualifying debtor under CCAA and its chief place of business was in Ontario so that court had jurisdiction to receive application -- It was appropriate to grant initial CCAA order with stay of proceedings, and ratification agreement was also approved.

Statutes considered:

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

Generally -- referred to

APPLICATION by debtor seeking authorization for plan of arrangement, stay of proceedings, and approval of debtor in possession financing.

***Morawetz J.*:**

1 The following is the endorsement in the matter of the Plan of Compromise and Arrangement of A & M Cookie Company of Canada. A & M Cookie Company of Canada, ("A & M"), brings this application as debtor under the *Companies' Creditors Arrangement* Act. It seeks the authorization to prepare and file with the Court a plan of arrangement and compromise with its creditors. It also seeks a stay of proceedings and approval of debtor in possession financing. It proposes that R.S.M. Richter Inc. act as Monitor.[FN1]

2 A & M is a Nova Scotia ULC. Catterton Partners V, together with affiliated entities (collectively "Catterton"), is an indirect owner of all of the common shares of A & M through its investment in Archway and Mother's Cookie Company Co. Inc. a Delaware company, ("A & M American"). A & M American also owns all of the shares of Mother's Cake and Cookie Co., a California company, ("Mother's"), Mother's, in turn, owns all of the shares of Archway Cookies LLC, a Delaware company, ("Archway"),

3 On October 6, 2008, Mother's and Archway, (collectively, "the Chapter 11 Debtors"), commenced voluntary proceedings pursuant to Chapter 11 of the United States Bankruptcy Code, which are being administered by the United States Bankruptcy Court in the District of Delaware.

4 A & M and the Chapter 11 Debtors are distinct corporate entities and have a different business focus. The business of A & M is based upon private label products for approximately 20 major customers. The U.S. operations were more focused upon direct store sales. The major suppliers of A & M are Canadian.

5 A and M's business and operations are principally based in Kitchener Ontario. A & M owns the manufacturing facility from which it operates and it also leases warehouse facilities in Kitchener and New Dundee, Ontario.

6 A & M provides private label cookies to most of Canada's leading retailers. For the fiscal year ending December 31, 2007, A & M had total sales revenues of approximately $52 million. A & M was originally established as Colonial Cookies in 1966. It was purchased by Beatrice Foods Inc. in 1973. In 1997 Parmalat purchased Beatrice Foods and in January 2005 A & M was acquired by Catterton. As of September 26, 2008, A & M employed approximately 352 employees comprised of 40 non-union and 312 union employees. A & M is party to a collective agreement with United Food and Commercial Workers Canada, Local 175. Although not formally represented by counsel at this hearing, Mr. Michael Duden, a representative of the Union did make some remarks.

7 The August 30, 2008, un-audited financial Statements show that A & M has $8.4 million of current assets and $4.6 million of other assets including capital assets. As of October 7, 2008, the principal liabilities of A & M were approximately $13 million. This is comprised of $8.4 million being the A & M portion of the Wachovia Credit Facility, accrued vacation pay of approximately $225,000, un-funded pension obligations of approximately $385,000, real property taxes of approximately $246,000 and unsecured trade payables of approximately $3.8 million.

8 The Chapter 11 debtors and A & M are co-borrowers under a credit agreement with Wachovia Capital Fin-

ance Corporation as lender and administrative agent and certain other lenders including Wachovia Canada, (collectively referred to as "Wachovia"). The facility is comprised of term loans and a revolving line of credit. As of October 1, 2008, the outstanding amounts due under the term loans and the revolver were approximately $15.9 million and $35.5 million respectively. The obligations of the co-borrowers under the credit facility are guaranteed by A & M American and A & M Canada Blocker Corp., the Delaware Company which is the direct owner of the shares of A & M. As security for its obligations under the credit facility, A & M granted Wachovia security over all of its property and assets. The credit facility with Wachovia is in default.

9 It does not appear that the Chapter 11 Debtors will be restructured in the traditional sense, rather it appears that there will be a sales process to sell their assets.

