Action No.: 0901-13483

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TRIDENT EXPLORATION CORP. ULC, FORT ENERGY CORP. ULC, FENERGY CORP. ULC, 981384 ALBERTA LTD., 981405 ALBERTA LTD., 981422 ALBERTA LTD., TRIDENT RESOURCES CORP., TRIDENT CBM CORP., AURORA ENERGY LLC., NEXGEN ENERGY CANADA, INC. AND TRIDENT USA CORP.

BRIEF OF AUTHORITIES OF FARALLON CAPITAL MANAGEMENT L.L.C., GOLDMANS SACHS ASSET MANAGEMENT AND MOUNT KELLETT CAPITAL MANAGEMENT LP

(Motion Returnable October 6, 2009)

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Lawyers for Farallon Capital Management L.L.C., Goldmans Sachs Asset Management, Mount Kellett Capital Management LP, the Required Lenders under the Trident Canada USD$500,000,000 Trident Canada Second Lien Credit Agreement

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Tab 1

19 C.B.R. (5th) 54

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Muscletech Research & Development Inc., Re
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO
Ontario Superior Court of Justice [Commercial List]
Farley J.
Heard: January 18, 2006
Judgment: January 18, 2006
Docket: 06-CL-6241

Counsel: Jay Carfagnini for Muscletech Research and Development Inc. et al.

Derrick Tay for Paul Gardiner, Iovate Health Sciences Inc.

Natasha MacParland for RSM Richter Inc., Proposed Monitor

Subject: Insolvency

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- Miscellaneous issues

Group of companies applied for initial order under Act -- Application granted -- Companies were insolvent given imbalance of assets to debt -- Debt was over $5,000,000 threshold of Act -- Stay of products liability actions against companies would facilitate bona fide resolution discussions forming basis of plan of compromise -- It was practical to have actions involving applicants and non-applicants dealt with together as latter were derivative -- Companies were all registered in Ontario and had substantial connection to it.

Cases considered by Farley J.:

> Babcock & Wilcox Canada Ltd., Re (2000), 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) -- considered
>
> Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) -- referred to
>
> Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) -- referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 -- referred to

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

Generally -- referred to

APPLICATION by group of companies for initial order pursuant to Companies' Creditors Arrangement Act.

Farley J.:

1 This is a short endorsement which may be elaborated upon.

2 I am satisfied that the applicants are insolvent given their imbalance of assets to debt (both determined and contingent liability as to product liability suits) and that the debt of the applicant group is over the $5 million threshold as to the CCAA test.

3 The product liability situation vis-à-vis the non-applicants appears to be in essence derivative of claims against the applicants and it would neither be logical nor practical/functional to have that product liability litigation not be dealt with on an all encompassing basis: see *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). It is understood that this stay will likely facilitate the entering into of overall *bona fide* resolution meetings/discussions which would form the foundation of a plan of reorganization and compromise.

4 I further understand that the applicants, all of which are Canadian companies registered in Ontario and with the substantial connections to this jurisdiction as set out a paragraph 67 of the applicants' factum:

> 67. In addition to the location of each Applicant's registered office, it is respectfully submitted that the following factors further support a finding that each Applicant's COMI is Ontario, Canada:
>
> (a) each of the Applicants was incorporated in Ontario;
>
> (b) each Applicant's mailing address is an Ontario address;
>
> (c) the principals, directors and officers of the Applicants are residents of Ontario;
>
> (d) all decision-making and control in respect of the Applicants, including product development, takes place at the Applicants' premises located in Ontario;
>
> (e) the Applicants' principal banking arrangements have been conducted in Ontario through the Canadian Imperial Bank of Commerce; and
>
> (f) all administrative functions associated with the Applicants and all of the employees that perform

> such functions, including general accounting, financial reporting, budgeting and cash management, are conducted and situated in Ontario.

will be making an application later today in the Southern District of New York U.S. Bankruptcy Court for recognition, pursuant to Chapter 15 of the US Bankruptcy Code, of the Initial Order which I am granting. In that respect, I would observe that as I discussed in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), the courts of Canada and of the US have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency.

