Court File No.

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 SIGNATURE ALUMINUM CANADA INC.

Applicant

FACTUM OF THE APPLICANT

PART I – OVERVIEW

1. Signature Aluminum Canada Inc. (the "Applicant") seeks protection from its creditors under the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA").[1] The Applicant is insolvent and as a result seeks a stay of proceedings and ancillary relief under the CCAA in order to create a stable environment within which it may restructure its business through either a plan of arrangement or compromise, or sale of the Applicant's business.

PART II – FACTS

2. The facts are set out in the affidavit of Parminder Punia sworn January 28, 2010 (the "Punia Affidavit") and are briefly summarized below.[2]

Background

3. The Applicant is a Nova Scotia corporation and carries on business in Ontario and Quebec, with its head office located in Richmond Hill, Ontario. The Applicant is

[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ["CCAA"].
[2] Affidavit of Parminder Punia sworn January 21, 2010 ["Punia Affidavit"].

in the business of aluminum extrusion (a process which forms and moulds aluminum for use by end-users).[3]

4. The Applicant is in financial distress and the current market environment and global recession have hampered turnaround efforts, making the Applicant's continued financial losses unsustainable.[4]

5. Moreover, 6919464 Canada Inc., now continued as 3241715 Nova Scotia Limited ("324"), has demanded repayment of the sum of $30,940,156.96 owing by the Applicant to 324. 324 is the sole shareholder of the Applicant.[5] Additionally, as a result of Signature's financial difficulties, by a demand dated January 28, 2010, (the "Biscayne Demand") Biscayne Metals Finance, L.L.C. ("Biscayne"), a senior secured creditor of the Applicant which is an indirect affiliate of the Applicant, has demanded that the Applicant honour its guarantee of certain obligations owed by 324's parent, Arch Acquisition Inc. ("Arch") to Biscayne and demanded payment of US $34,259,574, together with interest and costs accruing from and after December 31, 2009.[6]

6. For these and other reasons more fully described in the Punia Affidavit, the Applicant is facing a financial crisis which jeopardizes its ability to continue as a going concern enterprise.[7] Without a restructuring, the Applicant will likely have no alternative but to shut down its ongoing business and liquidate its assets.

The Proposed Monitor

7. FTI Canada (a trustee within the meaning of Section 2 of the *Bankruptcy and Insolvency Act* (Canada)), which was previously engaged to assist the Applicant in its restructuring options, has consented to act as Monitor in these proceedings.[8]

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[3] Punia Affidavit at para. 4.
[4] Punia Affidavit at para. 5 & 7.
[5] Punia Affidavit at para. 5.
[6] Punia Affidavit at para 6.
[7] Punia Affidavit at para. 7.
[8] Punia Affidavit at para. 91.

Applicant's Creditors

8. 324, HIG Bayside LBO Fund II, L.P ("HIG Bayside Fund"), Biscayne Metals Finance, LLC ("Biscayne") and Shapes L.L.C. ("Shapes") are related to the Applicant and are its major secured creditors. The nature and amounts of these liabilities are more fully described in the Punia Affidavit.[9]

9. In addition to the above mentioned secured creditors, six other secured creditors have registered security against the Applicant in either Ontario or Quebec, all of which relate to specific equipment, vehicle financing or previously consigned inventory. Hydro-Quebec has also effected the registration of a hypothec against title to the St. Therese Plant. The Applicant has certain unsecured intercompany obligations owing to affiliates in the amount of approximately US $20,820,000 and trade liabilities in the amount of US $19,400,000.[10]

Plan Support Agreement and the 324 Credit Bid

10. Biscayne has agreed to the terms of a Plan Support Agreement that will facilitate a restructuring and enable a going concern solution for the Applicant's current financial difficulties.[11]

11. The Plan Support Agreement provides that Biscayne will either: (a) fund a plan of arrangement and compromise, in form and substance satisfactory to Biscayne (the "Plan"); or (b) together with 324, offer CDN $25 million for substantially all of the assets of the Applicant, to be credited against the obligations of the Applicant to Biscayne and 324 (the "Credit Bid").[12]

12. Although Biscayne retains the option of implementing a restructuring through either the Plan or the Credit Bid, Biscayne has advised the Applicant that its preferred option is to support a Plan which would allow unsecured creditors to receive a dividend on their unsecured claim. Given the amount of secured claims

[9] Punia Affidavit at para. 43.
[10] Punia Affidavit at para. 48-51.
[11] Punia Affidavit at para. 58.
[12] Punia Affidavit at para. 58.

against the Applicant, the Credit Bid would not result in any distribution to unsecured creditors.[13]

The Proposed Marketing Process

13. Before seeking court approval to either file the Plan or accept the Credit Bid, the Applicant intends to conduct a marketing process (the "Marketing Process") to determine if it is possible to identify a purchaser for the Applicant's assets and business that would provide greater value to the Applicant and its stakeholders than the Credit Bid (i.e. the baseline offer), which may include a purchaser that is committed to acquiring the Applicant's operations on an operating basis at more than one of its plants.