10 The operations of A & M have been shut down. However, Catterton believes that A & M, despite its current difficulties, may have a viable standalone business that could be restructured if it was first given an opportunity to stabilize operations under the CCAA and then attempt to formulate a plan of arrangement. There have been extensive negotiations over the past two weeks between A & M, the U.S. Debtors, Wachovia and Catterton with a view to reaching an agreement to provide interim financing to A & M and the Chapter 11 Debtors during the CCAA proceedings and the Chapter 11 proceedings to permit the U.S. Debtors to undertake their sales process and to assist with the restructuring of A and M.

11 The parties have reached an agreement on interim financing arrangements, however this agreement, which is referred to as the Ratification Agreement, is subject to the approval of both this Court and the United States Bankruptcy Court for the District of Delaware.

12 Wachovia takes the position that, in the event that the interim financing arrangements are not approved by the courts, it will have no choice but to consider enforcing its security, which would likely result in the liquidation of A & M. However, if the Ratification Agreement is approved, Wachovia is prepared to provide credit support and other assistance to A & M. The issue, arising out of the interim financing arrangement, which is of concern to this Court, is that A & M has agreed to guarantee the obligations of the Chapter 11 Debtors up to a maximum of U.S. $5 million, a guarantee that has been described as a last out guarantee, i.e., Wachovia would look to the guarantee after the assets of the U.S. Debtor have been realized.

13 A & M has not previously provided a guarantee to Wachovia in respect of the Chapter 11 Debtors or other parties to the credit facility. Prom A & M's standpoint, the key terms of the Ratification Agreement include the following:

(a) Forbearance by Wachovia during the CCAA process.

(b) Terms of financing for the liquidation of the U. S. Debtors.

(c) Terms of the existing credit facilities for A & M to continue to revolve during the CCAA process and new financial covenants for A & M during the CCAA process, and;

(d) Existing debts and security granted by A & M and the Chapter 11 Debtors are confirmed.

14 The Court must consider whether approval of the Ratification Agreement should be granted at this time recognizing that if there is a shortfall to Wachovia on the realization of U.S. assets, it is conceivable that up to U.S. $5 million of assets of A & M would not be available to the current creditors of A & M. Clearly, this would

potentially be detrimental to the interest of the creditors of A & M.

15 In these circumstances, counsel to both A & M and Wachovia submitted that the issue should be considered in light of the alternatives. At the present time, A & M has been shut down. Mr. Heidecorn, a member of the Board of Directors of A & M, has stated in his affidavit, that based upon his knowledge and information concerning the forced sale value of the assets of A & M, he did not believe that the unsecured trade creditors would receive any distribution if the business was immediately discontinued and wound down by Wachovia without credit support. Although no formal liquidation analysis has been undertaken, counsel to A & M was able to file a preliminary liquidation analysis, which confirmed the statement made by Mr. Heidecorn. In view of the sensitive nature of the analysis and the uncertainty facing A & M at this time, counsel submitted that this preliminary analysis should be filed under seal for confidentiality reasons. Under the circumstances I am of the view that such a request is reasonable and a sealing order shall issue,

16 Catterton is of the view that the restructuring of the standalone entity may be viable but it will be difficult to proceed with such a restructuring without the cooperation of Wachovia and without a release of the share pledge. The release of the share pledge is the cornerstone for Catterton's participation insofar as it proposes that the restructuring would enable Catterton to maintain the equity or a portion of the equity on a going forward basis.

17 There is also the issue of 350 jobs in the Kitchener area. Mr. Duden indicated to the Court that the Union is supportive of the restructuring effort.

18 The parties who stand to be detrimentally affected are the trade creditors who total approximately $3.8 million. The trade debt is concentrated among a limited number of suppliers. Conceivably some of these suppliers will continue to deliver supplies to A & M and they may stand to benefit if A & M continues in operation.

19 Counsel to the proposed Monitor advised that the Monitor has not been in a position to comment on the liquidation analysis and was not in a position to provide any meaningful report on the potential impact of the Ratification Agreement. I note that it would have been helpful if the Monitor had been involved in this process at an earlier stags. The Court certainly would have benefited from an analysis of this situation. It is also noted that the Ratification Agreement does provide for additional liquidity as Wachovia will continue funding capital requirements of A & M during the CCAA proceedings under the revolving credit facility and that Catterton is also prepared to provide a subordinated D.I.P. facility of up to $4.7 million. The support of Catterton can be considered significant as it is based upon Catterton's view that if the business is restructured there would be a benefit to all stakeholders, including the unsecured creditors of A & M and Catterton as the owner of the business.