5 As this order today is being requested without notice to persons who may be affected, I would stress that these persons are completely at liberty and encouraged to use the comeback clause found at paragraph 59 of the Initial Order. In that respect, notwithstanding any order having previously been given, the onus rests with the applicants (and the applicants alone) to justify *ab initio* the relief requested and previously granted. Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question. This endorsement is to be provided to the creditors and others receiving notice.

6 Order to issue as per my fiat.

Application granted.

END OF DOCUMENT

Tab 2

7 C.B.R. (5th) 102

C

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General Chemical Canada Ltd., Re
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GENERAL CHEMICAL CANADA LTD.
AND IN THE MATTER OF THE APPLICATION OF GENERAL CHEMICAL CANADA LTD.
Ontario Superior Court of Justice [Commercial List]
Farley J.
Heard: January 19, 2005
Judgment: January 19, 2005
Docket: 05-CL-5712

Counsel: Steven J. Weisz, Amanda B. Kushnir for Applicant, General Chemical Canada Ltd.

Ashley J. Taylor for Proposed Monitor, PricewaterhouseCoopers Inc.

David Chernos, Marc Lavigne for Honeywell ASCa Inc.

Mark Laugesen for Harbert Distressed Investment Fund, L.P. and Harbert Distressed Master Fund, Ltd.

Lewis Gottheil for Canadian Auto Workers

Subject: Insolvency

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

Application was made for stay of proceedings and ancillary relief in Companies' Creditors Arrangement Act proceeding -- Application granted -- Company was over threshold in terms of Act -- Parties were encouraged to use comeback clause.

Statutes considered:

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

Generally -- referred to

APPLICATION was made for stay of proceedings and ancillary relief in Companies' Creditors Arrangement Act proceeding.

Farley J.:

1 General Chemical Canada Ltd., the applicant, is certainly over the threshold re CCAA. Under the circumstances, it is appropriate to grant it a stay and the ancillary relief requested. Harbert, the lender and beneficial part shareholder was supportive of the application based on its position being carved out; it now opposes the application because I am not able to rationalize the carve out based on the information before me in the material nor as presented. That said and notwithstanding Harbert's opposition, the order is to issue as per my fiat.

2 Interested parties are encouraged to use the comeback clause on a timely basis. Of course it is desirable to discuss points of concern in a mutual *bona fide* way so as to see whether these concerns can be consensually resolved. In any comeback situation, the onus rests solely and squarely with the applicant to demonstrate why the original or initial order should stand as is.

3 There are some very practical and real issues to be dealt with on a functional basis. They should not be relegated to being dealt with in either a leisurely pace way or on a paper (as opposed to functional) basis. I would expect that every involved government department would assist in this functional solution.

Application granted.

END OF DOCUMENT

Tab 3

2009 BCSC 13, [2009] B.C.W.L.D. 2279, [2009] B.C.W.L.D. 2277, 52 C.B.R. (5th) 30

C
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Encore Developments Ltd., Re
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT R.S.C. 1985, c. C-36
And IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, S.B.C. 2002, c. 57
AND IN THE MATTER OF ENCORE DEVELOPMENTS LTD., PATTON CONSTRUCTION (2002) LTD. and 0796269 B.C. LTD.
British Columbia Supreme Court
D. Brenner C.J.S.C.
Heard: December 11, 2008
Judgment: January 21, 2009
Docket: Vancouver S088161

Counsel: H. Ferris for Petitioner

J.I. McLean for Bancorp Financial Services Ltd

J. Webster Q.C., R. Pearce for Canadian Western Bank

W.D. MacLeod for Invested Financial

C. Emslie for P3 Holdings Inc.

J. Grieve for Monitor

P. Reardon for First Calvary Savings & Credit Union

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

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

Real estate developer had secured debt totalling $29 million and unsecured debt of $2.5 million -- In reliance upon developer's representations, first day Companies' Creditors Arrangement Act order was issued ex parte -- Later that day, developer entered into loan agreement with onerous terms, none of which were disclosed at ex parte hearing -- Fundamental premise of CCAA filing was that developer had substantial equity in its projects and that those projects would generate sufficient funds to complete remaining projects -- Two secured creditors brought application to set aside and vacate first day order -- Application granted -- Contrary to developer's representations at ex parte hearing, there was likely substantial shortfall to secured lenders -- There was no principled basis for putting in place or maintaining stay that would prevent creditors from enforcing their security in conventional manner should they so choose -- Order was set aside at outset as there was no justification for filing and proceeding ex parte.

