Court File No. CV-10-8647-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE RECEIVERSHIP OF
SKYSERVICE AIRLINES INC.
of the City of Toronto, in the Province of Ontario

BOOK OF AUTHORITIES
(Motion to Lift Stay of Proceedings)

Date: June 15, 2010

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TAB 1

C

2000 CarswellAlta 622

Canadian Airlines Corp., Re

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs and Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., Defendants

Alberta Court of Queen's Bench

Paperny J.

Judgment: May 4, 2000
Docket: Calgary 0001-05071, 0001-05044

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Counsel: *G. Morawetz*, *A.J. McConnell* and *R.N. Billington*, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C., and *D. Nishimura*, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrange-

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ments — Effect of arrangement — Stay of proceedings

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and had voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — In determining whether stay should be lifted, court had to balance interests of all parties who stood to be affected — This would include general public, which would be affected by collapse of airline — Evidence indicated that liquidation would be inevitable were noteholders to realize on collateral — Objective of stay was not to maintain literal status quo but to maintain situation that was not prejudicial to creditors while allowing airline "breathing room" — It was premature to conclude that plan would be rejected or that proposal acceptable to noteholders could not be reached — Evidence indicated that airline was moving to effect compromises swiftly and in good faith — Appointment of receiver to manage collateral would negate effect of stay and thwart purposes of Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — Proposal that airline make interim payments for use of security was not viable — Suggestion that other airline financially supporting plan should pay out airline's debts to noteholders was without legal foundation — Existence of solvent entity financially supporting plan with view to obtaining economic benefit for itself did not create obligation on that entity to pay airline's creditors — Noteholders could not require sale of assets or shares of airline's subsidiary — Subsidiary was not debtor company but was itself property of airline — Marketing of subsidiary's assets would constitute "proceeding in respect of petitioners' property" within meaning of s. 11 of Act — Even if marketing of subsidiary's assets did not so qualify, court has inherent jurisdiction to grant stays in relation to proceedings against third parties where exercise of jurisdiction is important to reorganization process — In deciding whether to exercise inherent jurisdiction, court weighs interests of insolvent corporation against interests of parties who would be affected by stay — Threshold of prejudice required to persuade court not to exercise inherent jurisdiction to grant stay is lower than threshold required to persuade court not to exercise discretion under s. 11 of Act — Noteholders failed to meet either threshold — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Cases considered by *Paperny J.*:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) — considered

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.) — considered

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147 (Ont. Gen. Div.) — referred to

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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.) — referred to

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

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

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — referred to

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

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142 (B.C. C.A.) — considered

Philip's Manufacturing Ltd., Re (1992), 15 C.B.R. (3d) 57 (note), 143 N.R. 286 (note), 70 B.C.L.R. (2d) xxxiii (note), 15 B.C.A.C. 240 (note), 27 W.A.C. 240 (note), 6 B.L.R. (2d) 149 (note) (S.C.C.) — referred to

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

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — considered

s. 11 — considered

s. 11(4) — considered

APPLICATION by holders of senior secured notes in corporation for order lifting stay of proceedings against them in *Companies' Creditors Arrangement Act* proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

***Paperny J.* (orally):**

1 Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply

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for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and

2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or

2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

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8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

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15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident

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that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of th particular case.

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

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

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

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

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would

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satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, ca-

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> tering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

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> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

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TAB 2

2005 CarswellOnt 1987, 11 C.B.R. (5th) 324

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2005 CarswellOnt 1987

994814 Ontario Inc. v. RSL Canada Inc.

994814 ONTARIO INC. (Applicant) and RSL CANADA INC. (Respondent)

Ontario Superior Court of Justice

Ground J.

Heard: May 13, 2005
Judgment: May 17, 2005
Docket: 05-CL-005735

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Counsel: A. Kauffman for 994814 Ontario Inc. (Secured Creditor)

G. Benchetrit for Richters, Receiver of RSL Canada Inc.

C. Hunter for Reinhard Schmidt

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Interim receiver — Powers, duties and liabilities

Not role of receiver to carry out any investigations or other actions at request of one particular creditor — Order appointing receiver neither mandated nor authorized investigation at request of one particular creditor.

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

DETERMINATION of motion brought by receiver.