14. If higher and better bids are identified in accordance with the Marketing Process, the Applicant intends to attend before the Court to seek approval of the additional steps necessary to determine the highest and best offer or series of offers, and complete the Marketing Process. This may include seeking permission to conduct an auction among those determined to be qualifying bidders for this initial phase (the "Phase One Qualifying Bidders"), or to undertake such other process to complete the Marketing Process as is usual in CCAA proceedings.[14]

15. If, following the Marketing Process, no offer is identified that is higher and better than the Credit Bid, the Applicant intends to seek the Court's approval to either file the Plan or, if the Plan cannot be achieved, to accept the Credit Bid on the terms and conditions contained therein.[15]

16. The Monitor has reviewed and recommended the Marketing Process.[16]

[13] Punia Affidavit at para. 10.
[14] Punia Affidavit at para. 11.
[15] Punia Affidavit at para. 12.
[16] Pre-Filing Report to the Court submitted by FTI Consulting Canada Inc. in its capacity as proposed Monitor ["Monitor's Pre-filing Report"] at para. 26.

Investment Banker

17. In order to assist with the Marketing Process, the Applicant has retained CIBC Mid Market Investment Banking, a division of Canadian Imperial Bank of Commerce (the "Investment Banker") in accordance with the terms of an engagement letter dated December 22, 2009 (the "Engagement Letter").[17]

18. The Applicant seeks the approval and authorization of the Court of the terms of the Engagement Letter, and the authorization of the Applicant to carry out the terms of the Engagement Letter. The Monitor has reviewed and recommended the Engagement Letter, including the amount of the fees payable to the Investment Banker. The Applicant also seeks an order sealing the Engagement Letter as this information is highly competitive and commercially sensitive.[18] The Monitor supports this recommendation.

DIP Financing

19. Biscayne has agreed to provide DIP financing to the Applicant in the maximum principal amount of US $1,500,000 (the "DIP Financing"), which will permit the Applicant to continue its operations and pursue a going concern solution during these CCAA proceedings.

20. The DIP Financing is to be provided for substantially on the terms as set out in a DIP term sheet between Biscayne, as DIP Lender, and the Applicant, as borrower subject only to such non-material amendments as may be agreed to by the parties and consented to by the Monitor (the "DIP Term Sheet"). The basic financial terms of the DIP Term Sheet are summarized in the Punia Affidavit.[19]

21. The other priority secured creditor of the Applicant, namely, HIG Bayside Fund (which is an indirect affiliate of Signature), is consenting to the proposed DIP

[17] Punia Affidavit at para. 66.
[18] Punia Affidavit at para. 68.
[19] Punia Affidavit at para. 88.

Facility and corresponding DIP Lenders Charge. 324 and Shapes have a junior security interest and have also consented.[20]

22. The Monitor has received the DIP Term Sheet and considered the DIP Financing in light of the Cash Flow Projections. The Monitor recommends approval of the DIP Term Sheet and the DIP Lenders Charge.[21]

Administration Charge

23. The Applicant seeks an Administration Charge securing the professional fees owing to the Applicant's counsel, the Monitor and the Monitor's counsel. The Applicant also requests the Administration Charge secure the base work fee from the Investment Banker.

24. The Monitor supports the granting of the Administration Charge.

Pre-Filing Payments

25. The Applicant requests that in certain limited circumstances it be entitled to make pre-filing payments, with consent of the Monitor, in consultation with the DIP Lender and only where such pre-filing payment is made on such terms that provide a material benefit to the Applicant and its stakeholders.

Pension Obligations

26. The Applicant is the sponsor and administrator of various registered pension plans including, without limitation, defined benefit pension plans which if wound up today would each have a wind-up deficiency (collectively, the "DB Pension Plans").

27. The Applicant has been addressing the funding deficiencies in the DB Pension Plans by meeting its statutory obligations to make special payments on a monthly basis, and is current in respect of these obligations. The obligations for special payments currently amount, in aggregate, to approximately $93,000 per month.

[20] Punia Affidavit at para. 89.
[21] Monitor's Pre-Filing Report at para. 38 & 39.

The Applicant's Cash Flow Projections indicate that it will not generate sufficient cash flow through the period of the Cash Flow Projections to fund this obligation, and the DIP Lender is not prepared to provide the required financing for this obligation.[22]

28. It is therefore proposed that the special payments will be suspended during these CCAA proceedings.

PART III – ISSUES AND THE LAW

29. The Applicant is a company to which the CCAA applies. As detailed in the Punia Affidavit, it is insolvent and has claims against it in excess of $5 million.[23] This Application is properly before the Court as the Applicant's head office is located in Richmond Hill, Ontario.[24]

30. The Applicant has complied with the obligations of section 10(2) of the CCAA which sets out documentation required in connection with an initial application, in that this initial application is accompanied by (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;[25] (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement;[26] and (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.[27]

31. In seeking the assistance of this Court pursuant to the CCAA, the Applicant has sought certain specific relief for consideration by the Court.[28] Specifically, this Honourable Court must determine the following:

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[22] Punia Affidavit at para. 57.
[23] Punia Affidavit at para. 5.
[24] Punia Affidavit at para. 7.
[25] CCAA, s.10(2); Monitor's Pre-filing Report at Appendix B.
[26] *Ibid.*
[27] Punia Affidavit at Exhibit "B".
[28] CCAA, s.11.

