Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

BOOK OF AUTHORITIES OF THE RESPONDING PARTY, JOHN P. WALSH
(Lift Stay Motion returnable March 26, 2012)

Dated: March 20, 2012

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TAB 1

COURT FILE NO.: 03-CL-4932
DATE: 20040202

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

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

AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

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

- AND -

COURT FILE NO.: 03-CL-5003
DATE: 20040202

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

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

AND IN THE MATTER OF UNITED AIRLINES INC. OF THE STATE OF DELAWARE, IN THE UNITED STATES OF AMERICA AND THE OTHER ENTITIES LISTED ON SCHEDULE "A"

APPLICATION UNDER SECTION 18.6 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

BEFORE: FARLEY J.

COUNSEL: *John Legge* and *William M. Sharpe*, for the Moving Parties, Always Travel Inc., Highbourne Enterprises Inc., and Canadian Standard Travel Agent Registry (CSTAR)

Katherine L. Kay and *Nicholas P. McHaffie*, for the Responding Party, Air Canada

Michael A. Penny and *Tycho Manson*, for the Responding Party, United Airlines Inc.

Peter J. Osborne and *Monique Jilesen*, for the Monitor, Ernst & Young Inc.

Howard A. Gorman, for the Unsecured Creditors' Committee

Robert I. Thornton and *Gregory R. Azeff*, for GECAS

Jeremy E. Dacks, for GE Capital

HEARD: January 27, 2004

2004 CanLII 28744 (ON SC)

2004 CanLII 28744 (ON SC)

ENDORSEMENT

[1] This endorsement applies to both the Air Canada (AC) matter (Court File No. 03-CL-4932) and the United Airlines Inc. (UA) matter (Court File No. 03-CL-5003), *mutatis mutandis*. These are the promised reasons for dismissing the motion of the moving parties (plaintiffs in the proposed class proceedings in the Federal Court). They should be read in conjunction with and as incorporating my previous decisions in each file released September 24, 2003.

[2] It does not appear to me that there is anything which is truly new in the sense of not being contemplated at the time of the September 11, 2003 hearings and as to which I gave my decisions on September 24, 2003. Those decisions provided that the stay was lifted for limited purposes of AC and UA providing their responding certification materials (which they have done). That was with the object of benefiting both the plaintiffs on the one side and AC and UA on the other with respect to the proposed insolvency reorganizations of AC and UA respectively. With respect, the fact that AC and UA have so provided their responding certification materials was a contemplated matter and thus nothing new; that occurrence ought not to have been taken as an invitation to come back to this court to in essence relitigate the September 2003 motions all over again. Those decisions have not been appealed and thus those issues which were then dealt with (or ought to have been raised) are *res judicata*. I note that even if one were to view them as not technically *res judicata* for any particular purpose, it would to my view be an abuse of process to attempt this relitigation as in substance it would appear to be at least a collateral attack on the September 2003 decisions.

[3] I specifically note the thoughtful observation of Hugessen J. in his May 30, 2003 and December 10, 2003 reasons that this court is the proper court to deal with the extent and timing of a stay in the context of the CCAA proceedings and that "Farley J. is still [December 10, 2003] the proper person to decide whether allowing the present class action certification proceedings to continue beyond the present stage would be detrimental to, or might hinder the proper administration of the CCAA proceedings." It seems to me that the plaintiffs ought to take into account that both the AC and the UA insolvency proceedings are fast approaching the time when, if the reorganizations are successful, then both these airlines will enter into the post-emergence stage. Any fresh alleged wrongdoing (i.e. wrongdoing in the post-emergence period) would of course not be affected by any stay. With respect to pre-filing activity, then these claims can be accommodated within the general claims procedure in either insolvency proceedings. It seems to me that what the plaintiffs are suggesting is that AC and UA continue as defendants in the class proceedings action as if there were no insolvency proceedings which are in fact aimed at resulting in a reorganization and that once this litigation has been finally dealt with, then the extent of liability (if any) of AC and UA will be known and might then be applied back into the insolvency proceedings as a proven claim.

[4] Even at the most optimistic time scheduling this would appear to be contemplating that the insolvency proceedings would in effect be held up for at least a year subsequent to the presently contemplated emergence of either airline. The magnitude of the plaintiffs' claims are that if allowed at anything approximating the amounts claimed, they would probably have a material affect upon the voting views of the other creditors involved.

[5] With respect, the plaintiffs have not focussed on the test for lifting a CCAA stay as discussed by Paperny J. in *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at pp. 6-8. Instead, the plaintiffs have in my view quite mistakenly addressed the situation as an ordinary lift stay situation, citing *Church & Dwight Ltd. v. Sifto Canada Inc.* (1994), 20 O.R. (3d) 483 (Gen. Div.), or as a lift stay pursuant to a bankruptcy lift stay situation, citing *Re Ma*, [2000] O.J. No. 2954 (Dep. Reg. Ont.) affirmed (2000), 20 C.B.R. (4th) 267 (Ont. Bankruptcy), affirmed (2001), 24 C.B.R. (4th) 68 (Ont. C.A.); *Ontario New Home Warranty Program v. Chevron Chemicals* (1996), 41 C.B.R. (3d) 100 (Dep. Reg. Ont.); *Arrojo Investments v. Cardamone*, [1995] O.J. No. 4545 (Gen. Div.). In the bankruptcy situations where a trustee has taken over the assets and undertaking of a bankrupt, a reorganization for the benefit of all stakeholders – including litigation claimants – is not contemplated except in very rare and exceptional circumstances. However, what we have here in both the AC and UA situations is an insolvent corporation (not a bankrupt one) which is attempting within a relatively short period of time to reorganize itself for the benefit of all stakeholders. There is no trustee in bankruptcy appointed to take over the assets and undertaking in a reorganization; in a bankruptcy situation, as is noted in those bankruptcy cases, it is important to determine whether the trustee in bankruptcy objects to the litigation continuing (frequently a trustee will not object so long as it does not, as trustee, become involved (and embroiled) in the continuing litigation).

[6] The reorganization stay provision has to be viewed in light of the Parliamentary objectives of the CCAA. See a discussion of the CCAA objectives in *Re Lehndorff General Partner Ltd.* (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). As to the stay itself, see Gibbs J.A. for the Court in *HongKong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 5 where he observed:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. ... When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

2004 CanLII 28744 (ON SC)

See also Blair J. in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at p. 309 where he stated:

> By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.
>
> ...
>
> ... in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

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[7] As it appears envisaged by the plaintiffs, they wish to proceed unimpeded by either the claims process in place or otherwise, in pursuing their litigation against AC and UA "in the ordinary course." As discussed, that litigation would be of major proportions, complexity and importance to these insolvent but attempting to reorganize corporations and their stakeholders. The effect on these restructuring efforts would be a fairly large multiple of cuts in the death of a thousand cuts which I was concerned about in the *Re Air Canada (Regulators' Motions)* released July 21, 2003.

[8] I do not see that the plaintiffs have in fact presented any new – truly new – evidence to support their second request to lift the stay for the purpose of their carrying on the case in the Federal Court "in the ordinary course."

[9] The plaintiffs' motions for a lift of the stay in this regard are dismissed. AC and UA requested costs of $10,000 for each airline. Costs in CCAA insolvency proceedings are sparingly asked for and even more sparingly given. In this case, I would think it appropriate to award some costs, but not at the level requested (albeit that the requested costs are nowhere near the actual costs to the airlines); the plaintiffs are to pay $1,000 to each of AC and UA, such costs to be paid forthwith and in no event later than March 1, 2004.

J.M. Farley

Released: February 2, 2004

TAB 2

Citation: Allen-Vanguard Corporation (Re), 2011 ONSC 5017
Court File No. CV-09-00008502-00CL
Date: 20110825

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 ARRANGEMENT AND REORGANIZATION OF **ALLEN-VANGUARD CORPORATION** UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND SECTION 186 OF THE *ONTARIO BUSINESS CORPORATIONS ACT*., R.S.O. 1990, c.B.16, AS AMENDED Applicants	*Ronald G. Slaght, Q.C., Eli S. Lederman* for the Directors and Officers of Allen-Vanguard Corporation *C. Scott Ritchie, Michael G. Robb, Daniel E.H. Bach* for class action plaintiffs *Alan L.W. D'Silva, Daniel S. Murdoch* for Underwriters **Heard**: November 16, 2010

2011 ONSC 5017 (CanLII)

C. CAMPBELL J.:

REASONS FOR DECISION

[1] Two motions were heard together: the first by former directors and officers of Allen-Vanguard to enforce the terms of a Sanction Order, which the directors and officers say release them as well as Allen-Vanguard from all claims except those specifically provided for in section 5.1 (2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA.") In addition, the former directors assert that the claims of the Plaintiffs in two proposed Class Actions are not sustainable against them in law under s. 5 .1 (2) of the CCAA.

[2] The second motion by the Underwriters of Allen-Vanguard seeks to dismiss or stay the action brought against the Underwriters by shareholders in a proposed Class Action.

[3] A cross-motion brought by Plaintiffs in the two proposed Class Actions seeks, if required, variation of the terms contained in the Sanction Order granted December 16, 2009, to permit the Class Actions to proceed.

[4] By way of an endorsement dated February 9, 2011, the Court sought further information from the parties with respect to the factual circumstances that surrounded the agreement that was embodied in the terms of the Sanction Order. That information has been provided and will be referred to later in these Reasons.

[5] The claims that the directors who are the moving parties seek to effectively enjoin are those brought in two Class Actions (hereinafter the "Laneville action" and the "Love action"), wherein former shareholders seek damages against directors, officers and Underwriters based on alleged misrepresentation to shareholders by the Defendants about the effect on Allen-Vanguard of its purchase of another company in 2007.