2009 BCSC 13, [2009] B.C.W.L.D. 2279, [2009] B.C.W.L.D. 2277, 52 C.B.R. (5th) 30

Bankruptcy and insolvency --- Practice and procedure in courts -- Application to set aside

Real estate developer had secured debt totalling $29 million and unsecured debt of $2.5 million -- In reliance upon developer's representations, first day Companies' Creditors Arrangement Act order was issued ex parte -- Later that day, developer entered into loan agreement with onerous terms, none of which were disclosed at ex parte hearing -- Fundamental premise of CCAA filing was that developer had substantial equity in its projects and that those projects would generate sufficient funds to complete remaining projects -- Two secured creditors brought application to set aside and vacate first day order -- Application granted -- Contrary to developer's representations at ex parte hearing, there was likely substantial shortfall to secured lenders -- There was no principled basis for putting in place or maintaining stay that would prevent creditors from enforcing their security in conventional manner should they so choose -- Order was set aside at outset as there was no justification for filing and proceeding ex parte.

Statutes considered:

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

s. 244 -- referred to

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

Generally -- referred to

s. 11(a) -- considered

APPLICATION by creditors to set aside and vacate order granted ex parte.

***D. Brenner C.J.S.C.*:**

1 This is an application by Canadian Western Bank ("CWB") and Bancorp Financial Services Ltd. ("Bancorp") to set aside and vacate *nunc pro tunc* the first day *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*"CCAA"*) order granted *ex parte* on November 21, 2008. At the conclusion of counsels' submissions I allowed the application. My reasons follow.

2 Encore is a real estate developer. It owns six properties in the Okanagan area that it has in various stages of development. When the first day order was granted no work was underway on any of the projects: a number were substantially completed; the others consisted of bare land.

3 Encore has six lenders who hold security on various of the properties. The secured debt totals $29 million; the unsecured debt is $2.5 million. CWB and Bancorp hold a significant amount of Encore's secured debt.

4 On November 21 in reliance upon Encore's representations to the court the first day order was issued *ex parte*. In addition to the customary 30 day stay, it provided for an administrative charge of $300,000, a D & O charge of $30,000, an authorization for DIP financing up to $500,000 pending the comeback hearing, the appointment of a Chief Restructuring Officer with the costs to be included in the administration charge. The comeback hearing was scheduled for December 19, 2008.

5 The first day order was issued during the morning of November 21; later that day Encore received DIP loan

terms from P3 Holdings Ltd. (which was not represented by Mr. Emslie until the day before this hearing). These included: an interest rate of 24% compounded monthly, a $120,000 interest reserve hold back, a $30,000 commitment fee and a prepayment penalty fee. Presumably the terms of the DIP loan entered into that afternoon were not available in the morning as none of the terms were disclosed to the court during the course of the *ex parte* hearing. On November 27, the DIP loan was entered into on the terms as presented to Encore November 21.

6 The fundamental premise of the *CCAA* filing was that Encore had substantial equity in its projects and that the sale of the remaining units in the four substantially completed projects would generate sufficient funds to fund the balance of the costs that Encore would incur in completing the remaining projects (principally the Marascape project) which is estimated at $41 million.

7 The applicants say this premise was flawed; rather than there being "millions of dollars in equity in the other properties" as represented to the court at the *ex parte* hearing, the applicants say "there is no equity in these projects" and that "the material before the court was flawed and the factual underpinning of the Initial Order cannot withstand critical analysis".

8 They submit:

1. All of Encore's projects were either completed or consisted of bare land.

2. There is a multi-million dollar shortfall to the existing mortgage lenders.

3. The Marascape project has an existing shortfall on an "as is" basis, no hope of being refinanced, and no realistic possibility of being built and sold in the current market.

4. The entire real estate market in the Mara Lake area has collapsed.

Encore's Projects

Brookstone

9 This is a completed 32 unit project outside of Kelowna. Sales are pending on two units, 24 units remain to be sold. Encore calculates its equity in this development at $307,000. However the applicants say this presumes that all of the remaining units will sell for full list prices, that it fails to allow for sales commissions and finally, that it fails to take into account the carrying cost of the units until sold. An allowance for sales commissions alone reduces the equity figure to almost zero. Any significant carrying costs will tip the project negative. Given the recent changes in the real estate market the assumption of all sales at full list price is also doubtful.