(a) Should this Honourable Court grant the requested stay of proceedings?

(b) Should this Honourable Court approve the proposed Marketing Process?

(c) Should this Honourable Court approve the Engagement Letter and seal the terms of the Engagement Letter?

(d) Should this Honourable Court grant the Administration Charge and the DIP Lenders' Charge on a priority basis over the property of the Applicant?

(e) Should this Honourable Court grant an order entitling the Applicant to make certain pre-filing payments on certain terms and conditions?

(f) Should this Honourable Court stay the making of special payments during the course of the CCAA proceedings?

A. Stay of Proceedings

32. The Applicant seeks to restructure its business and operations for the benefit of a broad cross-section of stakeholders including employees, suppliers, creditors and customers.

33. The purpose of the CCAA is to preserve an insolvent company as a viable operation and to allow it to reorganize its affairs to the benefit not only of the debtor but its creditors as well.[29]

34. In order for an insolvent company to restructure there must be a means of holding its creditors at bay, hence the powers vested in the Court under the CCAA which allows the Court to order a stay that temporarily enjoins creditors from making claims against the debtor company.[30] This stay maintains the *status quo* and prevents any creditor from obtaining an advantage over other creditors[31] and

[29] *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 at 8 (B.C.S.C.).
[30] *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at p. 3 (B.C.C.A.); CCAA, s.11.02.
[31] *Woodward's Ltd. (Re)* (1993), 17 C.B.R. (3d) 236 at para. 12 (B.C.S.C.).

provides a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.[32]

35. The Applicant requires a stable environment within which to restructure its business through either a plan or arrangement or compromise, or through a sale of its business as a going concern. It is submitted that it is appropriate for the Court to grant the requested stay in these circumstances.

B. The Marketing Process

36. The Court has articulated the factors it should consider when exercising its general discretion to authorize a sale process in a CCAA proceeding:

(i) Is a sale transaction warranted at this time?

(ii) Will the sale benefit the whole "economic community"?

(iii) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(iv) Is there a better viable alternative?[33]

37. In applying these factors to the case at hand, it is submitted that:

(i) The Applicant does not seek approval of the Credit Bid at this time; rather, the Applicant seeks an order approving the Marketing Process and deeming the 324 Credit Bid to be a "Phase One Qualifying Bid" under the Marketing Process in order to set a bench mark against which to assess other offers.

Courts have previously approved similar "stalking horse" bids for such purposes, while delaying approval of any transaction until after the relevant

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[32] *Woodward's Ltd. (Re)* (1993), 17 C.B.R. (3d) 236 at para. 12 (B.C.S.C.); *Elan Corp. v. Comiskey* (1990), 1 C.B.R. (3d) 101 at para. 22 (Ont. C.A.).

[33] *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 at para. 48 (Ont. S.C.J. [Commercial List]); *Brainhunter Inc. (Re)*, [2009] O.J. No. 5578 at para 13 (Ont. S.C.J. [Commercial List]) ["*Brainhunter*"].

sale process has been completed and noted the benefit to stakeholders from having a "bird in the hand".[34]

Approval of a formalized sale process does not imply approval of the sale itself. It does, however, provide a foundation for the Applicant and the Court to ensure a fair outcome for all participants and stakeholders in the business. Should it be necessary to seek approval of the Credit Bid, or any other transaction, the Applicant will need the Court's authorization pursuant to section 36(1)of the CCAA.[35] The Marketing Process is essential to ensuring that whatever transaction is pursued by the Applicant, the process leading up to the proposed sale or disposition will satisfy the Applicant's obligation to fulfill the foregoing criteria.

Moreover, since Biscayne and 324 are related parties, in the event that the Court is asked to approve the Credit Bid, the Court must consider whether good faith efforts were made to sell the assets to arm's length third parties, and whether the consideration to be received under the Credit Bid is superior to the consideration that would be received under any other offer.[36] The Marketing Process, as recommended by the Monitor, constitutes a good faith effort to sell the Applicant's assets to arm's length third parties, and will enable the Applicant to establish that the consideration paid is the best in the circumstances.

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[34] *Indalex Ltd. (Re)*, [2009] O.J. No. 3027 at para. 11 (Ont. S.C.J. [Commercial List]); *Brainhunter* at para. 13.