20 The situation has been summed up by Mr. Heidecorn at paragraph 18 of his affidavit, sworn October 13, 2008, which reads as follows: (as read)

> "The management of A & M therefore believes that the stabilizing of relations with Wachovia through the ratification agreement combined with the breathing space afforded by CCAA protection has the greatest potential to preserve value for stakeholders of A & M including of course, Catterton.

21 Among those benefits are:

> i. A & M may be able to succeed as a viable business if cut loose from the unsuccessful operations of the U.S. debtors.

ii. The prospect of preserving over 350 manufacturing jobs in the distressed Southern Ontario market, and;

iii. The preservation of the business for customers and suppliers."

22 I accept this statement.

23 I am satisfied that A & M is a qualifying debtor within the meaning of the CCAA. I am also satisfied that the chief place of business of A & M is in Ontario and as such this Court has the jurisdiction to receive this application. The required financial statements including the projected cash flow of A & M have been filed and in my view, it is appropriate to grant the initial CCAA order with a stay of proceedings in effect to November. 14, 2008. The Ratification Agreement is also approved. The form of draft order as presented is, subject to certain agreed upon revisions to paragraphs 41(a) and 43 is acceptable. Order to go in the form submitted, as amended.

24 *REPORTER'S NOTE:* A brief recess is taken and the Court continues with other matters.

Application granted.

FN1. *REPORTER'S NOTE:* This motion was recorded by an agency reporter, not the reporter that transcribed it.

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TAB 7

COURT FILE NO.: CV-09-7966-00CL
DATE: 2009-01-27

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

RE: In the Matter of a Plan of Compromise or Arrangement of Smurfit-Stone Container Canada Inc. and others

BEFORE: Pepall, J.

COUNSEL: Sean F. Dunphy and Alexander D. Rose for the Applicants
Robert J. Chadwick and Christopher G. Armstrong for the Proposed Monitor
Susan Grundy for the DIP Lenders

ENDORSEMENT

[1] Smurfit-Stone Container Canada Inc. ("SSC Canada"), Stone Container Finance Company of Canada II, MBI Limited, 3083527 Nova Scotia Company, BC Shipper Supplies Ltd., Specialty Containers Inc., 639647 British Columbia Limited, 605681 N.B. Inc. Canada, and Francobec Company (the "Applicants") seek relief under the CCAA. They also request that the terms of the Initial CCAA order apply to two Canadian partnerships affiliated with the Applicants, namely Smurfit-MBI and SLP Finance General Partnership (the "CCAA Entities"). Each of these CCAA Entities has filed for Chapter 11 protection in the U.S. Deloitte and Touche Inc. has consented to act as Monitor in the CCAA proceedings.

[2] On January 26, 2009, Smurfit-Stone Container Corporation ("Smurfit-Stone") and certain of its affiliates including SSC Canada commenced Chapter 11 proceedings in the U.S. Smurfit-Stone is based in St. Louis, Missouri and in Chicago, Illinois. It is a leading North American producer of paperboard products, market pulp, corrugated containers and other specialty packaging products. It is also one of the world's biggest recyclers of paper. It

currently holds approximately 18% of the North American container board market. Its operations have been negatively affected by the global economic downturn, the decrease in consumer spending, the manufacturing exodus from North America, a rise in costs, and a general market shift away from paper-based packaging. It has numerous direct and indirect subsidiaries.

[3] SSC Canada and Smurfit-MBI, an Ontario limited partnership, are its principal Canadian operating entities. SSC Canada operates mills and plants producing liner board, corrugating medium and food board. Smurfit-MBI is a converting operation that produces corrugated containers using liner board from the mills. Its general partner is MBI Limited which carries on no business other than acting as Smurfit-MBI's general partner and has no assets other than its interest in Smurfit-MBI.

[4] 3083527 Nova Scotia Company is wholly-owned by SSC Canada. It does not carry on business except that it is one of the two Smurfit-MBI limited partners (the other being SSC Canada). BC Shipper Supplies Ltd. is no longer active. Specialty Containers Inc.'s assets were all sold in 2008. 639647 British Columbia Limited has no operations and holds the shares of BC Shippers Supplies Ltd. and Specialty Containers Inc.