***Ground J.*:**

1 With respect to the various issues raised by Mr. Schmidt in response to the motion being brought by the Receiver, I am not satisfied that there is any reason to interfere with the proposed distribution of $3.6 million to 994814 Ontario Inc. ("994"). It appears to me that clearly the cash advances were made and that they were made pursuant to

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a pre-existing security instrument and, although one might query the motivation for further loans to the company in the position that it appears to have been in late 2004, that is no basis on which to question the validity or enforceability of the transaction.

2 With respect to the other issues raised by Mr. Schmidt being the reduction of capital and reinvestment of the funds by way of shareholder loan in July 2003 and the payment of a dividend in November 2004, the totality of the evidence before this court could cause one to question whether the tests under the OBCA were in fact met at the time these transactions were entered into and accordingly, it may be appropriate for Mr. Schmidt to take whatever proceedings he sees fit to challenge these transactions. I am of the view, however, that it is not appropriate to order the Receiver to undertake any such investigation. It is not the role of the Receiver to carry out any investigations or other actions at the request of one particular creditor and, as counsel for the Receiver correctly submitted, the order appointing the Receiver neither mandates nor authorizes any such investigation. If, however, Mr. Schmidt should undertake such investigation, the **Receiver** is, in my view, obliged to provide all documents, information and books and records in its possession, not otherwise privileged, to whomever Mr. Schmidt may appoint for purposes of carrying out such an investigation.

3 An order will issue as sought by Mr. Schmidt lifting the **stay** of proceedings imposed by the order of February 8, 2005 to allow Mr. Schmidt to file, issue and serve an application for a **bankruptcy order**. Otherwise, Mr. Schmidt's motion is dismissed.

4 With respect to the **Receiver's** motion, an order will issue on the terms of paragraphs 2, 3, 4, 5, 6, 7 and 8 of the **Receiver's** motion record.

5 Costs of today's proceedings payable to 994 by Mr. Schmidt within 30 days in the amount of $1,500, all in.

Order accordingly.

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TAB 3

2009 CarswellOnt 374, 50 C.B.R. (5th) 58, [2009] G.S.T.C. 12

C
2009 CarswellOnt 374

Bank of Nova Scotia v. Huronia Precision Plastics Inc.

The Bank of Nova Scotia (Applicant) v. Huronia Precision Plastics Inc. (Respondent)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: November 4, 2008
Judgment: January 26, 2009
Docket: CV-08-7722-00CL

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Counsel: Sam Rappos, for Applicant, Bank of Nova Scotia

A'Amer Ather, for Canada Revenue Agency

Chris Burr, for Maxium Financial Services Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

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

Bank brought motion for order permanently lifting order for stay of proceedings against company to allow bank to bring application for **bankruptcy** order against company — Canada Revenue Agency ("CRA") also brought motion in which it sought order directing **receiver** to pay CRA GST debt of $63,164.17, and in event that court permitted **lifting of stay**, order permitting CRA to take necessary steps to protect its priority position over GST held in trust — Vesting order provided that receiver would distribute holdback of $130,000 after payment to CRA of amount of GST claim to extent that it was found to attach to net proceeds in priority to interest of bank — Bank's motion granted; CRA's dismissed — Issue was whether CRA had priority with respect to amounts over bank according to s. 222 of Excise Tax Act — Bank would have ability to nullify GST deemed trust by bringing application for bankruptcy order — Desire for bank to alter priorities was legitimate reason to seek bankruptcy — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Bank brought motion for order permanently lifting order for stay of proceedings against company to allow bank to bring application for **bankruptcy** order against company — Canada Revenue Agency ("CRA") also brought motion in which it sought order directing **receiver** to pay CRA GST debt of $63,164.17, and in event that court permitted **lifting of stay**, order permitting CRA to take necessary steps to protect its priority position over GST held in trust —

Vesting order provided that receiver would distribute holdback of $130,000 after payment to CRA of amount of GST claim to extent that it was found to attach to net proceeds in priority to interest of bank — Bank's motion granted; CRA's dismissed — Issue was whether CRA had priority with respect to amounts over bank according to s. 222 of Excise Tax Act — Bank would have ability to nullify GST deemed trust by bringing application for bankruptcy order — Desire for bank to alter priorities was legitimate reason to seek bankruptcy.