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Background

[6] As of December 2009, Allen-Vanguard was insolvent. An Application was made on December 9 for an Initial Order under the CCAA, appointment of a Monitor and a Plan Filing and Meeting Order. The effect of the Initial Order among other matters stayed the existing Class proceeding.

[7] The circumstances that surrounded the Plan Filing/Meeting Order, the Court was advised, were necessary to avoid a bankruptcy. The subsequent vote on December 9, 2010 was approved in favour of the Plan by 100% of affected creditors.

[8] The circumstances that surrounded the December 9, 2010 Application and Order were a variation on a CCAA process that has come to be known as a "pre-packaged" Application. The secured creditors agreed to a restructuring of their secured debt in circumstances involving a going concern sale of assets where, had a bankruptcy ensued, there would have been no recovery for creditors or shareholders beyond very incomplete recovery for those secured creditors.

[9] The First Report of the then proposed Monitor, Deloiite and Touche, in support of the Initial Order, outlined the transaction that had been proposed to all creditors as early as September 2009, posted on SEDAR and to which (apart from the question of releases) no party was opposed on December 9.

[10] The Plan provided for the Secured Lenders foregoing a portion of their existing debt and fees, converting the remainder of the existing debt into a multi-year restructured term loan with terms more favourable to the Company and a new revolving credit facility.

[11] The Court accepted the opinion of Deloitte & Touche that without the proposed transaction, the Company would likely not be able to meet its financial obligations as they became due and would likely be unable to carry on the business beyond the very short-term, which would then necessitate liquidation.

[12] The conclusion by Deloitte & Touche, accepted by the Court, was that the restructuring process in the Plan maximized the value of the Company for the benefit of all stakeholders and represented the best offer from that process.

[13] The alternative faced by the Company was that of a forced liquidation, which as estimated by the Monitor would result in a shortfall to secured lenders in excess of $100 million.

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The Laneville Action

[14] The proposed Class Action Plaintiff in the Laneville action issued on October 9, 2009 a Statement of Claim dated November 26, 2009, which sought appointment on behalf of a Representative Plaintiff and for a class of Allen-Vanguard shareholders who allege that Allen-Vanguard Corporation and its directors and officers are liable for various misrepresentations, negligence and oppression.

[15] The Statement of Claim detailed a transaction that occurred in 2007 for which the Class Plaintiffs claim the directors and officers failed to properly value and account for in the financial statements of Allen-Vanguard, when Allen-Vanguard purchased all of the shares of a private corporation called Mid-Eng Systems Inc.

[16] In addition, the Class Plaintiff claims damages for negligent misrepresentation not only under the common law but as well under s. 138.3 of the *Ontario Securities Act* in connection with the same transaction.

[17] The only creditor objection to the Plan taken at the time of the Initial Order was from counsel for the Proposed Class Plaintiff in the Laneville action, who sought an adjournment of the vote based on the wording of the proposed release terms.

[18] The adjournment of the vote was not granted given the financial fragility of Allen-Vanguard, and the sanction hearing, which was to deal with the wording of the proposed release terms, was set for December 16, 2009.

[19] The Second Report of the Monitor, dated December 10, 2010, advised the Court of the terms of the release and injunctions that had been negotiated, the terms of which were put forward for approval on an unopposed basis. No objection was taken at the sanction hearing by counsel for the Class Plaintiff and no amendment to the Release portion of the Sanction Order sought. Whatever had been negotiated between the parties came before the Court on an unopposed basis. Counsel for the Class Action Plaintiffs and for the Defendant directors had input into and agreed to the wording.

[20] The Court has been advised that by agreement of counsel, the wording of the Release was negotiated by the parties with the recognition that there would likely remain an issue on which the Court would have to rule. That issue is now the subject of the first motion and the cross motion. I have been advised as a result of the inquiry of February 9, 2011 and what is now obvious as a result of the recent correspondence (including an affidavit sworn June 30, 2011 and objected to) is that Plaintiffs' counsel in the Laneville action and counsel for the directors had quite different views in respect of the kinds of claims that could be included in s. 5.1(2).

[21] As I now understand it, counsel for the Allen-Vanguard Corporation made no representation or agreement that the claims in the Laneville action were within those permitted by s. 5.1(2) of the CCAA.

[22] Counsel for the Plaintiff in the Laneville action believe that the language in the Sanction Order preserves the claims in both the Laneville action and the Love action, including the claims against the Underwriters. It is submitted by the Plaintiff that the jurisprudence in respect of s. 5.1(2) permits not only claims against directors but as well officers to the extent there is insurance coverage, and that the Plaintiffs' position is consistent with the jurisprudence under s. 5.1(2).

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[23] Counsel for the Directors and for Underwriters submit that counsel for the Plaintiff knew or ought to have known at the time they agreed to the language of the Plan of Arrangement and the draft Sanction Order that the claims asserted against the Directors and Officers of Allen-Vanguard might nevertheless fail to meet one of the exceptions set out in s. 5.1(2) of the CCAA.

[24] In the result, the issue of what was or was not agreed to as part of the Sanction Order comes down to the question of whether or not the wording of s. 5.1(2) of the CCAA, read in context of statutory interpretation, is sufficient to permit continuance of claims in the Laneville and Love actions.

[25] As reported by the Monitor in the First Report, the Plan contemplated two releases: a General Release and an Equity Claims Release, both of which had been contemplated in the proposed Plan. Neither the Equity Claims Release nor the General Release was intended to release or deal with or affect in any respect claims under ss. 5.1(1), (2) and (3) of the CCAA, which read:

> 5.1 (1) a compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> 5.1 (2) A provision for the compromise of claims against directors may not include claims that
> (a) relate to contractual rights of one or more creditors; or
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressed conduct of directors.
>
> 5.1 (3) the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

[26] The Monitor in its Second Report remarked as follows:

> 28. The injunctions provided in the Plan are limited by section 5.1 (2) of the CCAA. The injunctions barring any person from commencing, continuing or pursuing any proceeding on or after the Effective Time for a claim that such person may have against the Company or any current or former officer of the Company of the type referred to in subsection 5.1 (2) of the CCAA... but permit any such subsection 5.1 (2) claim to proceed against a current or former director of the company except that any such claim against a current or former director of the company is permitted recourse, and sole recourse, to the Company's insurance policies in respect of its current and former directors. The estimated value of any coverage under such insurance is $30 million as per the Luxton Affidavit.
>
> 29. The Monitor is aware of at least one group of stakeholders affected and by the Supplemental Injunction, being a group of current and former shareholders of the Company that have served a Notice of Action and Statement of Claim on the Company seeking approximately $80 million in damages from the Company and its directors and officers, as further described in the monitors First Report. As stated above the terms of the Supplemental Injunction would permit this claim to survive against the current and former directors of the Company with recourse limited to the Companies insurance as referenced above."

[27] The Releases and Sanctions are contained in the language of the Sanction Order. A summary of the provisions with paragraph references to the Sanction Order is as follows:

> 22. Releases are essential to the Plan
>
> 23. All Persons give full release to each of the Released Parties including contribution and indemnity but directors not released in respect of any claim of the kind referred to in section 5 . 1 (2) of the CCAA.
>
> 24. Release of Applicant and current and former directors provided that nothing therein releases a director or current or former officer in respect of any claim of the kind referred to in section 5 .1 (2) of the CCAA.
>
> 25. All Persons enjoined and estopped from commencing or continuing actions with the exception of any claim against the directors of the kind referred to in section 5 .1 (2) of the CCAA..
>
> 26. Injunction and bar with respect to section 5 .1 (2) against the applicant... and that the sole recourse for any claims against a current or former director or officer of the Applicant Limited to any recoveries from the Applicants insurance policies in respect of current or former directors and officers
>
> 27. Laneville Action dismissed as against the Applicant without prejudice to discovery rights against representative of the Applicant.

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The Love Action

[28] On February 8, 2010, after the Sanction Order had been made, another Proposed Representative Plaintiff, Gordon Love, commenced a second action and is represented by the same counsel as in the Laneville action. The Statement of Claim, dated March 10, 2010 against the directors and officers of Allen-Vanguard Corporation, includes claims against Cannacord Financial Ltd (and others collectively referred to as "Underwriters.")

[29] An Amended Statement of Claim dated August 10, 2010 asserts in the Love action claims for negligence against directors, officers and Underwriters, all arising out of the transaction and alleged failure to properly disclose the transaction in the financial statements and transaction referred to in paragraph 15 above in respect of a 2007 acquisition.

Issues

1. Do the Laneville action and the Love action and their proposed class claims fall within those claims non-exempt under s. 5.1(2) of the CCAA?
2. Does the language of the Release contained in the Sanction Order apart from s. 5.1(2) permit either the Laneville or Love actions, including that against Underwriters, to continue?
3. Is there any basis on which the Court could or should vary the terms of the Release section of the Sanction Order?

[30] Having reviewed the language of the Releases contained in the Sanction Order, I am satisfied that the only basis that the release language permits claims as against the directors is if they are those contemplated in s. 5.1(2) of the CCAA not to be released.

[31] The object of the CCAA is to facilitate the restructuring of an insolvent corporation. In order to effect restructuring, a compromise of creditors' claims is almost inevitably an essential ingredient of a Plan under the CCAA.

[32] The Plan, to be effective and to obtain Court approval, requires consensus and agreement by various classes of creditors. Many of the issues that arise before a Plan is approved by the Court involve a contestation between creditor groups as to how they should be classified and what extent of what group approval should be appropriately required. No motion was brought to seek to lift the stay in respect of actions provided for in the Initial Order.