[35] The Monitor has indicated that it has also considered the Marketing Process in light of the principles articulated in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). Moreover, the CCAA enumerates certain factors that the Court is to consider when deciding whether to grant the authorization of an asset sale, including, among other things:
(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
(b) whether the monitor approved the process leading to the proposed sale or disposition;
(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
(d) the extent to which the creditors were consulted;
(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[36] CCAA, s.36(4).

In the recent CCAA filing of *Canwest Publishing Inc. et al* ("Canwest Publishing"), Justice Pepall approved a marketing process that included a credit bid from the Applicant's senior secured lenders as a baseline bid against which to seek superior offers. In so holding, Justice Pepall found that the alternative of bankruptcy or liquidation would result in significant detriment to the creditors and employees of the Applicants, as well as the broader economic community. Justice Pepall also took comfort from the position of the Monitor in that case, which supported the proposed transaction.[37]

(ii) A sale transaction will benefit the whole economic community by ensuring that an entity will survive to provide continued employment for employees, continued supply of goods to the marketplace, and contribute generally to the industrial economy;

(iii) The debtors' creditors are not being prejudiced by the Marketing Process. The Applicant is not requesting that the Court foreclose a creditor's right to raise any issues or concerns prior to consummation of a transaction, Indeed, ample opportunity will be provided to creditors of the Applicant to make submissions to the Court, including on a motion to approve the next phase of the Marketing Process, and/or a motion to approve a proposed sale or sales;

The Applicant seeks approval by the Court of the Credit Bid as a Phase One Qualifying Bid under the Marketing Process. Unlike many marketing processes that involve a "stalking horse" bid, the Credit Bid does not contemplate a break fee in the event that a higher and better offer or offers is identified.[38] Accordingly, deeming the Credit Bid to be a Phase One Qualifying Bid is not prejudicial to the Applicant's stakeholders, and sets a basic benchmark against which other potential bidders can put forward offers.

(iv) The Marketing Process is the best method to either (i) identify the Plan (or in the alternative the Credit Bid) as the best outcome for the Applicant's

[37] *Canwest Publishing Inc.*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 27 ["*Canwest Publishing*"]
[38] Punia Affidavit at para. 65.

creditors or (ii) to produce an offer for the Applicant's assets that is superior to recovery under the Credit Bid (i.e., the baseline offer). If no Plan can be achieved, and no higher or better offer is attained, the Credit Bid provides a backstop for stakeholders that can provide a going concern solution for stakeholders.

38. In order to ensure that the Applicant can pursue its restructuring efforts in a timely manner, and comply with the timeline set out above to complete a restructuring,[39] it is submitted that the approval of the Marketing Process on this initial hearing is appropriate.[40]

39. The Marketing Process, including the Credit Bid proposed in this case, is analogous to the process approved by this Court in Canwest Publishing. It is submitted that it is appropriate to approve such a process in this case.

C. Investment Banker and Sealing Order

40. In order to assist in the implementation of the Marketing Process, the Applicant seeks the approval and authorization of the Court of the retention of the Investment Banker, and approval of the terms of the Engagement Letter.

41. The engagement of the Investment Banker is appropriate as it ran the sale process conducted by William L. Bonnell Ltd. for the Applicant and its sister company, Apolo Tool & Die Manufacturing Inc. in 2007, and is therefore familiar with the business and the marketplace for the assets. This background is particularly helpful in facilitating the expedited Marketing Process that Applicant intends to undertake.[41] Moreover, the Monitor supports the engagement of the Investment Banker and believes the fees payable to the Investment Banker to be reasonable.[42]

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[39] Punia Affidavit at para. 69.
[40] Approval of sales processes on the initial Application have been granted in the CCAA proceedings of Destinator Technologies Inc. and Canwest Publishing Inc.
[41] Punia Affidavit at para. 66.
[42] Monitor's Pre-filing Report at para 30.

42. The Applicant seeks to have the terms of the Engagement Letter sealed. In *Sierra Club of Canada v. Canada (Minister of Finance)*[43], the Supreme Court of Canada held that sealing orders should only be granted when:

i) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk;

ii) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

43. The information subject to the sealing request is commercially sensitive information which if disclosed would harm the Investment Banker's competiveness in the marketplace. The terms of the Engagement Letter require it to be maintained as confidential. Given that the Monitor has reviewed and recommended approval of the Engagement Letter, including the amount of the fees payable to the Investment Banker, it is submitted that the sealing order will not prejudice stakeholders and is therefore appropriate.