Fifth Avenue Flats

10 This is bare land that was appraised in June 2008 at $1,660,000. After deducting the secured debt, Encore calculates its equity at $120,500. However, again no allowance is made for sales commission or carrying costs. In addition, the value has likely eroded since the June appraisal.

Silver Ridge

11 This is a completed bare lot subdivision outside of Vernon. There are 48 lots left unsold. On a gross listed

value of $10,040,051 for these lots, Encore on November 21 estimated an equity of $2,043,822.

12 However, Bancorp says its second mortgage debt was understated by approximately $170,000. No selling commissions or interest charges for the sales period were included.

13 A February 12, 2008 appraisal done for Encore values the lots at $9,544,000; a current appraisal prepared for Bancorp values Silver Ridge at $7,825,000. On November 21, the Bancorp and Canadian Western Bank mortgages totalled $7,809,000. Bancorp's appraiser estimates it will take five years to sell these lots. If this were to occur, Bancorp estimates that Encore would suffer a $3 million shortfall on this project.

Tabor Drive

14 There is one remaining unsold house in this development. Equity is estimated at $64,331 based on a sale at the list price with no carrying costs.

Lakeshore

15 The appraised value of these lands presented as a four residence development was $3,510,000. However if one takes the projected construction and development costs as set out in the petitioner's appraisal and adds it to the debt there is a net equity shortfall of approximately $600,000.

16 In summary for these five projects, instead of equity projected in the petition of $2.5 million, a more realistic estimate would produce an equity figure of zero or less.

Marascape

17 The Marascape project is raw land on Mara Lake on which the petitioner originally proposed to develop 98 units for sale. In the petition, Encore set out a 2007 appraised value of the project once completed of $67,940,000; the raw land was valued then at $9,490,000. Encore estimated a profit on the development of $13,500,000.

18 However there is current debt on the lands of $11,500,000, which represents a $2 million shortfall from the 2007 appraised value.

19 Bancorp also says that both the market and the economic conditions have changed markedly since the 2007 appraisal. It says the real estate market in the area has virtually collapsed. Over 500 units are either under construction or in the final stages of completion and available for sale. There have been only two sales in the last six months. Many of these other projects are financially distressed and prices will likely be reduced.

20 Finally Bancorp points out the petitioner itself appears to acknowledge the doubtful viability of the Mara development as presently configured. In paragraph 101(b) of its petition Encore says that it is seeking funding "to conduct a development assessment to determine the costs viability of proceeding with construction on the Marascape...".

21 At the time of the first day order, Encore's business consisted of three pieces of bare land, Fifth Avenue Flats, Marascape and Lakeshore, one unsold house at Tabor Drive and two essentially completed subdivisions of vacant lots. There was no ongoing work being carried out on any of these projects.

22 Section 11 of the *CCAA* directs the court not to make an initial order unless:

> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate.

23 Here no such circumstances existed. There was no project development work in progress. The projects were either bare land or completed subdivisions awaiting sale. There was no active business being carried out that required shielding by a *CCAA* stay.

24 It is also probable that there was no equity in any of the projects. Contrary to the representations of Encore at the hearing of the petition, the reality is that there is a likely substantial shortfall to the secured lenders. The Marascape project has an existing shortfall on an "as is" basis.

25 There is really no principled basis for putting in place or maintaining a stay that would prevent the real estate lenders from enforcing their security in the conventional manner should they so choose. Accordingly, I conclude that the first day order must be set aside.

26 The next issue is whether the set aside should be *nunc pro tunc*. In the rather unusual circumstances of this case, I concluded that it should be set aside from the outset.

27 This application was filed and heard on an *ex parte* basis. On such an application where the relief sought affects the rights of others, the applicant must demonstrate to the court the need for urgency and the reason why those against whom relief is sought *ex parte* are not being given notice. In addition, the applicant must use utmost good faith to disclose to the court fairly and frankly all of the relevant information, particularly as to urgency and the reason as to why notice should not be given.

28 Here there was no urgency. Encore was not operating; it was effectively shut down. Because of Encore's representation to the court that it had equity of approximately $2.5 million, the true exposure of the secured lenders to the costs of the *CCAA* was not disclosed. With the true equity being zero or negative, it is clear that this *CCAA* could only be run by priming the mortgage lenders.