Cases considered by *Morawetz J.*:

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "bankrupt" — considered

s. 43 — pursuant to

s. 67(2) — considered

s. 67(3) — considered

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

Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

Pt. IX, Div. II [en. 1990, c. 45, s. 12(1)] — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1.1) [en. 1993, c. 27, s. 87(1)] — considered

MOTION for order permanently lifting order for stay of proceedings against company; MOTION for order directing receiver to pay Canada Revenue Agency amount of $63,164.17.

***Morawetz J.*:**

1 The Bank of Nova Scotia ("BNS") seeks an order permanently lifting the stay of proceedings provided for in paragraph 9 of the order of September 17, 2008 (the "Appointment Order") as against Huronia Precision Plastics Inc. ("Huronia") for the purposes of permitting BNS to bring an application for a bankruptcy order against Huronia pursuant to s. 43 of the *Bankruptcy and Insolvency Act* ("*BIA*"); and authorizing and directing Zeifman Partners Inc. ("Zeifman" or the "Receiver"), the court appointed Receiver of Huronia to consent, on behalf of Huronia, to BNS's application for a bankruptcy order.

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2 The Canada Revenue Agency ("CRA") has also brought a motion in which it seeks an order directing the **Receiver** to pay to CRA immediately, the amount of $63,164.17; and in the event that this court permits a **lifting** of the **stay** to permit BNS to apply for the **bankruptcy** order, a lifting of the stay to permit CRA to take the necessary steps to protect its priority position.

3 The Appointment Order was made September 17, 2008. The Receiver subsequently brought a motion returnable September 30, 2008 seeking an order vesting certain equipment in Magna Closures Inc. ("Magna") and directing that the net proceeds of the sale would stand in the place of the equipment.

4 The order was granted on September 30, 2008 (the "Vesting Order") and paragraph 9 of the Vesting Order provides:

> 9. THIS COURT ORDERS that notwithstanding paragraph 30 of the Appointment Order, the Receiver shall withhold from the net proceeds of the Purchased Assets the total sum of $130,000 (the "Holdback") pending resolution of the claim asserted by Canada Revenue Agency ("CRA") respecting possible pre-receivership GST arrears said to be owing by the Debtor (the "GST Claim"). The Receiver shall distribute the Holdback, or any balance thereof after payment to CRA of the amount of the GST Claim to the extent that it is found to attach to the net proceeds in priority to the interest of Maxium and BNS, to Maxium and BNS in accordance with their respective proportionate entitlements to the net proceeds under the terms of the Bill of Sale or as otherwise agreed upon by them, upon the consent of CRA, Maxium and BNS or a further order of this Court.
>
> [emphasis added]

5 Subsequent to the granting of the Vesting Order, CRA informed BNS and Maxium that CRA's claim for GST for the period prior to the Appointment Order was $63,164.17.

6 Pursuant to ss. 222(1) of the *Excise Tax Act* ("*ETA*"), persons who have collected GST amounts but have not remitted them to CRA, as and when required to do so by the *ETA*, are deemed to hold those amounts in trust for the Crown.

7 The one notable exception to the priority granted to the deemed trust is that it is subject to s. 222(1.1) of the *ETA*, which provides that s. 222(1) does not apply, at or after the time a person becomes bankrupt (within the meaning of the *BIA*), to any amounts that, before that time, were collected or became collectable by the person as or on account of tax under Division II of the *ETA*.

8 Section 67(2) of the *BIA* provides that all deemed trusts created by federal or provincial legislation for Her Majesty are rendered invalid except those that would be valid in the absence of such legislation and except those set out in s. 67(3) of the *BIA*. The deemed trust under the *ETA* is not listed in s. 67(3), nor, in my view, is it analogous to the deemed trusts that are set out in that section.

9 Counsel for BNS submits that it is clear that the *ETA* specifically contemplates that the priority afforded to the Crown under s. 222 of the *ETA* can be extinguished and reversed on the occurrence of a bankruptcy. Further, both the *ETA* and the *BIA* recognize that any priority that CRA could potentially have with respect to the Holdback in the amount of the GST Claim would be reversed upon the bankruptcy of Huronia.

10 CRA submits that it has priority over BNS with respect to the Holdback pursuant to the provisions of the *ETA* and since BNS has acceded to CRA's priority as a result of paragraph 9 of the Vesting Order, BNS should not be permitted to bring an application for a bankruptcy order to disrupt CRA's priority to which it acceded.