D. Court-Ordered Charges

44. The Court has statutory authority to grant the proposed Administration Charge and the DIP Lender's Charge (collectively, the "Charges").[44] In order to grant the Charges, the Court must be satisfied that notice has been given to secured creditors who are likely to be affected by the Charges.[45]

45. A "secured creditor" in the CCAA is defined as a:

> holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec,

[43] *Sierra Club of Canada v. Canada (Minister of Finance)* (2001), 211 D.L.R. (4th) 193 at para. 53 (S.C.C.).
[44] CCAA, ss. 11.2 & 11.52.
[45] *Ibid.*

> pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of the Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

46. The secured creditors likely to be affected by the Charges include 324, H.I.G. Bayside Fund, Biscayne and Shapes. The foregoing parties have consented to these proceedings and the Charges, and have been given notice of the Applicant's application for CCAA protection.[46]

47. The Applicant does not seek priority over the other secured creditors registered under the personal property security regimes in Ontario and Quebec (the "PPSA Secured Creditors") or Hydro-Quebec, (which has registered a hypothec against title to the St. Therese Plant), to the extent they have validly perfected security, as those parties have not been provided notice of this application. To the extent beneficiaries of statutory deemed trusts are secured creditors for the purposes of the CCAA, the Applicant does not seek priority of the Charges over those deemed trust claims that the Applicant has determined are relevant to its circumstances.[47] In the Applicant's view, the relevant parties are those who hold claims in respect of source deductions from wages,[48] GST[49]/QST,[50] and vacation pay.[51]

48. The draft Initial Order provides that interested parties who wish to vary, rescind or otherwise affect the provision of the Initial Order with respect to the Charges may bring a motion for such relief prior to February 15, 2010.

49. Such a comeback date is consistent with recent cases, including CCAA proceedings of *Destinator Technologies Inc.*, *Quebecor World Inc.*, *Canwest Communications*, *Bombay Furniture Company of Canada Inc.* and others.

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[46] Punia Affidavit at para. 42 & 89.
[47] Note that pursuant to section 22(4) of the *Retail Sales Act* R.S.O. 1990, c. R.31, the deemed trust provisions contained therein do not apply in proceedings to which the CCAA apply.
[48] *Income Tax Act*, 1985, c. 1 (5th Supp.), s.227.
[49] *Excise Tax Act*, R.S.C. 1985, c.E-15, s. 222.
[50] *An Act respecting the Ministère du Revenu*, R.S.Q. c. M-3, s.20.
[51] *Employment Standards Act*, 2000 S.O. 2000, c. 41, s. 40.

50. In *CanWest Communications*, Justice Pepall made the following observation:

> Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.* On a comeback motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.[52]

Administration Charge

51. In order to protect the fees and expenses of the Monitor, counsel to the Monitor, counsel to the Applicant and the Investment Banker (to the extent of its base completion fee), the Applicant seeks a charge in favour of these professionals to secure payments of its reasonable fees and disbursements incurred both prior to filing and after in the amount of $1,500,000 (the "Administration Charge").

52. In order to grant the Administration Charge, the Court must be convinced that (i) notice has been given to the secured creditors likely to be affected by the charge; (ii) the amount is appropriate; and (iii) the charges should extend to all of the proposed beneficiaries.[53]

(i) Notice

53. As mentioned above, all secured creditors who are likely to be affected by the Administration Charge have been provided with notice of this Application.

(ii) Is the amount appropriate?

54. The amount of the Administration Charge requested is up to $1.5 million. While Justice Pepall noted in *Canwest Communications*, estimating quantum is an

[52] *Canwest Publishing* at para. 29.
[53] *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 at para. 38 (Ont. S.C.J. [Commercial List]) ["*Canwest Communications*"].

"inexact exercise",[54] the Monitor supports the Administration Charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the Applicant, having considered the potential professional fees to be incurred, as more specifically set out in the Monitor's Pre-Filing Report.[55] In addition, the secured creditors of the Applicant who would be affected by the proposed Administration Charge have consented to it.

(iii) Should the charges extend to all of the proposed beneficiaries?

55. The beneficiaries of the Administration Charge are (a) the Monitor and its counsel; (b) counsel to the Applicant; and (c) the Investment Banker in respect of its base completion fee. The Applicant and the proposed Monitor believe that the above-noted professionals have played and will play a necessary and integral role in the restructuring activities of the Applicant to date and going forward.[56]

56. In considering both the issues of the amount of the Administration Charge, and who should be entitled to its benefit, Justice Pepall in *Canwest Publishing* has proposed that the following factors ought to be considered:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[57]

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[54] *Canwest Communications* at para. 40.
[55] Monitor's Pre-Filing Report at para. 43.
[56] Monitor's Pre-Filing Report at para. 45.
[57] *Canwest Publishing* at para. 54.

57. It is submitted that the complexity of the proposed restructuring is sufficient to warrant the involvement of the proposed professionals. Each will play a critical role in the Marketing Process, the Plan negotiations, and the ultimate implementation of a successful reorganization or sale. There is no unwarranted duplication of roles among those to benefit from the proposed Administration Charge. With respect to the amount proposed, as discussed above, the Monitor considers it appropriate, given the work estimated to be undertaken, and the secured creditors of the Applicant have consented the amount of the Charge.

58. It is furthermore submitted that it is unlikely that these professional would continue to participate in these proceedings if the Administration Charge is not approved to secure their professional fees and disbursements, and therefore approval of the Administration Charge is appropriate.