[33] In this case, no creditor came forward to oppose approval of the Plan, including the terms of the release language as set out in the Sanction Order. The effect of a Sanction Order is to create a contract between creditors. (See *Canadian Red Cross Society* (2002), 35. C.B.R. (4th) 43 (Ont. S.C.J.).

[34] The most significant feature of the CCAA Applications that have come before the Court in the last two or three years is that the negotiation has taken place to achieve consensus among creditors often before the Initial Order under the statute.

[35] One can rightly understand the reluctance on the part of a provider of interim financing to continue to do so on an indefinite basis, when the approval process may be dragged out for days, weeks or months.

[36] All secured creditors whose security continues to deteriorate during the period of negotiation will seek an early determination of the consensus necessary for approval of a Plan; otherwise, liquidation may be preferable.

[37] Such consensus requires agreement among many stakeholders, including not just creditors but as well current and former directors and officers, many of whose continued cooperation is necessary and integral to a Plan's success.

[38] To avoid the inequity that would result from creditor claims that were outstanding as against directors at the time of a CCAA application, s. 5.1(2) was amended in 1997 to its present form. As Hart J. noted in *Re-Liberty Oil & Gas Ltd.* 2002 ABQB 949 at paragraph 4, before the enactment of this section, the legislation provided for compromises of claims only against the petitioning company. The new section extends relief against directors of the petitioning company subject to exceptions.

[39] It is appropriate to approach statutory interpretation with the assumption that meaning is to be accorded to each of the words used in the provision within the overall purpose of the CCAA. The absence of other words can also be purposeful.

[40] The CCAA has been said to be a skeletal statute designed to give flexibility and expediency in the ability of the company, with the concurrence of its creditors, to accomplish a restructuring of its debt in the avoidance of liquidation or bankruptcy, and does not contain a

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comprehensive code that lays out all that is permitted or barred. (See *ATB Financial v. Metcalfe & Mansfield Alternative Investments11 Corp.*, 2008 ONCA 587 per Blair J.A para. 44.)

[41] Since the hearing in this matter, the Supreme Court of Canada has rendered a decision in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, which endorses the broad principles of the CCAA and the discretion granted to the Court to effect a restructuring if possible or an orderly liquidation.

[42] The case involved a contest between the deemed trust provisions of the *Excise Tax Act* and the CCAA. Madam Justice Deschamps, speaking for the majority, noted the need for clarity of the underlying purpose with respect to the CCAA.

[43] Paragraphs 12 to 14, 17, 58-59 and 63 of that decision read as follows:

> 12. Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.
>
> 13. Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.
>
> 14. Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.
>
> ...
>
> 17. Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).
>
> ...
>
> 58. *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the

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hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59. Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> *Elan Corp. v. Comiskey* reflex, (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting.)

...

63. Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

[44] I have quoted from the above decision at length to stress the nature of the discretion that is inherent in the CCAA statute to allow the Court to fashion a structure or process to best benefit stakeholders. Consistent with that purpose and as a matter of statutory interpretation, it is appropriate to look at the interpretation of s. 5.1(1) and (2) of the CCAA. Section 5.1 (1) deals with "obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

[45] A Plan can therefore provide for the compromise of claims against directors where a director may in law be liable for the payment of a company's obligation with the exceptions set out in s. 5.1(2).

[46] In my view, the best that can be said of s. 5 is that it is not as clearly drafted as it might have been.

[47] It is noteworthy that in the first line of s. 5.1(2), the only claims that may not be excluded in a compromise are those against "directors." Claims that can be excluded in a compromise include those against "officers" and the "company" itself. Why is this the case? One reason undoubtedly is the personal liability that directors face under both Federal and Provincial legislation, or the personal undertaking of a director to a creditor such as a personal guarantee. (See *C.I.T. Financial v Lambert* 2005 BCSC 1779.)

[48] By way of example, s. 131 (1) of the OBCA provides that directors are made personally liable for unpaid wages of the corporation's employees to a maximum of six months. Reading through s. 5.1 (1) and (2), there is nothing in the wording that would prevent the compromise of such claims against officers or the company itself, but not as against directors. The CCAA does not contain a definition of the word "creditor" but does of the terms "secured creditor," "unsecured creditor" and "shareholder." It would seem that for the purposes of the CCAA and in particular s. 5.1 (2), a creditor would include both a secured creditor and an unsecured creditor, but would not include a shareholder.

[49] Section 5.1(2) refers only to creditors and not shareholders as prospective claimants, whether in contract, tort or statutory oppression.

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[50] In this case, the claims by the Class Action Plaintiffs are on behalf of shareholders against directors, since the effect of the CCAA stayed the action against the company Allen-Vanguard. The claims arise with respect to a 2007 transaction and the pre-filing financial statements, but the claims do not involve officers or the company, only directors.

[51] While framed in negligence, the claims in these actions seek to involve the remedy of oppression under the OBCA to enlist the broad scope of remedy possible under that statute. However, it is only in respect of unpaid obligations of the company and other contract-type claims where the law imposes liability on the Defendant directors that invokes the exception in s. 5.1 (2). It is noteworthy that the word "negligence" does not appear in the section at all.

[52] In their essence, the claims in the two actions allege a failure on the part of the directors in 2007 and the company to enter into a provident transaction and the transaction represented a misrepresentation to shareholders of the value of the transaction causing a reduction in shareholder value. Such claims are not of the same kind as those contemplated in section 5.1 (1). They do not relate to "obligations of the company where the directors are by law liable."

[53] The claims relate to transactions that were well in advance of the Initial CCAA Order. In *Re Canadian Airlines Corp.* 2000 ABQB 442 (leave refused to ABCA and to SCC), it was held that claims against the directors should only be released if they arose prior to the date of the CCAA proceeding.

[54] I agree that the oppression remedy is expansive in scope and empowers the Court to make determinations and orders that can have a direct and even a radical impact on the internal management and status of a corporation, including even an order winding up the corporation. (See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2nd) 113 (Ont. Div. Ct.) and *Incorporated Broadcasters Ltd. v. CanWest Global* 2001 CanLII 28395 (ON S.C.) at paragraphs 101-105.) Oppression as it occurs within s. 5.1(2) of the CCAA must be read within the context of the section itself.

[55] The claims in the Love and Laneville actions are in negligence and no other remedy is sought apart from a claim for damages and access to whatever insurance may be available to respond to claims against directors and officers. There is nothing before the Court to suggest that the insurers, assuming there is a valid policy, are aware of the restriction on remedy.

[56] I see no basis from the pleadings in this action for which it would be appropriate to consider the scope of relief that might otherwise apply under the oppression remedy section of the OBCA. Counsel for the Plaintiffs in the Proposed Class Actions cannot bolster their position by limiting recovery to the applicable Directors and Officers Insurance, when there is no basis for the claim at all, either under the language of the Release or the meaning to be accorded to s. 5.1 (2).

[57] In *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, the Supreme Court of Canada commented on the expectations of stakeholders including but not limited to shareholders, in considering a Plan of Arrangement in the context of an oppression claim. Part of

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the test for "oppression" referred to in that decision is an expectation on the part of the claimant to be "treated in a certain way and that failure to meet the expectation involved unfair conduct."

[58] I fail to understand how the expectation of one or more shareholder groups can be any different with respect to the impugned transaction than those of creditors or indeed the company itself vis-à-vis the directors, particularly since neither the officers nor the company itself is pursued.

[59] The Sanction Order in this case by its terms provided release of the claims now sought to be pursued. By the terms of the Sanction Order, the only reasonable expectation of stakeholders would be that unless specifically authorized by the Order, any claim against directors would be barred. Potential claims against directors were not assigned to class plaintiffs nor was direction sought by any party about the effect of s. 5.1 prior to the issuance of the Order. Given the issue now before the Court and the disagreement of the parties, perhaps the better practice would have been to advise the Court of the issue and "carve" it out of the Plan.

[60] The Court is put in a difficult position when asked in a very constrained timeframe to approve the restructuring with releases. It should certainly not be the expectation that in every instance, releases of the type here should be granted as a matter of course. Those with unpaid obligations of the company may assert that directors are liable if they fail to fulfill the company's obligation when they are legally bound to do so.

[61] I am of the view that third-party releases in particular should be the exception rather than the rule. There may very well be instances in which the releases are not integral or necessary to the restructuring and should not be approved. That was not suggested in the approval process here. There was no evidence presented at the time of the granting of the Sanction Order to suggest that directors were not important to the restructuring. Indeed, the only evidence before the Court was to the contrary: that the directors were integral to the Plan's success.

[62] In this case, the putative Plaintiffs did not oppose the granting of the Sanction Order and in effect took their chances that the Order might after the fact permit the limited claim referred to in the Monitor's Report.

[63] All of the other stakeholders, including the secured creditors, directors, officers and the Applicant Company, approved the form of Order.

[64] It is certainly speculative at this time to consider, had the form of Order proposed been objected to, to what extent the Court would have any jurisdiction to grant the language now sought by the Plaintiffs, without rejecting the Plan entirely.

[65] The duty of directors is first and foremost to the company itself. The oppression remedy does not in my view permit one group (shareholders) to claim oppression when other stakeholders, for example employees or creditors or indeed the company itself, have allegedly suffered a loss that results in insolvency and are unable to seek redress and still preserve restructuring.

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[66] To vary or amend the Sanction Order now to permit the claims to continue might at the very least require the presence and concurrence of all of those who supported the form of Order in the first place.

[67] Counsel for the proposed Plaintiffs refer to several decisions, which they urged support the proposition that shareholder actions for oppression against directors are permitted under s. 5.1 (2) of the CCCA.

[68] Each of those decisions, while fact-specific, in my view is consistent with a narrow range of actions warranted for a shareholder against the director under the exception to s. 5.1 (2).