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11 Counsel for BNS submits that at no time prior to or after the issuance of the Vesting Order did it accede to the CRA having an interest in the Holdback in the amount of GST Claim in absolute priority to BNS.

12 In my view, absent the wording of paragraph 9 of the Vesting Order, BNS would have the ability to reverse the priority of the GST Claim by bringing an application for a bankruptcy order.

13 The Court of Appeal decision in *Ivaco Inc., Re*, [2006] O.J. No. 4152 (Ont. C.A.) stands for the proposition that it is not improper to seek a bankruptcy order for the purpose of reversing a statutory priority. In this case, it would be to reverse the priority position of CRA. Further, the timing of BNS's action has no bearing on the validity of the action being sought as there are no such time limitations imposed under s. 222(1.1).

14 It seems to me that the issue to consider is whether paragraph 9 of the Vesting Order operates so as to support the position put forth by CRA. In my view, the paragraph is clear where it provides that the Receiver "shall distribute the Holdback, or any balance thereof, after payment to the CRA of the amount of the GST Claim *to the extent that it is found to attach to the net proceeds in priority to the interest of*... [Maxium and BNS]". [emphasis added]

15 I agree with the submission of counsel to BNS that paragraph 9 reflects that any distribution of the Holdback to CRA is dependent on a determination as to whether the GST Claim attaches to the Holdback in priority to the interest of BNS.

16 In its factum, counsel to CRA, at paragraph 24 states that the Receiver's obligation to pay the deemed trust portion of the GST was made explicit and that the obligation to pay CRA was not otherwise qualified by any conditions. I disagree. The emphasized portion of paragraph 9 has to be given a common sense interpretation which, in this case, takes into account that, at the time of the issuance of the Vesting Order, there was an outstanding issue with respect to the priority of the interest of Maxium and BNS.

17 CRA also made the submission that the Receiver had certain obligations and responsibilities as set out in paragraph 9 of the Vesting Order which specifically qualifies the Receiver's rights as set out in the Appointment Order. Counsel for CRA submitted that the relevant portion of the Vesting Order specifically speaks to payment to CRA and, as of the date of the hearing of this motion, with Huronia not being bankrupt, the Receiver is under an obligation to pay CRA the amount of its deemed trust claim. I do not read paragraph 9 in such a way that it supports this submission. At the time of the granting of the Vesting Order, the issue of priority with respect to the interest of Maxium and BNS had not been determined with finality. It follows that the payment obligation to CRA had not been triggered.

18 Paragraph 9 does not, in my view, direct the Receiver to distribute the Holdback to CRA forthwith upon the CRA providing evidence to the Receiver with respect to the amounts owing by Huronia for the period prior to the issuance of the Appointment Order. If it did, the emphasized words in paragraph 9 would serve no purpose.

19 Finally, with respect to the request of BNS to lift the stay for the purpose of bringing an application for a **bankruptcy** order against Huronia and authorizing the **Receiver** to consent to such application, I am satisfied that the desire for BNS to use the *BIA* to alter priorities is a legitimate reason to seek a bankruptcy (see *Re Ivaco Inc.*) and the timing of the BNS's action has no bearing on the validity of this request.

20 Consequently, it follows that the motion of BNS is granted and an order shall issue lifting the stay of proceedings against Huronia for the purpose of permitting BNS to bring the application for bankruptcy order and authorizing the Receiver to consent to such application on behalf of Huronia.

21 In these circumstances, it also follows that no order is to be made directing the Receiver to make payment to

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CRA, nor is the stay to be lifted to enable CRA to take steps to protect its position. The motion of CRA is dismissed.

22 If the parties are unable to agree on costs, brief written submissions, to a maximum of three pages, may be filed within 20 days.

Order accordingly.

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TAB 4

2005 CarswellQue 3345, EYB 2005-88605

2005 CarswellQue 3345

Jetsgo Corp., Re

In the matter of the companies'creditors arrangement act, R.S.C. 1985 c. C-36, as amended: Jetsgo Corporation, Debtor, and RSM Richter Inc, Monitor, v. Moneris Solutions Corporation, Petitioner

Cour supérieure du Québec

Rolland J.C.S.