DIP Lender's Charge

59. The Applicant seeks approval of the terms of the proposed DIP Facility, and the DIP Lender's Charge in an amount up to US $1,500,000 securing all obligations owed to the DIP Lender by the Applicant under the DIP Term Sheet and any other DIP Credit Documentation.

60. In determining whether to grant the DIP Lender's Charge, the Court must:

(i) consider whether notice has been given to secured creditors who are likely to be affected by the security or charge;

(ii) determine that the amount of the DIP is appropriate and required having regard to the debtor's cash flow statement;

(iii) ensure that the DIP charge does not secure an obligation that existed before the order was made; and

(iv) consider the enumerated factors in paragraph 11.2(3) of the CCAA, including:

- the period during which the company is expected to be subject to proceedings under this Act;

- how the company's business and financial affairs are to be managed during the proceedings;
- whether the company's management has the confidence of its major creditors;
- whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- the nature and value of the company's property;
- whether any creditor would be materially prejudiced as a result of the security or charge; and
- the monitor's report referred to in paragraph 23(1)(b), if any.[58]

(i) Notice

61. As described above, notice has been given to all secured creditors who are likely to be affected by the DIP Lender's Charge.

(ii) Is the DIP amount appropriate?

62. The DIP Financing will be in the maximum principal amount of US $1,500,000. The approval of the proposed DIP Financing and the DIP Lender's Charge is sought to ensure that the Applicant has sufficient funding to continue operations through these CCAA proceedings.[59] The Monitor has reviewed the requested amount in light of the Cash Flow Projections and recommends approval of the DIP Term Sheet.

63. While the DIP Term Sheet was the only financing sought or submitted, the DIP Lender is not charging interest for advances made under the DIP Term Sheet, nor is it charging any fees related to the DIP Financing. The Applicant submits that as a consequence, the DIP Term Sheet represents the best financing terms available to it. The Monitor concurs.

[58] CCAA, s. 11.2(4); *Canwest Communications* at para. 32-35.
[59] Punia Affidavit at para. 86.

(iii) Does the DIP Charge secure pre-filing obligations?

64. The DIP Term Sheet does not contemplate a refinancing of any existing debt and does not contemplate the securing of any pre-filing debt by way of a court-ordered charge.[60]

(iv) Enumerated Factors

65. In addition to the foregoing, the Court should consider the following when reviewing the enumerated factors:

- The Applicant anticipates requiring protection under the CCAA until approximately June 7, 2010, in order to enable it to either complete a plan of arrangement, or a sale as contemplated. The Plan Support Agreement and the draft Asset Purchase Agreement filed each contemplate a concluded Plan or sale by that date. The availability of the DIP Facility is limited to coincide with this period of time. The timeline proposed will facilitate an expedited restructuring process intended to minimize, as far as possible, any disruption to the business and stakeholders of the Applicant.

- As reported by the Monitor, the management has the confidence of its major creditors and will continue to manage the Applicant's business and financial affairs during the proceedings. The Applicant's major secured creditors have consented to these proceedings.

- the Applicant's assets, which include inventory, receivables, equipment and the real property on which three manufacturing facilities are located are substantial relative to the amount of the DIP Financing;[61]

- no creditors will be materially prejudiced as a result of the security or charge, as the secured creditors likely to be affected by the charge have

[60] Punia Affidavit at para. 87.
[61] Punia Affidavit at para. 60.

been given notice of these proceedings and consented to the Charges; and

- the Monitor's pre-filing report indicates that the Monitor is supportive of the DIP Financing and the DIP Lender's Charge.[62]

66. DIP financing allows debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors.[63] The DIP financing requested in this case will ensure that the Applicant will have sufficient resources to operate during these proceedings (thus avoiding a termination of business operations and a liquidation) and thereby facilitating a going concern solution.

67. It should also be noted that the DIP Lender would not agree to provide the proposed DIP Financing without a DIP Lender's Charge. Accordingly, it is submitted that approval of the DIP Lender's Charge is appropriate.[64]

E. Pre-Filing Payments

68. The draft form of Initial Order filed herewith contains a provision permitting the Applicant to pay certain pre-filing amounts, with the consent of the Monitor, and in consultation with the DIP Lender, where in the opinion of the Applicant and the Monitor such payments (i) are necessary to preserve the property, business and/or ongoing operations of the Applicant and (ii) can be made on such terms and conditions as will provide a material benefit to the Applicant and its stakeholders as a whole.

69. The ability to pay pre-filing amounts on the terms as set out above will assist where the supply of material and services are crucial to maintaining a viable operation while the insolvent company undertakes efforts to restructure, and no other reasonable alternative to such supply is available.

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[62] Monitor's Pre-Filing Report at para. 38 & 39.
[63] *Canwest Communications* at para. 31.
[64] See *Canwest Publishing* at para. 46.