[69] In *Re-Liberty Oil & Gas Ltd.*, 2002 ABQB 949, where the action did proceed, the allegation involved a personal representation, indeed a fraudulent one, by the defendant director to two individuals who happened to be shareholders. The complained acts were not those of the company (as here), but rather personal and direct as between the director and shareholder. In other words, there was the proximity that one would expect in a tort situation.

[70] In *Worldwide Pork Corp.*, 2009 SK QB 414, the action was not permitted to proceed. At paragraphs 14 and15 Justice Dawson said:

> It must be remembered that the oppression remedy is not designed to settle every dispute of a corporation but only those that involve and abuse of the corporate system and for which a common-law remedy does not exist.
>
> As well, the plaintiffs have pled that their claim is for damages, for loss of profits and loss of pay out dividends. There must be a causal connection between the alleged oppresive conduct and the loss claimed to be suffered by the plaintiffs. That is, there must be a causal nexus between the alleged conduct and the loss suffered by the plaintiffs. There is no pleading which sets out how the alleged loss of profit or dividends resulted from the conduct alleged to be oppressive. But in any event the losses claimed are losses as a result of Worldwide Pork not being profitable, that is, being unable to provide a return to shareholders for their investment. Such a loss cannot support an action for oppression since it comes with in the exception contained in section 5.1 (2) (b.) of the CCAA.

[71] In *Re-Blue Star Battery Systems International Corp.* (2000), 10 B.L.R. (3d) 221, Farley J. of this Court dealt with a claim very much like that considered by the Supreme Court of Canada in *Century Services, supra,* as it involved G.S.T. At paragraph 12, he said

> Thus it appears to me that RevCan, not having put itself into position where it could (and did) perfect its derivative claims as set out in section 323 (2) (a) of the *Excise Tax Act* never had a claim against the directors which could survive the sanction of the Plan vis-à-vis the Applicants. Nothing that this Court could do at the present time (that is, at the time when considering the CCAA sanctioned motion) could crystallize a RevCan claim against the directors. RevCan would have to take additional multiple steps over some period of time to establish a claim against the directors."

[72] Farley J. went on to discuss the hypothetical of a claim in oppression against the directors as provided for in s. 5.1(2) in the context where the creditor had put the directors on notice of the promise of the company to pay the tax.

[73] The argument of the Proposed Plaintiffs here is that "oppressive conduct" is not to be carved out, but that wrongful conduct that involves directors, even though the action as against the company cannot continue, it can continue against the directors.

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[74] What in my view is consistent with the decisions in the three cases mentioned and in the Québec case *Papiers Gaspésia* 2006 QCCS 1460 (CanLII) and with the interpretation of s. 5.1(2) is that the actions of the directors toward persons who may be regarded as creditors, and may in this context include a shareholder, are based on a direct relationship when a director takes on an obligation to make a payment that would otherwise be the obligation of the company and promises to do so or is obliged to do so by legislation. In most cases this will be a post-filing obligation. In other words, a promise by a director directly to a creditor stakeholder that is made following a CCAA Initial Order may attract liability to the director and should not be released.

[75] It would be inconsistent with the scheme of the CCAA to allow all claims in which shareholders claim oppression to proceed against directors for acts or omissions that they did in the name of the company prior to the Initial Order. There would be little if any incentive to directors to pursue restructuring if they were going to be so exposed. On the other hand, personal undertakings or obligations of directors made during the CCAA process should not easily be released.

[76] To permit the kind of claims as the Proposed Plaintiffs would see them would create a priority to that class of unsecured creditors that properly should belong to the creditors as a group. No leave to continue the Class action was sought before the Sanction Order was granted and even on this motion no submission was put forward for the exercise of discretion under section 5 .1 (3).

[77] None of the cases referred to in argument dealing with s. 5.1(2) squarely deals with the issue raised here – that the section was intended to related to post-filing claims or personal undertakings of directors to creditors in connection with the proposed plan prior to filing.

[78] The final argument on behalf of Class Plaintiffs is that to deny the claim of shareholders as against directors would only benefit their insurers, since the Class Plaintiffs have agreed to limit any recovery to the amount of the insurance. I fail to see how this advances the position of the Proposed Plaintiffs. No information was put before the Court about the particulars of the insurance. The Court has no information to know whether or not the insurers even know of this issue.

[79] If the claim does not lie as against the directors in the first place under s. 5.1(2), the limitation of the claim as against the potentially available insurance does not advance the case of the class of Plaintiffs.

[80] There would be little meaning left to s. 5.1 if all claims of negligence and wrongful conduct against directors for pre-filing activity could not be released and no need for the discretion provided for in s. 5.1 (3) for Court to override this compromise as not being fair or reasonable. As noted above in the passages from the *Century Services* case, the purpose of the CCAA and the discretion granted to the Court are to permit restructuring to work, not create new causes of action.

[81] The concern of the Court, which necessitated the further inquiry, was that the language of the Sanction Order might imply on the part of the Applicant and directors who had knowledge of

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the particulars of the claim that the facts could give rise to a s. 5.1(2) claim. I am satisfied based on the further information provided that no such admission is to be implied.

[82] The relief sought by the directors is therefore granted.

<u>Underwriters</u>

[83] Underwriters acted on share and warrant offerings of Allen-Vanguard in September 2007 and certified a related prospectus. The Love Class Action was commenced in February 2010 and the proposed Representative Plaintiff claims damages against Underwriters under s. 130 of the *Securities Act (Ontario)* and also makes claims on the basis of negligence, unjust enrichment and waiver of tort.

[84] Underwriters rely on the provisions of the releases granted by the Sanction Order and in particular the claims against the Applicant Company Allen- Vanguard. As well, Underwriters rely on the definition of "Equity Claims" in the Sanction Order and submit that because the provisions of the Order in paragraph 26 (ii) bar certain claims against third parties who might claim contribution and indemnity against the restructured company, they should be entitled to the benefit of that provision.

[85] The response of the proposed Class Plaintiffs in the Love litigation is that the claim against Underwriters is based on the negligence, fraud or wilful misconduct of Underwriters. It is submitted that Underwriters are not entitled to indemnity as against Allen-Vanguard for the several negligence of Underwriters, either at law or under s. 130 of the *Securities Act.*

[86] The proposed Class Plaintiff submits that given the nature of the claim as against Underwriters, Underwriters would never have had a right to an indemnity for the claims asserted in the Love Action and therefore there were no such claims to be released.

[87] It is submitted that Underwriters bargained any possible indemnity away by the terms of their contract with Allen-Vanguard in September 2007, and that even if they had the benefit of an indemnity, all that was required for the Plan's success was that Alan-Vanguard be protected from Underwriters, not that Mr. Love's claims against Underwriters be eliminated.

[88] Counsel for the Plaintiff in the Love Action also urges that Underwriters did not have the right of indemnity as at the time of the Initial Order, and the Sanction Order bars any indemnity that they might otherwise have had and there is nothing in the language of either Order to preclude the claim of the Class Plaintiff against Underwriters limited to Underwriters' negligence.

[89] Finally, it is submitted that since Underwriters did not "bring anything to the table" in respect of the restructuring, there is no basis on which the Court should vary the Sanction Order to now provide the indemnity that the Order fails to provide.

[90] In the alternative, the Class Plaintiffs suggest that the Sanction Order be clarified, if necessary, to clearly provide the right of the Class Plaintiff to proceed against Underwriters.

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[91] In my view, there is a distinction to be made between the claim as against the directors and that against Underwriters, since in the case as against the directors, the parties appear to have bargained that if the claim could be brought under s. 5.1(2), it could proceed. That consideration was known to the parties who negotiated and agreed on the form of the Sanction Order and that was the only claim not otherwise covered by the Release terms.

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[92] In the case of Underwriters, there was nothing to suggest that any discussion or negotiation took place with respect to specific protection for Underwriters or the allowance of a claim against Underwriters at the time that the Sanction Order was approved.

[93] This is another reason why in my view s. 5.1(2) of the CCAA should be read narrowly with respect to pre-filing claims or claims that relate to pre-filing activity.

[94] The *Ontario Business Corporations Act*, R.S.O. 1990 c. B. 16 ("OBCA") contains a statutory process for that kind of action and remedy sought by the Class Plaintiffs in both actions. Section 246(1) reads as follows:

> **246.** (1) Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

[95] The Supreme Court of Canada dealt with the issue of collective shareholder claims versus claims that are those of the corporation itself in *Hercules Management Ltd. et al. v. Ernst & Young*, 1997 CanLII 345, [1997] 2 S.C.R.165. The case involved a claim by shareholders of the corporation against its auditors for an alleged negligence in preparation of financial statements of the corporation. Paragraph 48 of the reasons refers to and adopts a statement of Farley J. in *Roman Corp. v Peat Marwick Thorne* (1992), 11 O.R. (3rd) 248 (Gen. Div.) at p 260.

> As a matter of law the only purpose for which shareholders receive an auditor's report is to provide the shareholders with information for the purpose of overseeing the management and affairs of the corporation and not for the purpose of guiding personal investment decisions or personal speculation with a view to profit.

[96] The plaintiffs in *Hercules* asserted reliance on financial statements in monitoring the value of their equity and then due to auditors' negligence, they failed to extract it before the financial demise of the company.