Judgment: 5 april 2005
Docket: C.S. Qué. Montréal 500-11-025198-058

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Counsel: *Me Sylvain Rigaud, Me Louis J. Gouin*, for Jetsgo Corporation

Me Sylvain A. Vauclair, for Monitor

Me Alain Riendeau, for Moneris Solutions Corporation

Subject: Insolvency

***François Rolland, Chief Justice*:**

1 On March 11, 2005, the Court issues an initial order (hereinafter « Initial Order ») pursuant to the Companies' Creditors Arrangements Act (hereinafter « CCAA ») declaring inter alia that the Debtor, Jetsgo Corporation (hereinafter « Jetsgo »), is a company to which the CCAA applies, granting a stay of proceedings with respect to Jetsgo and its assets and property up until and including April 11, 2005.

2 Moneris Solutions Corporation (hereinafter « Moneris ») is requesting from this Court an Order providing for a limited **lift** of the **stay** of proceedings imposed under the initial order to permit Moneris to **issue** and serve and Application for **Bankruptcy Order** (hereinafter « **Bankruptcy** Application »).

3 Moneris is a creditor of Jetsgo and, together with Bank of Montreal, Royal Bank of Canada and Harris Trust and Savings Bank for whom Moneris is the duly authorized agent in respect of these proceedings, expects to be the largest creditor of Jetsgo as a result of claims against Jetsgo in respect of Visa and Mastercard credit card chargebacks caused by Jetsgo's cessation of operation on march 11, 2005.

4 Moneris requests said permission for the sole purpose of serving and filing the Bankruptcy Application.

5 Moneris does not intend to proceed and present the Bankruptcy Application at this time, the mere filing of the Bankruptcy Application being made for the purposes of setting the « date of the initial bankruptcy event » as that

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term is defined in section 2(1) of the Bankruptcy and Insolvency Act (« BIA ») in order preserve the rights of any trustee in bankruptcy of Jetsgo to pursue any reviewable transactions, settlements, improperly declared dividends and fraudulent preferences and conveyances which may have taken place during the statutory time period prescribed by the BIA, in the event of the termination of the CCAA stay period;

6 Jetsgo contests the Motion and suggests that the initial order be modified to indicate that in the event of bankruptcy, the bankruptcy date is the date determined by the parties.

7 Moneris does not agree.

8 Jetsgo contests this Motion on the ground that the filing of a petition in bankruptcy could colour the file eventhough it would have no legal effect on the CCAA arrangement.

9 In some cases, the Courts have agreed to modify the initial order in order to provide for a date of bankruptcy. This was done by consent of the parties.

10 Article 2 (1) of the BIA states :

> [« **date of the initial bankruptcy event** » « **ouverture de la faillite** »] « date of the initial bankruptcy event », in respect of a person, means the earliest of the date of filing of or making of
>
> a) assignment by or in respect of the person,
>
> b) a proposal by or in respect of the person,
>
> c) a notice of intention by the person,
>
> d) the first petition for a receiving person order against the person, in any case,
>
> (i) referred to in paragraph 50.4(8) (a) or 57(a) or subsection 61(2), or
>
> (ii) where a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal, or
>
> e) the petition in respect of which a receiving order is made, in the case of a petition other than one referred to in paragraph (d). »

11 Article 2.1 of the Bankruptcy Insolvency states:

> **2.1** For the purposes of this Act, the bankruptcy or putting into bankruptcy of a person occurs at the time or date of
>
> (a) the granting of a receiving order against the person;
>
> (b) the filing of an assignment by or in respect of the person; or
>
> (c) the event that causes an assignment by the person to be deemed.

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12 The date of the bankruptcy is defined by the (BIA) and not by consent of the parties or by an event not foreseen in the (BIA).

13 In consequence, the date of the bankruptcy is established in accordance with the BIA provisions.

14 *WHEREFORE, THE COURT* :

15 *GRANTS* the motion;

16 *GRANTS* a lift of the stay of proceedings pursuant to the initial order issued by this Court on March 11, 2005 in the present file for the purposes of allowing Petitioner Moneris Solutions to issue and serve a Bankruptcy Application.

17 *ALLOWS* Petitioner Moneris Solutions Corporation to issue and serve a Bankruptcy Application.

18 *THE WHOLE* without costs.

Solicitors of record:

Ogilvy Renault, for Jetsgo Corporation

McCarthy Tétrault, for Monitor

Fasken Martineau DuMoulin, for Moneris Solutions Corporation

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IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC., of the City of Toronto, in the Province of Ontario

Court File No. CV-10-8647-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding Commenced at Toronto

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