[5] SLP Finance General Partnership is owned by two Delaware companies. It does not carry on operations but owns the shares of 605681 N. B. Inc. which was liquidated in 2005 and of Francobec Company, a Nova Scotia company which previously operated a hardwood chipping facility which is now inactive. It has US$574 million in investment assets.

[6] Stone Container Finance Company of Canada II does not carry on business except that it issued notes, the proceeds of which were remitted to SSC Canada. It has assets of US$62 million and liabilities of US$207 million. Collectively all of these companies and partnerships are referred to as the CCAA Entities.

[7] The CCAA Entities employ approximately 2,600 people across Canada many of whom are unionized.

[8] Smurfit-Stone operates as a North American company rather than as a collection of individual business units. The U.S. and Canadian operations are fully integrated. In this regard, they have a centralized cash management system. All high level management decisions are made by a U.S. management team and it will have responsibility for the restructuring plan for the CCAA entities.

[9] A secured credit facility covers both the Canadian and American operations. The amount outstanding on this pre-filing secured credit facility as of January 23, 2009 was approximately US$1 billion of which approximately US$367 million is attributable to SSC Canada. Security over all material Canadian assets had been provided as part of this facility.

[10] The debt of the CCAA Entities also includes Canadian notes of US$200 million and trade creditor payables of US$53.4 million. In addition, there is a Canadian accounts receivable securitization programme, the outstanding balance of which is US$38 million as of January 23, 2009. There are six defined benefit registered pension plans in Canada for which there is an aggregate solvency deficiency of approximately $132 million as at December 31, 2007.

[11] The Applicants are insolvent, have indebtedness in excess of $5 million and qualify pursuant to the CCAA. The proposed outline for a plan includes continuing the process of selling and realizing value in respect of closed and discontinued operations and coordinating with the US entities to achieve a balance sheet restructuring.

[12] As a result of the Chapter 11 filing, the pre-filing secured credit facility is no longer available. In addition, the Chapter 11 filing constitutes an event of termination under the receivables agreement that governs the accounts receivable securitization programme. As such, absent some additional facility, the CCAA Entities would be required to repay amounts owing under the pre-filing credit agreement. In addition, they would no longer be able to benefit from the accounts receivable securitization programme, would have no access to operating credits, would be unable to operate in the ordinary course, and would be unable to satisfy ongoing obligations.

[13] Under the DIP facility that is proposed, both SSC Canada and the U.S. company, Smurfit-Stone Container Enterprises, Inc. ("SSCUS") are borrowers; the total commitment is US$750 million comprised of US$315 million in revolving facilities available to both SSCUS and SSC Canada, a US$400 million term loan available to SSCUS; and a US$35 million term loan available to SSC Canada. The term loan facilities are being used to take out the accounts receivable securitization programme. The loans to SSCUS are guaranteed by SSCC and most of the U.S. debtors and by SSC Canada and the latter provides a charge over its assets for all advances made to SSCUS. There would be rights of subrogation. The loans to SSC Canada are guaranteed by SSCUS and most of its U.S. subsidiaries and secured by a charge over substantially all of the assets of Smurfit-Stone's U.S. entities. The borrowings of SSC Canada are guaranteed by the other CCAA entities.

[14] While some of the DIP lenders also participated in the pre-filing secured credit facility, the DIP financing involves new money and is not a refinancing. New lenders are also participating in the DIP facility. The lenders of the pre-filing secured credit facility are unopposed to the order sought.

[15] The DIP lenders are unwilling to extend the DIP facility to SSC Canada absent its guarantee of the obligations of SSCUS under the DIP facility. In addition, the business is fully integrated making it impracticable particularly in the current credit environment to secure alternate financing on a stand-alone basis. To continue operations, the DIP facility is required. Estimated cash on hand for the Canadian operating entities at January 23, 2009 was $704,517 and the accounts payable balance is estimated to be in excess of US$53 million.