[97] The Supreme Court, in assessing the claim, referred at paragraph 59 to the rule in *Foss v Harbottle*:

> 59. The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354, at p. 367, as follows:
>
>> The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his

> investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

60. The manner in which the rule in *Foss v. Harbottle, supra*, operates with respect to the appellants' claims can thus be demonstrated. As I have already explained, the appellants allege that they were prevented from properly overseeing the management of the audited corporations because the respondents' audit reports painted a misleading picture of their financial state. They allege further that had they known the true situation, they would have intervened to avoid the eventuality of the corporations' going into receivership and the consequent loss of their equity. The difficulty with this submission, I have suggested, is that it fails to recognize that in supervising management, the shareholders must be seen to be acting as a body in respect of the corporation's interests rather than as individuals in respect of their own ends. In a manner of speaking, the shareholders assume what may be seen to be a "managerial role" when, as a collectivity, they oversee the activities of the directors and officers through resolutions adopted at shareholder meetings. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders *qua* individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover.

61. This line of reasoning finds support in Lord Bridge's comments in *Caparo, supra*, at p. 580:

> The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders . . . will be recouped by a claim against the auditor in the name of the company, not by individual shareholders. [Emphasis in Supreme Court decision.]

It is also reflected in the decision of Farley J. in *Roman I, supra*, the facts of which were similar to those of the case at bar. In that case, the plaintiff shareholders brought an action against the defendant auditors alleging, *inter alia*, that the defendant's audit reports were negligently prepared. That negligence, the shareholders contended, prevented them from properly overseeing management which, in turn, led to the winding up of the corporation and a loss to the shareholders of their equity therein. Farley J. discussed the rule in *Foss v. Harbottle* and concluded that it operated so as to preclude the shareholders from bringing personal actions based on an alleged inability to supervise the conduct of management.

62. One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is

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> the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

[98] The policy of limiting indeterminate liability as in *Hercules* is consistent with the basis for the limitation of claims under s. 5.1(2) as set out above. In my view the words of s. 5.1(2) do not create a cause of action that would otherwise not exist except by leave of the Court. It simply provides an exception to what otherwise could be included in a release.

[99] The release terms contained in the Sanction Order would deprive Underwriters from any claims for contribution or indemnity to which they would otherwise be entitled at law from the Company and its directors and officers should the actions of the Class Plaintiffs proceed.

[100] This is just one further reason to support not just what is required for a derivative action but also what is required to be taken into consideration before the Court issues a Sanction Order in this case in effect on consent.

[101] As noted above, what has come to be known as a "liquidating" CCAA application can provide problems not just for the parties but the Court itself. The presumption behind the timing of the Application in this case was that if not granted quickly, bankruptcy would have ensued with the inevitable loss of jobs, assets and creditor claims.

[102] The Class Plaintiffs are taken to have known of the CCAA proposal as early as September 2009 and could have sought leave to commence a derivative action prior to or during the CCAA process. No such step was taken.

[103] I am satisfied that it is appropriate in the circumstances to stay the claims as against Underwriters in negligence and misrepresentation.

[104] The Claim against Underwriters also alleges fraud. If the only claim were in fraud and full particulars of alleged fraud were contained in the pleading, the claim might survive since the wording of the Release does not extend to fraud.

[105] Apart from fraud, claims in negligence against Underwriters are caught by the terms of the Release. Arguably, the claims are those of the Company that are specifically released.

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Variation of the Sanction Order

[106] As noted above in reference to the decision in *Canadian Red Cross*, a Sanction Order in addition to being an Order of the Court and subject to the normal rules for variation thereof, represents an agreed contract between the creditors of an insolvent corporation.

[107] The Class Plaintiffs in the Laneville action did not seek to lift the stay at the time of the Initial Order. The Class Plaintiff accepted the Release provisions which extend to Underwriters when the Sanctioned Order was granted.

[108] Underwriters were released by the terms of the Sanction Order, and the Order, which was not appealed, represents a final determination of the rights of shareholders as against Underwriters.

[109] As was mentioned above, in respect of the suggestion of variation of the Sanction Order to permit the claim as against the directors, I conclude that it is not appropriate to vary a Sanction Order after the fact. The reliance that parties place on the finality of a Sanction Order is such that it would only be in extraordinary circumstances of a clear mistake, operative misrepresentation or fraud that would permit variation without re-opening the whole process.

[110] In *Extreme Retail (Canada) Inc. v. Bank of Montréal*, [2007] O.J. 3304 (Ont. S. J.) [Commercial List], Stinson J. held at paragraph 21 that an Approval and Vesting Order was a final determination of the rights of parties represented in that proceeding. Morawetz J. adopted those comments in *Royal Bank Body Blue Inc.* 2008 CanLII 19227 [ON S.C.] to the same effect at paragraphs 19 and 20. In my view the same principle applies to a Sanction Order.

[111] I see nothing in the requests of either Underwriters or the Class Plaintiffs that would be appropriate to permit variation of the Sanction Order as each of them have proposed.

[112] Should the Class Plaintiff in the Laneville action seek to pursue a claim against Underwriters limited alone in fraud, the action should be permitted to proceed subject to the Plaintiff persuading a judge that such a limited claim should be certified.

Conclusion

[113] For the above reasons the motion by the directors will succeed to enjoin the claims as against them in both the Love and Laneville actions. The motion of Underwriters to strike is granted, and motions for variation of the Sanction Order of both Underwriters and the Class Plaintiffs are dismissed. Counsel may make written submissions on the issue of costs.

C. CAMPBELL J.

Released:

Citation: Re Allen-Vanguard Corporation, 2011 ONSC 5017
Court File No. CV-09-00008502-00CL
Date: 20110825

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SUPERIOR COURT OF JUSTICE

ONTARIO

(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 ARRANGEMENT AND REORGANIZATION OF **ALLEN-VANGUARD CORPORATION** UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND SECTION 186 OF THE *ONTARIO BUSINESS CORPORATIONS ACT*., R.S.O. 1990, c.B.16, AS AMENDED

REASONS FOR DECISION

C. CAMPBELL J.

RELEASED: August 25, 2011

TAB 3

Alberta Court of Queen's Bench
Canadian Airlines Corp. (Re)
Date: 2000-05-04

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.

(Calgary 0001-05071, 0001-05044)

May 4, 2000.

2000 CanLII 28202 (AB QB)

[1] PAPERNY J. [orally]: — 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 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.

[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;

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-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.

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(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 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.*

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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.

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[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 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 CA1L 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, catering 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.

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[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:

> ...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 ...

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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

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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 4

Ontario Supreme Court
Canadian Red Cross Society/Société Canadienne de la Croix-Rouge, Re
Date: 1999-07-28

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

In the Matter of a Plan of Compromise or Arrangement of the Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge

The Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge, Applicant

1999 CanLII 15009 (ON SC)

Ontario Superior Court of Justice [Commercial List] Blair J.

Judgment: July 28, 1999

Docket: 98-CL-002970

Benjamin Zarnett and Jessica Kimmel, for Applicant, Red Cross.

Charles M. Wright, for Respondent, Barbara Baker et al.

John Spencer, for Respondent, Attorney General of Canada.

Michael Kainer, for Respondent, SEIU.

Carlton Mathias, for Respondent, Bayer Corp.

Mary Margaret Fox, for Respondent, Dominion of Canada General Insurance Company.

D. Ward, for Respondents, Provinces & Territories (except Que.).

P. Huff, for Respondent, 1986-1990 Hemophiliac, HCV Claimants.

Jeff Carhart, for Respondents, Québec Government & Hema-Québec.

Ken Arenson, for Respondents, Certain Individual Claimants.

D. Harvey, for Respondents, Pre-86/Post 90 HCV Claimants.

J.H. Grout, for Respondent, Monitor, Ernst & Young Inc.

Gary Smith, for Respondents, Pre86/Post 90 BC HCV Claimants.

***Blair J.*:**

[1] This Motion is brought on behalf of Ms. Barbara Baker for an Order lifting the CCAA stay in order to permit her leave to commence a class action proceeding, and to file a class proof of

claim in this proceeding, on her own behalf and on behalf of a class of persons said to be exposed to infection as a result of receiving transfusions of blood tainted or contaminated by Creuzfeld-Jakob Disease ("CJD"). CJD is a terrible malady—an infectious, rapidly progressive, fatal brain-deteriorating disease for which there is apparently no known treatment or cure.

[2] The issue to be considered here is not the tenability of such a class action proceeding or the question of whether or not the proposed class would be certified. These are matters for the class action proceeding itself, if it is to proceed. The issue here is whether it would be helpful and effective from the perspective of blood claimants exposed to CJD *and* with respect to the overall processing of the Red Cross CCAA proceeding itself—including, of course, the timely and fair compensation of Transfusion Claimants as a whole from the proceeds made available through the proposed Plan, if accepted and approved—to lift the stay for the reason proposed.

[3] In the particular circumstances of this restructuring proceeding I am not satisfied that it is necessary, or that it would be appropriate, to grant the relief sought. The motion is therefore dismissed.

[4] There are a number of reasons for arriving at this conclusion.

[5] First, the real issue is whether or not the potential CJD claimants have received adequate notice of the claims filing procedure designed, initially, to enable claimants to vote on the proposed Plan. A carefully constructed and elaborate notification procedure has been established and put into effect. It was arrived at after extensive negotiations amongst the myriad of claimants' representatives and finalized after full argument in Court. It included nation-wide notification in the national newspaper media on three occasions. It is readily apparent from the introductory words of the Notice itself that those who should claim included *anyone* with a direct or indirect blood claim against the Red Cross. A number of CJD claimants have already filed claims and numerous others have contacted the Red Cross or the Monitor. Ms Baker herself is Plaintiff in an Alberta action commenced against the Red Cross in 1996 and she received direct notification through her solicitors, as did other similar claimants. There is really no evidence that there have been any difficulties from inadequate notice to CJD claimants.