70. In the recent CCAA proceedings of *Canwest Communications*, Justice Pepall considered the following factors when granting similar relief requested by Canwest Communications:

(a) no payments would be made to critical suppliers without the consent of the Monitor;

(b) no charge was being sought in favour of the suppliers;

(c) the relief was not contrary to section 11.4(1) or to its purpose, which provides that critical suppliers may be compelled to supply in certain circumstances;

(d) the debtors only sought the ability to pay suppliers pre-filing amounts if in their opinion the supplier was critical to their business and ongoing operations;

(e) the proposed Monitor supported the request and agreed that it would work to ensure that payments to suppliers in respect of pre-filing liabilities were minimized; and

(f) the proposed Monitor would report any payments to the Court.[65]

71. The draft Initial Order sought in this case is consistent with the factors cited by Justice Pepall. No pre-filing payments will be made to suppliers without the consent of the Monitor, no charge is being sought, and the Applicant may only make payments to suppliers if in its opinion the payment is necessary to support ongoing operations, and can be made on terms and conditions materially beneficial to the Applicant and its stakeholders.

72. It is submitted that the requested relief is a measured approach to the payment of pre-filing obligations, and appropriate in the circumstances.

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[65] *Canwest Communications* at para 43.

F. Special Payments

73. It is proposed that the obligations of the Applicant to make special payments in respect of its pension plans be suspended during the course of the CCAA proceedings in order to comply with the terms of the DIP Financing and to ensure that the Applicant has sufficient cash flow available to permit it to fund its operations during these proceedings.[66]

74. In previous CCAA proceedings, including *Collins & Aikman Automotive Canada Inc., Fraser Papers Inc.* and *AbitibiBowater*, this Court has held that it has jurisdiction to make an order to suspend special payments, as such payments are unsecured debts that relate to employment services provided prior to filing.[67]

75. When determining whether to exercise its jurisdiction to suspend special payments, the Court should examine the financial situation of the debtor company to determine whether it warrants suspension of the special payments.[68] The Court should also consider the terms of the proposed DIP financing.

76. The Applicant does not have access to sufficient cash resources to fund this obligation during the course of these proceedings. The Cash Flow Projections attached to the DIP Term Sheet demonstrate a cash burn until June 7, 2010 of approximately $1.1 million. The DIP Lender has agreed to fund this cash burn in order to achieve a going concern solution for the Applicant. However, the DIP Lender is not prepared to provide the required financing for the obligation to make special payments, which is a pre-filing, unsecured obligation. It is an event of default under the DIP Term Sheet if the Applicant does not comply with the Cash Flow Projections or makes any payments in respect of special payments.

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[66] Punia Affidavit at para. 47 & 77.
[67] *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 at para. 20 (Ont. S.C.J. [Commercial List]) ["*Fraser Papers*"]; *Abitibibowater Inc. (Arrangement of)*, 2009 QCCS 2028, (8 May, 2009), Montreal 500-11-036133-094 at para. 27 (Que. S.C.) ["*Abitibibowater*"]; *Collins & Aikman Automotive Canada Inc.* (Re) (2007) C.B.R. (5th) 282 at para 89 (Ont. S.C.J. [Commercial List]) ["*Collins & Aikman*"].
[68] *Fraser Papers* at para. 21; *Abitibibowater* at para. 52; *Collins & Aikman* at paras. 90-92.

77. There is no priority for special payments in bankruptcy. Employees and former employees are not prejudiced by the relief requested as a bankruptcy would not produce a better result with respect to this obligation.[69]

78. The relief requested is appropriate as the financial situation of the Applicant described herein warrants suspension of special payments and failure to stay the obligation to pay the special payments would jeopardize the business of the Applicant and its ability to restructure.

79. The Applicant or the Monitor will promptly serve the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, the Unionized Workers of Bon L St. Therese, the Financial Services Commission of Ontario and the Régie des Rentes du Québec with the requested order, if granted. The requested order provides for a comeback date with respect to special payments on February 15, 2010. Accordingly, no party is prejudiced by the relief sought. As noted above, the comeback clause is an appropriate and effective mechanism to protect the rights and interests of constituents in an insolvency.

G. Conclusion

80. These CCAA proceedings, the proposed Marketing Process and the requested DIP Financing and other ancillary relief as outlined above will benefit creditors and other stakeholders of the Applicant as follows:

(a) in the short term, the CCAA proceedings will ensure stability and continuity for the customers and suppliers of the Applicant;

(b) an environment will be provided in which Biscayne and the Applicant can work with stakeholders to preserve the ongoing business by restructuring operations in a way that will make them financially self-sufficient in the long term;

[69] *Fraser Papers* at para 21.

(c) the Plan Support Agreement provides additional comfort to customers, suppliers, and employees that the Applicant will continue as a going concern; and

(d) the Marketing Process will ensure that the greatest value can be attained for the assets through the comprehensive canvassing of the marketplace, and provide the opportunity to identify an alternative going concern purchaser.