[16] The amount borrowed is to be secured by a charge on the Applicants' property following an Administration charge of $1 million and a Directors' charge of $8.6 million. Until a final order has been granted by the U.S. court approving continued lending under the DIP facility and until approved by this court, and prior to February 18, 2009, no more than $100,000 million of the U.S. revolving commitment and $15 million of the SSC Canada revolving commitment will be available for borrowing. During the initial 30-day stay period, the CCAA Entities anticipate they will require US$50 million of which US$31 million of the

term loan is to be used to refinance the account receivables securitization programme. This will result in an increase in cash receipts.

[17] The proposed Monitor filed a report. It described the extensive process undertaken to obtain new debt financing. It further understands that Smurfit-Stone, having thoroughly canvassed the market, does not have any satisfactory alternative financing arrangements available. The proposed Monitor is of the view that the restructuring and continuation of Smurfit-Stone and the CCAA Entities as a going concern is the best option available given that a going concern restructuring would preserve the value of Smurfit-Stone and the CCAA Entities whereas a liquidation and wind-down would likely result in a substantial diminution in value that could ultimately reduce creditors' recoveries. Significantly, the liquidation and wind-down of the CCAA Entities could eliminate a significant number of jobs, many of which would be preserved if the CCAA Entities are able to continue as a going concern. The proposed Monitor has also been advised that the CCAA Entities have recently been "net debtors", relying on advances from SSCUS to fund working capital requirements. Based on the information available to it, it is supportive of the DIP facility including SSC Canada's guarantee. In this regard, however, it is unable to provide views of the value of the guarantee or the probability that it will be called upon. Smurfit-Stone has advised the Monitor that SSC Canada's guarantee of SSCUS' obligations is contingent and that the DIP facility was negotiated with a third-party lender on the basis that there would be full recovery of all loans advanced to SSCUS under the DIP facility from the U.S. assets of Smurfit-Stone.

[18] The successful restructuring of the CCAA Entities appears to be inextricably intertwined with the successful restructuring of the Smurfit-Stone enterprise in the Chapter 11 proceeding. In order to continue day-to-day operations and to facilitate the company's restructuring, the U.S. debtors and the CCAA Entities require access to significant funding. Given all of these facts, I am prepared to grant the relief requested.

[19] As mentioned, the requested order extends the benefits of the protections provided by the order to Smurfit-MBI and SLP Finance General Partnership, both of which are partnerships but not Applicants. The operations of the partnerships are integral and closely interrelated with

that of the Applicants and in my view the request is appropriate in the circumstances outlined. See also *Re: Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24.

[20] As to the centralized cash management system, the proposed Monitor has reviewed it and will be able to adequately monitor the transfers of cash, including transfers within the system so that transactions applicable to SSC Canada and Smurfit-MBI can be ascertained, traced and properly recorded. The Monitor will review and monitor the system and report to the court from time to time. As of January 23, 2009, SSC Canada was estimated to have US$121,000 and CDN$185,000 in cash and Smurfit-MBI was estimated to have US$97,000 and CDN$414,000 in cash.

[21] The CCAA Entities seek to pay certain pre-filing amounts owed to critical suppliers. The proposed Monitor has been advised that SSC Canada's operations depend on a ready supply of key materials such as wood, chemicals, fuel and energy from third party suppliers and, in addition, SSC Canada's and Smurfit-MBI's operations are rcliant on rail and trucking services, custom brokers and third party warehouses. I am satisfied that the request to pay these pre-filing amounts is appropriate.

[22] According to Smurfit-Stone, it is very difficult to separate the creditors of the U.S. debtors from the creditors of the CCAA Entities. Smurfit-Stone intends to engage Epiq Bankruptcy Solutions LLC to send notice of the Chapter 11 proceedings to all creditors owed more than $1,000. The proposed Monitor has suggested that such notice include notice of the CCAA proceedings to the creditors of the CCAA Entities. I am in agreement with this proposed course of action but request that the Monitor report to the court when service has been effected.

[23] I also note and rely upon the comeback provision found in paragraph 57 of the order which allows any interested party to apply to the court to vary or amend this order on not less than seven days' notice.

[24] There are obviously numerous other provisions in the order that I have not addressed specifically as I believe they are all self-evident. In all of the circumstances I am prepared to

grant the order requested. Counsel will re-attend on Wednesday at 10:00 a.m. to address a further recognition order.

Pepall, J.