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[6] Secondly, I am not satisfied that any notification procedure evolving out of a commenced but then stayed class action proceeding would yield any different results. Neither the Red Cross nor the Monitor knows who the potential claimants are. Ms Baker's proposed class action solicitors appear not to know either.

[7] Thirdly, the Red Cross proceedings have been ongoing now for more than a year. They have had a very high profile, accompanied by wide spread publicity. This factor in itself carries with it a certain momentum for the discovery and assertion of claims.

[8] Fourthly - and against the background of the foregoing—the Red Cross proceedings themselves have developed a certain taut dynamic between the assertion of claims within the CCAA umbrella and the pending settlement of claims between at least a large group of the Transfusion Claimants and the various Governments. The proposed Plan is closely related to the successful completion of the Government settlement, and the timing of these proceedings is being synchronized with the timing of the approval and implementation of the latter. In an earlier motion today the CCAA schedule was modified so that the timing of the two would mesh.

[9] There are two implications arising from this fourth point. In the first place, I am reluctant to impose another feature into the CCAA procedure which might upset the current timing, particularly where—as I have indicated—I think the helpfulness of the proposed class action proceeding would be marginal at best in respect of the individual CJD claimants and in respect of the CCAA proceedings. Moreover, the claims procedure for voting purposes which has already been put in place—with the concurrence of the various groups of Transfusion Claimants—is one which is founded upon individual voting by claimants with respect to the Plan.

[10] I am not sure how individual voting would work in the context of the "class proof of claim" which Mr. Wright proposes should be filed, and I am not prepared to run the risk of upsetting the present procedure which is clearly underway and which has already absorbed a great deal of the time, energy and resources of the various Transfusion Claimants, at this late stage. There is an imperative at work here which demands that this proceeding be advanced and that voting and completion of the Plan (if accepted and approved) take place in as timely a fashion as possible, in order that Claimants receive what compensation they are entitled to as early as possible.

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[11] This is not the case, in my view—because it is not necessary to do so—to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. There are apparently no examples in Canada yet where such a procedure has been permitted. In the United States, which has—as Mr. Wright's factum put it—"a lengthier history of class proceedings", class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the *Matter of American Reserve Corp.*, 840 F.2d 487 (U.S. 7th Cir. Ill. 1988) (Feb. 18, 1988) (No. 87-1768), and *Reid v. White Motor Corp.*, 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 1989). As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.

[12] The Motion is therefore dismissed. I do not rule out, by this disposition, the possible appointment of Representative Counsel for the CJD claimants in this proceeding (similar to those already appointed for the various groups of Transfusion Claimants) should it be felt and determined to be necessary or appropriate in the future.

Motion dismissed.

1999 CanLII 15009 (ON SC)

TAB 5

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement of Canwest Global Communications Corp. and the other applicants listed on Schedule "A"

[Editor's note: Schedule A was not attached to the copy received from the Court and therefore is not included in the judgment.]

[2009] O.J. No. 5379

61 C.B.R. (5th) 200

2009 CarswellOnt 7882

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Heard: December 8, 2009.
Judgment: December 15, 2009.

(52 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Application by the CCAA applicants and the "CMI entities" for an order declaring that the relief sought by the "GS parties" was subject to the stay of proceedings granted on Oct. 6, 2009. Cross-motion by GS Parties for an order lifting the stay so they could pursue their motion challenging pre-filing conduct of the CMI entities, etc. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors supported the position of the CMI Entities. In essence, the GS Parties' motion sought to undo the transfer of the CW Investments Co. shares from 441 to CMI or to require CMI to perform and not disclaim the shareholders agreement as though the shares had not been transferred.

HELD: GS Parties' motions dismissed, save for a portion dealing with para. 59 of the initial order on consent; CMI Entities' motion granted with the exception of a strike portion, which was moot. The first issue was caught by the stay of proceedings and the second was properly addressed if and when CMI sought to disclaim the shareholders agreement. The substance of the GS Parties' motion was a "proceeding" subject to the stay under para. 15 of the initial order prohibiting the commencement of all proceedings against or in respect of the CMI Entitites, or affecting the CMI business or property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI business or the CMI property" which was stayed under para. 16 of the initial order. The substance and subject matter of the motion were certainly encompassed by the stay. The real question was whether the stay ought to be lifted in this case. If the stay were lifted, the prejudice to CMI would be great and the proceedings contemp lated by the GS Parties would be extraordinarily disruptive. The GS Parties were in no worse position than any other stakeholder who was precluded from relying on rights that arise upon an insolvency default. The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion. The onus to lift the stay was on the moving party. The stay was performing the essential function of keeping stakeholders at bay in order to give CMI Entities a reasonable opportunity to develop a restructuring plan.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32, s. 11.02

Counsel:

Lyndon Barnes, Alex Cobb and Shawn Irving for the CMI Entities.

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders.

K. McElcheran and G. Gray for GS Parties.

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild.

Hilary Clarke for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of

Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

> (i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
> (ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
> (iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
> (iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a

> price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet.

Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as

if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

(a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should

be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important

preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 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.
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect

of the company under an Act referred to in paragraph (1)(a);

(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.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc*[3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay

precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

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 significantly 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 passing 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.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the

commencement of the stay period.

9. It is in the interests of justice to do so.

(b) <u>Application</u>

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]:

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> "The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts."

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt

arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may -- on notice given in the prescribed form and manner to the other parties to the agreement and the monitor -- disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based

on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

S.E. PEPALL J.

cp/e/qlrds/qljxr/qlced/qlaxw/qlcas

1 (2000), 19 C.B.R. (4th) 1.

2 [1990] B.C.J. No. 2384 (C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1.

5 (1993), 17 C.B.R. (3d) 24.

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992) 14 C.B.R. (3d) 303.

9 R.S.O. 1990, c. C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 5 C.B.R. (5th) 92 at para. 37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1.

TAB 6

COURT FILE NO.: 04-CL-5306
DATE: 20050627

2005 CanLII 23317 (ON SC)

SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

BEFORE: FARLEY, J.

COUNSEL: *William V. Sasso*, for the Moving Parties, Georgian Windpower Corporation and Nanticoke 80 WP Inc.

Michael Barrack and *Geoff Hall*, for Stelco

Kevin Zych, for the Noteholders

Kyla Mahar, for the Monitor

Sharon L.C. White, for USW Local 1005

Lily Harmer, for USW International

HEARD: June 27, 2005

ENDORSEMENT

(GEORGIAN WINDPOWER CORPORATION MOTION)

[1] There is a limited lift stay of the CCAA stay to allow the Statement of Claim to be initiated and filed plus the Rule 21 cross-motion to be dealt with. If the cross-motion is dismissed, then no further action is to be taken by the plaintiff until Stelco emerges from CCAA and that stay is generally terminated, except with further leave of the court.

J.M. Farley

DATE: June 27, 2005

TAB 7

CITATION: NFC Acquisition GP Inc. (Re), 2012 ONSC 1244
COURT FILES NOS.: CV-12-9554-00CL and CV-12-9616-00CL
DATE: 20120222

2012 ONSC 1244 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

Court File No: CV-12-9554-00CL

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp.

AND RE:

Court File No: CV-12-9616-00CL

Bank of Montreal, Applicant

AND:

NFC Acquisition GP Inc., NFC Acquisition Corp., NFC Land Holdings Corp., New Food Classics, and NFC Acquisition L.P., Respondents

BEFORE: D. M. Brown J.

COUNSEL: E. Lamek and C. Fell, for the Monitor and proposed Receiver, FTI Consulting Canada Inc.

C. Prophet and F. Lamie, for the Applicant, Bank of Montreal

D. Bish and A. Slavens, for the NFC Debtors

P. Osborne and B. Gray, for certain Directors of the Debtors

D. Bulas, for Edgestone Capital

H. Chaiton, for Westco MultiTemp Distribution Centres Inc.

HEARD: February 22, 2012

REASONS FOR DECISION

I. Motion to lift a *CCAA* stay to appoint a receiver

[1] The Bank of Montreal, the senior secured creditor of the debtor respondents, NFC Acquisition GP Inc., NFC Acquisition Corp., NFC Land Holdings Corp., New Food Classics, and NFC Acquisition L.P. (the "Debtors"), moves for an order lifting the stay of proceedings in the *CCAA* matter (CV-12-9554-00CL) to permit it to apply to appoint FTI Consulting Canada Inc. as receiver of all of the property, assets and undertaking of the Debtors.

II. Background events

[2] NFC produces ground and formed meats and held a 40% market share of the market for frozen burgers sold in grocery stores. On January 17, 2012 Morawetz J. made an Initial Order under the *CCAA* in respect of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp. (the "NFC Entities"). Two features of the Initial Order are of particular relevance to this motion. First, the Court approved a sale process in respect of the NFC Entities. Second, under the terms of the approved DIP facility, the availability of additional commitments under the facility beyond the initial $3.5 million was tied to the success of the sales process – if a Sales Process Default occurred, there would be no further availability of funds under the DIP Facility.

[3] The Monitor, FTI Consulting Canada Inc., has filed a Third Report dated February 21, 2012 describing the results of the sales process. Three final offers were received by the February 13, 2012 deadline. The Monitor then worked with NFC management to refine the terms of two bids.

[4] On February 13 a Major Customer of NFC advised the company that it had one day to match a competitive bid from another supplier of certain products which had proposed to reduce its prices to the Major Customer. The Monitor informed the two final bidders of this development. Between February 13 and 20 discussions took place amongst the Monitor, NFC, the two final bidders and the Major Customer to ascertain whether a transaction could be structured that would result in a going concern sale of the NFC Saskatoon production facility, or possibly both NFC production facilities.

[5] Under the terms of the Sales Process NFC had until the close of business on February 17 to put forward to BMO, in its capacity as DIP Lender, a form of agreement of purchase and sale so that the bank could determine whether it would make further advances under the DIP Facility.