PART IV – NATURE OF THE ORDER SOUGHT

81. If the requested relief is not granted, the most likely scenario is cessation of business and the liquidation of the Applicant's assets on a piecemeal basis. This result will have an immediate adverse impact on the Applicant's employees, suppliers, customers and secured creditors. The Applicant does not anticipate there being any value for unsecured creditors in a liquidation scenario. The Applicant therefore request an Order substantially in the form of the draft Initial Order filed with the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

FOR Linc Rogers/Katherine McEachern

SCHEDULE "A"

LIST OF AUTHORITIES

1. Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.).

2. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.).

3. *Woodward's Ltd. (Re)* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.).

4. *Elan Corp. v. Comiskey* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.).

5. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

6. *Brainhunter Inc. (Re)*, [2009] O.J. No. 5578 (Ont. S.C.J. [Commercial List]).

7. *Indalex Ltd. (Re)*, [2009] O.J. No. 3027 (Ont. S.C.J. [Commercial List]).

8. *Canwest Publishing Inc.* (Re), 2010 ONSC 222 (Ont. S.C.J. [Commercial List]).

9. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

10. *Sierra Club of Canada v. Canada (Minister of Finance)* (2001), 211 D.L.R. (4^{th}) 193 (S.C.C.)

11. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]).

12. *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Commercial List]).

13. *Abitibibowater Inc. (Arrangement of)*, 2009 QCCS 2028, (8 May, 2009), Montreal 500-11-036133-094 (Que. S.C.).

14. *Collins & Aikman Automotive Canada Inc. (Re)* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.).

SCHEDULE "B"

LEGISLATION

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

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

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

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

...

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

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

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

2. ***An Act respecting the ministère du Revenu*, R.S.Q. c. M-3**

Amount held in trust.

20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.

Non-payment.

Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.

3. ***Employment Standards Act, 2000 S.O. 2000, c. 41***

Vacation pay in trust

40. (1) Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.

Same

(2) An amount equal to vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account.

4. ***Retail Sales Tax Act R.S.O. 1990, c. R.31***

Trust for money collected

22.(1) Any amount collected or collectable as or on account of tax under this Act by a vendor shall be deemed, despite any security interest in the amount so collected or collectable, to be held in trust for Her Majesty in right of Ontario and separate and apart from the vendor's property and from property held by any secured creditor that but for the security interest would be the vendor's property and shall be paid over by the vendor in the manner and at the time provided under this Act and the regulations.

Extension of trust

(2) Despite any provision of this or any other Act, where at any time an amount deemed by subsection (1) to be held in trust is not paid as required under this Act, property of the vendor and property held by any secured creditor of the vendor that but for a security interest would be property of the vendor, equal in value to the amount so deemed to be held in trust shall be deemed,

> (a) to be held, from the time the amount was collected or collectable by the vendor, separate and apart from the property of the vendor in trust for Her Majesty in right of Ontario whether or not the property is subject to a security interest; and
>
> (b) to form no part of the estate or property of the vendor from the time the amount was so collected or collectable whether or not the property has in fact been kept separate and apart from the estate or property of the vendor and whether or not the property is subject to such security interest.

Same

(3) The property described in subsection (2) shall be deemed to be beneficially owned by Her Majesty in right of Ontario despite any security interest in such property or in the proceeds of such property, and the proceeds of such property shall be paid to the Minister in priority to all such security interests.

Exception

(4) This section and subsection 36 (2.1) do not apply in proceedings to which the *Bankruptcy and Insolvency Act* (Canada) or the *Companies' Creditors Arrangement Act* (Canada) apply.

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

Trust for amounts collected

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Amounts collected before bankruptcy

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

Withdrawal from trust

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

(a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

(b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

Extension of trust

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, 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 collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, 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 a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

6. ***Income Tax Act*, 1985, c. 1 (5th Supp.)**

Withholding taxes

227. (1) No action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act.

Return filed with person withholding

(2) Where a person (in this subsection referred to as the "payer") is required by regulations made under subsection 153(1) to deduct or withhold from a payment to another person an amount on account of that other person's tax for the year, that other person shall, from time to time as prescribed, file a return with the payer in prescribed form.

Failure to file return

(3) Every person who fails to file a return as required by subsection (2) is liable to have the deduction or withholding under section 153 on account of the person's tax made as though the person were a person who is neither married nor in a common-law partnership and is without dependants.

Trust for moneys deducted

(4) 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.

Extension of trust

(4.1) 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 227(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 that 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.

Meaning of security interest

(4.2) For the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.

Application to Crown

(4.3) For greater certainty, subsections (4) to (4.2) apply to Her Majesty in right of Canada or a province where Her Majesty in right of Canada or a province is a secured creditor (within the meaning assigned by subsection 224(1.3)) or holds a security interest (within the meaning assigned by that subsection).

Court File No.

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
SIGNATURE ALUMINUM CANADA INC. et al

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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