DATE: January 27, 2009

COURT FILE NO.: CV-09-7966-00CL
DATE: 2009-01-27

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC. AND OTHERS

ENDORSEMENT

PEPALL J.

Released: January 27, 2009

TAB 8

Court File No. 09-CL-8007

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

IN THE MATTER OF s. 18.6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF PLIANT CORPORATION OF CANADA LTD., PLIANT PACKAGING OF CANADA, LLC and UNIPLAST INDUSTRIES CO.

Applicants

UNOFFICIAL TRANSCRIBED ENDORSEMENT OF MR. JUSTICE WILTON-SIEGEL DATED MARCH 24, 2009

March 24/09

P. Macdonald for the applicants
M. Gottlieb for RSM Richter Inc.
F. Myers for the DIP Lenders
K. McEachern for Merrill Lynch

The applicants seek recognition of two orders of the Delaware Bankruptcy Court – the final DIP lending order and an order authorizing the use of funds under the DIP facilities to repay the outstanding debt of three foreign subsidiaries of Pliant Corporation and the debt of Pliant Corporation of Canada ("Pliant Canada") under facilities granted by Merrill Lynch.

The issue for this Court is any potential prejudice to the unsecured creditors of the applicants. I am satisfied that there is no such prejudice for the following reasons.

Each of Uniplast Industries Co. and Pliant Packaging of Canada LLC has given secured guarantees in respect of Pliant Corporation debt totalling approximately $796 million. This exceeds the value of that corporation on a liquidation basis. Accordingly, there is no equity in the two Canadian applicants to satisfy any unsecured claims against them.

With respect to Pliant Canada, the evidence indicates that it is not capable of being sold as a going-concern given the nature of its relationship to Pliant Corporation. The effect of the proposed advance is to replace existing secured borrowings under the Merrill Lynch facility with

secured borrowings in the same amount under the DIP financing. The total of such borrowings exceeds the liquidation value of Pliant Canada. There is therefore no equity in Pliant Canada to satisfy any claims of its unsecured creditors before the advance under the DIP facility. The circumstances are unchanged after the advance, apart from the termination of the cross-guarantees of the 3 foreign subsidiaries of Pliant Corporation. Given the absence of any equity in Pliant Canada to satisfy unsecured claims, this is of no significance.

Accordingly, order to go in the form attached including an order sealing the liquidation analysis subject to further order of this Court.

Wilton-Siegel J.

IN THE MATTER OF s. 18.6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF PLIANT CORPORATION OF CANADA LTD., PLIANT PACKAGING OF CANADA, LLC and UNIPLAST INDUSTRIES CO.

Court File No: 09-CL-8007

Mr. Paul MacDonald for the Applicants, February 11, 2009.
Mr. Robin Schwill, counsel to RSM Richter, proposed information officer
Mr. Jay Carfagnini & M. Wagner counsel to First Lien Holders and proposed DIP lenders
Ms. Katherine McEachern for Merrill Lynch, lender under the Credit Facilities.

The Applicants seek an order under S 18.6 of the CCAA to recognize the petitions for relief filed today under Chpt 11 of Title 11 of the United States Bankruptcy Code (the "U.S. Proceedings") in the United States Bankruptcy Court for the District of Delaware by Pliant Corporation & certain of its subsidiaries. The Applicants are also debtors in the U.S. Proceedings. They are clearly "interested persons" for the purposes of an application

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding commenced at TORONTO

APPLICATION RECORD
(returnable February 11, 2009)

McMILLAN LLP
Barristers & Solicitors
Brookfield Place, Suite 4400
181 Bay Street
Toronto, Ontario
M5J 2T3

Paul G. Macdonald LSUC# 23129M
Tel: 416.865.7167
Wael M. Rostom LSUC# 43165S
Tel: 416.865.7790

Fax: 416.865.7048

Lawyers for the Applicants

under s 18.6(4) of the CCAA.

A single proceeding in the U.S. to deal w/ the Applicants has been proposed due to the integrated management of the Applicants w/ the other Chpt 11 Debtors, as well as the role that they play in the Chpt 11 Debtors overall pre-petition debt structure. As the affidavit of Mr Auburn indicates, there is extensive financial inter-dependence between the Applicants & the other Chpt 11 Debtors.