[6] On February 17 one of the two final bidders withdrew from the sales process. The remaining bidder was prepared to proceed with an amended offer, but one which would require the DIP Lender to advance the remaining $7 million in the DIP Facility.

[7] On Monday, February 20 BMO delivered a notice that a Sales Process Default had occurred under the DIP Facility. Further funding was no longer available to the Debtors. That evening the Board of NFC resigned *en masse*. Management posted notices at the Debtors' facilities advising the employees that no work would be available for them the next day, Tuesday, February 21. That has led the Monitor to make the following recommendation:

2012 ONSC 1244 (CanLII)

> In light of the delivery of the Default Notice by BMO, the resignation of the NFC Board of Directors and management, the lack of funding for NFC's business and the perishable nature of NFC's inventory, the Monitor is of the view that it is vital to have an immediate and orderly shut-down of the NFC manufacturing operations and a swift transition to a court-appointed receivership of the assets of NFC. The Monitor is hopeful that a buyer for the closed NFC manufacturing faculties can be quickly identified among the parties that participated in the Transaction Process, and that the manufacturing facilities can be sold on a turn-key basis in a short period of time, rather than liquidated.
>
> The Monitor has prepared a cash flow projection for the conduct of a shut-down receivership for the assets of NFC, which would be funded pursuant to Receiver's Certificates. BMO has agreed to fund such Receiver Certificate amounts on a basis and priority consistent with the existing DIP Facility and DIP Charge.

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[8] As of February 20, 2012 the Debtors owed BMO approximately $24.5 million. BMO is the senior secured creditor and the DIP Lender. The priority position of the BMO is not in dispute.

[9] BMO applies for a lifting of the stay in the *CCAA* proceeding and the appointment of a receiver over the Debtors to secure the property and assets of the Debtors, including the perishable food inventory, and to proceed with an orderly realization and maximization of the value of the Debtors' assets. Paragraph 36(b) of the Initial Order provided that upon the occurrence of an event of default under the Definitive Documents, BMO, as DIP Lender, could apply to the court for the appointment of a receiver. A Sale Process Default is a Specified Event of Default, and BMO gave notice of such a default this past Monday.

[10] FTI has consented to act as receiver of the Debtors.

II. Analysis

[11] In *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200 (S.C.J.) Pepall J. summarized the principles which should guide a court when facing a request to lift a stay of proceedings under the *CCAA*:

> 32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"http://www.lexisnexis.com/ca/legal/frame.do?reloadEntirePage=true&rand=1329866046275&returnToKey=20_T14002786868&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.957761.1646166896 - fn-11, an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*. That decision also indicated that the judge should consider the

good faith and due diligence of the debtor company.http://www.lexisnexis.com/ca/legal/frame.do?reloadEntirePage=true&rand=1329866046275&returnToKey=20_T14002786868&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.957761.1646166896 - fn-13

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.* and Professor McLaren has added three more since then. They are:

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 significantly 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 passing 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.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

[12] Turning to the present case, BMO gave notice of its motion by e-mail yesterday to those on the Service List in the *CCAA* proceedings. Under the circumstances such short notice was necessary, and I validate the short service.

[13] No party has appeared to oppose the motions to lift the stay and appoint a receiver. The Monitor supports the lifting of the stay and the appointment of a receiver. The Monitor also advised that the Saskatoon local of the employees' union does not oppose the orders sought.

[14] Quite frankly, on the evidence before me, I see no other alternative than appointing a receiver. The Sales Process has fallen apart as a result of the inability to work out an

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arrangement with the Major Customer. Consistent with the terms of the DIP Facility approved in the Initial Order, BMO, as DIP Lender, has declined to make further advances and has served a notice of Sales Process Default. As a result, the Debtors have no access to further working funds.

[15] The Board of the Debtors resigned *en masse* two days ago; the Debtors are rudderless, reducing the prospects of a viable proposal in the *CCAA* process down to nil. The Monitor advises that management instructed employees not to report to work yesterday, so the Debtors are not carrying on any business at the moment. A significant inventory of meat products sits in the Saskatoon facility, although the Monitor advises that any fresh meat either has been shipped out or frozen. In a very real sense the Debtors have ceased carrying on business as a going concern.

[16] The appointment of a receiver is required to stabilize this situation for the benefit of all stakeholders of the Debtors.

[17] BMO has filed a draft receivership order which contains some amendments to the Commercial List Model Receivership Order. I reviewed the proposed amendments with counsel in open court and heard submissions and explanations on some of the proposed changes. No party opposes the proposed draft receivership order. BMO and the receiver clarified that with respect to paragraphs 24 and 26 of the proposed order, the receiver will be bound by the terms of the February 7, 2012 letter from the Monitor to Westco which was placed before the court on the motion to obtain the February 16, 2012 extension order. BMO and the receiver confirmed, at the request of Debtors' counsel, that the orders sought would not terminate the existing *CCAA* proceedings.

[18] In sum, I conclude that the pressing circumstances in which the Debtors find themselves make it just and reasonable to appoint a receiver over them. I therefore grant BMO's motion to lift the stay of proceedings in the *CCAA* matter, and I grant the Bank's motion to appoint FTI Consulting as receiver over the Debtors. I have signed the draft orders submitted by BMO.

D. M. Brown J.

Date: February 22, 2012

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TAB 8

Ontario Supreme Court
PSINet Ltd., Re
Date: 2002-01-14

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

In the Matter of a Plan of Compromise or Arrangement of PSINet Limited, PSINetworks Canada Limited, PSINet Realty Canada Limited and Toronto Hosting Centre Limited (Collectively, the "Companies")

2002 CanLII 49572 (ON SC)

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: January 14, 2002

Judgment: January 14, 2002

Docket: 01-CL-4155

Peter Griffin, Matthew Sammon (Student-at-law), for PSINet Inc.

Lyndon Barnes, Fred Myers, for Companies, CCAA Applicants

Heath Whiteley, acting for Shimigelsky and Campbell

Markus Koehnen, for Cisco Inc.

George Benchetrit, Vern Da Re, for Comdisco Canada Ltd.

Raymond Slattery, for Royal Bank of Canada

Geoffrey Morawetz, Candy Schaffel, for PricewaterhouseCoopers Inc., Monitor

Craig Martin, for BCE Emergis Inc.

Michael MacNaughton, for 360 Networks Inc. and 360 Urbanlink Ltd.

Nancy Roberts, for PSINet Realty Canada Ltd., PSINetworks Canada Ltd., Toronto Hosting Centre Ltd., PSINet Limited

Farley J.:

[1] PSINet Inc. (Inc.) moved for permission to effect a registration of its General Security Agreement (GSA) as to the assets and undertaking of its Canadian subsidiary PSINet Ltd. (Ltd.) pursuant to s. 30(6) of the *Personal Property Security Act (PPSA).* Inc.'s 1996

registration expired February 19, 2001. Until evidence of a GSA was located in Ltd.'s minute books on December 3, 2001, it appears that management in place at Inc. when Ltd. and related Canadian subsidiaries filed for *Companies' Creditors Arrangement Act (CCAA)* protection on May 31, 2001 was unaware of either the existence of a GSA, its 1996 registration in Ontario under the *PPSA* or its expiry of registration. Stephanie O'Donnell, the Administrative Assistant for International Affairs at Inc., had been advised in clear and unambiguous terms in FULL CAPS of the need for Inc. to register when counsel reported to her in 1996. Apparently, there was no reminder or tickler system at Inc. Ms. O'Donnell left Inc. in April, 2001. All that was found in Inc.'s files was a note on the file referring to the need to re-register.

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[2] Up until the "discovery" of December 3, 2001, Inc. and everyone else appear to have been operating as to Ltd. on the basis that Inc. was an unsecured creditor as to its $220 million claim out of a total of $300 million of unsecured claims. There were some secured creditors as to equipment whereby security interests were the subject of purchase money security interests (PMSIs) registered.

[3] Inc. only registered its GSA in Ontario. That means that it was unsecured as to assets outside Ontario vis-à-vis other creditors (but not vis-à-vis Ltd.). When questioned today as to the percentage of value of assets in Ontario, the best ballpark estimate was in excess of 80%. If Inc. is allowed to re-register its GSA then there will be a tremendous devaluation of the expected dividends of the unsecureds. One would have to observe that while it is unfortunate for Inc. (and those claiming through Inc.) that Inc. did not have in place any financial system in respect of providing for registration, it is also unfortunate for any creditor dealing with Ltd. in the half year period to December, 2001, to be operating under the understanding as fostered by Inc. that Inc.'s very significant creditor's claim was unsecured. It is also interesting to note that Inc. has presented its case today with one of the arguments being that the other creditors ought not to be the beneficiaries of a windfall; the other side of that coin when looked at slightly at an angle is that Inc., if permitted to re-register, will be the recipient of a benefit which it was not expecting to receive until the discovery of December 3, 2001 lit the lamp of hope.

[4] Section 30(6) of the *PPSA* provides as follows:

> Where security interest that is perfected by registration becomes unperfectcd and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of the first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

That section does not mention or allude to any concern that should be had as to the negligence of the party which leads to the unperfection. Who is allowed to take advantage of the interim state of unperfection—it is only someone who "acquired rights in all or part of the collateral during the [unperfection period]". An unsecured creditor has no rights in the collateral at any time by the very definition of being an *unsecured* creditor. See *Yustin Construction Ltd., Re,* [1986] O.J. No. 28 (Ont. Bktcy.) at p. 10; Alan Schwartz, "Security Interests and Bankruptcy Priorities: A Review of Current Theories," (1981) Journal Legal Studies 1 at pp. 7-8.

[5] Royal Bank argues that it may have taken a different tack on things prior to December 3rd, if it had known that Inc. had a GSA and perforce if it had known that Inc. might assert a s. 30(6) "right". Cisco essentially argued the same. Both these are equipment financers as to whom there was a dispute as to whether they were unsecured as to a portion of their claims (i.e. that the value of their collateral was not sufficient to equal or exceed their claims). Cisco reached an agreement as to its claim in the sense that in a three way stipulation approved by this court and the U.S. Bankruptcy Court it agreed to a $5 million U.S. payment with the balance of $15 million being the subject of an unsecured claim. Royal Bank has not agreed to any such split; its position is that it should be paid out its claim in full. Another creditor, Comdisco, regards its Lease Agreement as a true lease giving it security without *PPSA* registration. However, it appears to have a fall back that if it is an unsecured creditor, then it asserts that the unsecureds will be unfairly treated as they will receive no dividend if Inc. is permitted to re-register (this overlooks that Inc. would remain unsecured as to any assets of Ltd. outside of Ontario, but as discussed, given the 80% ballpark, that would roughly mean that the expected dividend would be cut by a factor of 5 and to the extent that Ontario has more than 80%, that factor will climb). Jeffrey Shimigelsky and Judy Campbell are unsecured creditors to the tune of $6 million. They also filed an affidavit which specifies that they have been directly prejudiced by Inc.'s unawareness/indicating that it was an unsecured creditor. Their direct prejudice appears to be that they have expended money on legal costs over the

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six month period in participating in the *CCAA* proceeding. At page 21 of his affidavit, Shimigelsky states:

> Over the past six months we have been led to the end of this process and were reasonably hopeful that there would be some modest reward. I can say with some considerable certainty that had we received advice from our legal counsel back in June of 2001 that there was a $300 million security package which would likely take all of the rewards associated with the sale of the assets of PSINet Limited, that it is unlikely that we would have participated in the process except modestly. Both Judy and I have spent some considerable time and legal costs in participating to date.

I have considerable sympathy for his position and appreciate his frustration. However, he does appear to be under the impression (not unreasonably so) that Inc., if re-registration is permitted, will take all the available "pot" and leave nothing for the unsecureds whereas, as discussed above, that would not be completely accurate. While the picture is not completely black, it is a very, very dark shade of grey however. Secondly, he does forthrightly acknowledge that he and Campbell would have "participated... modestly" in the process.

[6] Paragraph 15 of the original *CCAA* Order granted by me provides inter alia that during the Stay Period (now continued to date) "the right of any person... to assert, enforce or exercise any right... of... registration... be and is hereby restrained." Should the stay be lifted to allow registration of Inc.'s GSA under the *PPSA*? Inc. points to various cases where the courts have lifted stays to allow for the filing of liens and similar relief: see *Anvil Range Mining Corp., Re* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div. [Commercial List]) at p. 95; *Re Olympia & York Developments Ltd.* (1992), A.C.W.S.J. Lexus 38651 at paras. 11-14; *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), at pp. 310-11; *Woodward's Ltd., Re* (1993), 100 D.L.R. (4th) 133 (B.C. S.C.), at pp. 147-50; *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.,* [1994] O.J. No. 953 (Ont. Gen. Div. [Commercial List]) at para. 2.

[7] It may well be that the re-registration provisions of the *PPSA* need some looking at by the Legislature. This subject case may be a catalyst for that. However, it does seem fair that "everyone" is presumed to know the state of the *PPSA* register and it would appear as well the fact that the law permits an unperfeeted security claim to become re-perfected, subject only to the limitations of s. 30(6).

[8] Neither Royal Bank nor Cisco nor 360 Networks filed an affidavit. It would inappropriate for the court to assume that they would have taken a different tack (and further that, if they had,

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they would have succeeded in either their negotiations or in court if they had taken that different tack). That being said, one still has considerable sympathy for their concern and their frustration.

[9] However, with respect to estoppel, it would appear that Denning M.R.'s minority views in *Brikom Investments Ltd. v. Carr,* [1979] 2 All E.R. 753 (Eng. C.A.) (although possibly being accepted in England thereafter) have not ever been accepted in Canada. See G.H. Fridman, *The Law of Contract in Canada,* (4th ed, Carswell) at pp. 142-3; *Fort Frances (Town) v. Boise Cascade Canada Ltd.* [1983] 1 S.C.R. 171 (S.C.C.), at pp. 17-18 (of printout).

[10] With respect to *CCAA* principles, Cisco asserts that *Sharp-Rite Technologies Ltd., Re,* [2000] B.C.J. No. 477 (B.C. S.C. [In Chambers]) and its reasoning demonstrate that the stay ought not to be lifted relying on paras. 35 and 51. However, it appears quite clear that the security documentation in place there bore absolutely no resemblance to the actual transaction—see paras. 7-13. Under those circumstances, I do not see that *Sharpe-Rite* is of much assistance in the present situation. As well, *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449 (Ont. C.A.) and *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.,* [1997] O.J. No. 4457 (Ont. Gen. Div. [Commercial List]) are both cases where the Plan had already been approved; what we are dealing with here is prior to any Plan being advanced, let alone approved. See the previous cases mentioned where a stay has been lifted to perfect an existing right (as opposed to pursuing a claim).

[11] I do not see how Cisco (or Royal Bank) have demonstrated that they acquired some interest in assets outside their PMSI as a result of Inc.'s period of unperfection, nor do I see that Inc. is claiming that it has anything but a subordinate security interest to their PMSIs. In that regard, there seems to be nothing of assistance to Cisco or Royal Bank in *Ziegel & Denomme,* The Ontario Personal Property Security Act Commentary and Analysis (1994, Canada Law Book) pp. 238-9.

[12] Royal Bank proposes that I accept that the Monitor, PricewaterhouseCoopers Inc., (PWC) has been a representative of the creditors so that s. 20(1)(b) of the *PPSA* be invoked so that the unperfected security interest of Inc. not be affected vis-à-vis the Monitor. It relies on *Richard H. McLaren,* 2002 Annual Ontario Personal Property Security Act (Carswell) at p. 91; however, Professor McLaren gives no case or other jurisprudence to support his observation that a Monitor represents the interests of the creditors in the same way that a

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trustee in bankruptcy, receiver or liquidator does. In these present circumstances, and the terms of appointment, I do not see PWC in that role. *Bramalea Inc. (Trustee of) v. KPMG* (1999), 13 C.B.R. (4th) 195 (Ont. S.C.J. [Commercial List]) appears to turn on its particular circumstances; it also appears that the monitor there was engaged prior to the *CCAA* amendments which made a monitor mandatory.

[13] Nor do I see that it is appropriate to appoint an Interim Receiver pursuant to s. 47 of the *BIA* at the present time.

[14] In the end result while I understand the frustration of the other creditors, I do not see that Inc. has put itself into a position whereby it should be prevented from re-registering. However, that is a discretionary decision and it appears to me that it would be just and reasonable to impose certain conditions as a prerequisite to that permission. Firstly it is obvious that the cause of the problems in the imperfection has been Inc.; therefore Inc. should be responsible for everyone's costs in attending today to deal with its request to re-register, such costs are to be the reasonable solicitor-client costs to be paid forthwith (I assume that Inc. will be able to agree on these costs without difficulty) so that they can be paid before January 31, 2002. Secondly I note that Limited is a wholly owned subsidiary of Inc. and that it and the other applicants were described in the initial material as being part of the PSINet group headed by Inc. I also note Keith Halbert's affidavit of September 10, 2001 where he stated: "none of the applicants' creditors hold general security over the assets of the applicants, the proceedings of sale are expected to be sufficient for significant recovery by the applicants' unsecured creditors." It would of course be difficult for any creditor of Ltd. to specify exactly how much costs (out of pocket, external legal and internal time) Inc.'s unawareness during the six month period has cost them; certainly the "frustration cost" would be impossible to measure. It would be wasteful to now constitute a separate claim process to determine what those costs were for any creditor. I understand however that Ltd. has in hand two plan alternatives. It strikes me that the one which releases should now be adjusted by a material (albeit relatively modest amount) in favour of the non-Inc. creditors as compensation for the aforesaid costs. I trust that Inc. will be encouraging Ltd. to be "generous" in this regard so that, if the plan is in fact approved by the requisite majorities (keeping in mind that this "generosity" may be of some assistance in that regard), the lack of an appropriate adjustment will not become a factor in any sanction hearing.

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[15] The stay is lifted to permit Inc. to register upon Inc. agreeing to such conditions above. [Inc. accepted those conditions on January 16, 2002.]

[16] It seems to me that Ltd. is proceeding diligently and in good faith to present a plan. In fact, it is proposed that a plan be circulated by January 21, 2002 (there being at the present an "A" plan and a "B" plan depending on this decision; I do not see that my requirement that one of these plans be adjusted to be a "C" plan would delay that filing given that this decision will be available January 15, 2002). Therefore I see no reason to lift the stay to allow Royal Bank to proceed with its bankruptcy petition. Royal Bank's cross-motion is dismissed. Ltd.'s motion for the stay extension and ancillary relief is granted. I note that a bankruptcy of Ltd. would take it outside the cross-border protocol with attendant problems in resulting cross-border matters. Orders accordingly.

[17] Stay extension granted to April 15, 2002.

Motion granted.

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RAVINDER KUMAR SHARMA
Plaintiffs (Moving Parties)

- and-

TIMMINCO LIMITED et al.
Defendants (Responding Parties)

Court File No. CV-09-378701-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

BOOK OF AUTHORITIES
OF JOHN WALSH
(Motion returnable March 26, 2012)

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