I am satisfied that this is an appropriate instance for an order under s 18.6 The Applicants' Canadian creditors will have the right to file proofs of claim & participate in the U.S. Proceedings in the same manner as the Applicants' U.S. creditors.

Counsel for the First lien holders & proposed DIP lender supports this application.

Merrill does not oppose, but indicates it may subsequently come back to this court if further issues develop. It also asserts, quite properly, that given the volume of material filed for today's attendance, virtually immediately

before this hearing, that the applicants should be held to the standard of a party seeking relief on an ex parte motion. Mr MacDonald assures the court that all pertinent facts, in relation to the narrow order sought today, have been highlighted in court today.

An order, providing for a stay, & the appointment of an information officer (thereby sought in para 1 of the application Record) shall issue in the form on which I have endorsed my fiat.

The balance of this application is adjourned to Feb 13. 2009

I note that the applicants were restructured in 2006, through a 5.18.6 order issued by Farley J.

Duncan Hon J

(HOY)

March 24, 2009

IN THE MATTER OF s. 18.6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF PLIANT CORPORATION OF CANADA LTD., PLIANT PACKAGING OF CANADA, LLC and UNIPLAST INDUSTRIES CO.

Court File No: 09-CL-8007

March 24/09
P. Macdonald for the applicants
M. Gottlieb for RSM Richter Inc.
F. Myers for the DIP lenders
K. MacFadyen for Merrill Lynch.

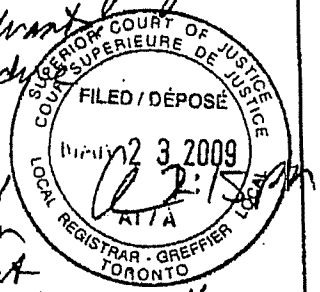
LATE FILING

The applicants seek recognition of two orders of the Delaware Bankruptcy Court – the final DIP lending order and an order authorizing the use of funds under the DIP facilities to repay the outstanding debts of three foreign subsidiaries of Pliant Corporation and the debts of Pliant Corporation of Canada ("Pliant Canada") under facilities granted by Merrill Lynch.

The issue for this Court is any potential prejudice to the unsecured creditors of the applicants. I am satisfied that there is no such prejudice for the following reasons.

Each of Uniplast Industries Co. and Pliant Packaging of Canada LLC has given unsecured guarantees in respect of Pliant Corporation debts to Tolling approximately $776 million. This exceeds the value of that corporation on a liquidation basis. Accordingly there is no equity in the two Canadian applicants to satisfy any unsecured claims against them.

PTO.



ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding commenced at TORONTO

AMENDED MOTION RECORD OF THE APPLICANTS
(returnable March 24, 2009)

McMILLAN LLP
Barristers & Solicitors
Brookfield Place, Suite 4400
181 Bay Street
Toronto, Ontario
M5J 2T3

Paul G. Macdonald LSUC# 23129M
Tel: 416.865.7167
Wael M. Rostom LSUC# 43165S
Tel: 416.865.7790

Fax: 416.865.7048

Lawyers for the Applicants

With respect to Plant Canada, the evidence indicates that it is not capable of being sold as a going-concern given the nature of its relationship to Plant Corporation. The effect of the proposed advance is to replace existing secured borrowings under the Merrill Lynch facility with secured borrowings in the same amount under the DIP financing. The total of such borrowings exceeds the liquidation value of Plant Canada. There is therefore no equity in Plant Canada to satisfy any claims of its unsecured creditors before the advance under the DIP facility. The circumstances are unchanged after the advance, apart from the termination of the cross-guarantees of the 3 foreign subsidiaries of Plant Corporation. Given the absence of any equity in Plant Canada to satisfy unsecured claims, those ~~unsecured~~ of no significance.

Accordingly, order to go in the form attached, including an order sealing the liquidation analyses subject to further order of the Court.

Wilton-Siegel J.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985 c. C-36
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
INDALEX LIMITED et al

Court File No.CV-09-8122-00CL

the Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
199 Bay Street, Suite 2800
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9

Linc Rogers LSUC#: 43562N
Tel: (416) 863-4168

Katherine McEachern LSUC#: 38345M
Tel: (416) 863-2566
Fax: (416) 863-2653

Lawyers for the Applicants