29 In this case where the cost of the *CCAA* proceeding was to fall solely on the shoulders of one creditor group, there was no justification for filing and proceeding *ex parte*. If Encore were an operating company with many employees, and if it were faced with being shutdown by the security enforcement steps of one or more of its lenders, then an *ex parte* application might have been understandable. No such circumstances exist in this case.

30 In the absence of such factors, proceeding *ex parte* was simply unjustified. There was no evidence that any creditor had seized any assets, or was on the verge of seizing any assets. Neither was the petitioner's condition emergent, in the sense that a payroll was about to be missed or that Encore's viability was about to end.

31 The terms of the DIP loan in the case at bar only serve to emphasize this. To describe them as onerous would be an understatement. There was no justification for concluding such a DIP without representation from the secured lenders who would have to bear the entire cost of the restructuring exercise.

32 There are other considerations in this case. The petitioners were said to have "virtually exhausted all of their cash reserves" and "are no longer able to fund amounts owing to the various lenders". No mention was made during the November 21 hearing of any of the debtors' assets which might be utilized. These include payables from Mr. Patton, the principal of Encore, and Patton Farms of over $1.3 million.

33 Neither was the court advised that two days before the November 21 hearing a mortgage securing either an advance to Patton by, or securing repayment of $800,000 to Carol Patton, presumably Mr. Patton's wife, was put on the Patton Farms property.

34 Disclosure was made at the hearing of a demand for payment by Bancorp on its second charge on the Silver Ridge property. What was left unsaid was that it had not served a s. 244 notice under the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3. This section provides for a 10 day notice period in the event the lender chooses to proceed with realization. Hence even if Bancorp had been given notice of the November 21 application, it would not have been able to take any steps until it had served the s. 244 notice and until the 10 day notice period had elapsed. That would have provided a more than sufficient window in which to serve Bancorp and hold the November 21 hearing before Bancorp could take any realization steps.

35 There was simply no justification for proceeding *ex parte* in this case and hence it is appropriate that the first day order be set aside from the outset.

Application granted.

END OF DOCUMENT

Tab 4

2009 BCSC 145, [2009] B.C.W.L.D. 2022, [2009] B.C.W.L.D. 2023, 52 C.B.R. (5th) 47

C
2009 CarswellBC 285

Marine Drive Properties Ltd., Re
In the Matter of Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended
And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57
And In the Matter of Marine Drive Properties Ltd., Wyndansea Hotel Inc. and 0707624 B.C. Ltd.
British Columbia Supreme Court
Butler J.
Heard: January 29-30, 2009
Judgment: February 10, 2009
Docket: Vancouver S090306

Counsel: Mary I.A. Buttery, Owen J. James for Petitioners

E. Jane Milton, Q.C. for Ernst & Young Inc.

John I. McLean, V. Florianova for Bancorp Financial Services Inc., Bancorp Balanced Mortgage Fund Ltd., Cooper Pacific Mortgage Investment Corporation, Liberty Holdings Excell Corp.

Mark M. Davies for Liberty Holdings Excell Corp.

Peter Vaartnou for CareVest Capital Inc.

Gordon M. Elliott for Gulf & Fraser Fishermen's Credit Union

Kimberly S. Campbell for Folio Hotel & Resort Architecture, Ronald Lea Architect Ltd., William J. Reid Architect Ltd., Mark Whitehead Architect Ltd., Jacques Beaudreault Architect Ltd., Mark E.B. Thompson Architect Ltd.

Paul Hildebrand for Bigleaf Ventures Ltd., Samel Holdings Ltd., Adrian Karasz, Andriana Karasz, Cy McCullough, Caralyn Patricia Bennett, Dennis Robert Ohman, Leanne Claire Ohman, Keith Charles Shearer, Shelley Rose Price-Shearer

Subject: Insolvency; Civil Practice and Procedure

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

Debtor wished to develop property -- Debtor became insolvent and entered protection under Companies' Credit-

ors Arrangement Act on ex parte proceedings -- Creditors brought application to set aside order -- Application granted -- Application for original order should not have been made on ex parte basis -- Creditors were known and service on them was not impracticable -- Situation was not so urgent as to require ex parte proceedings -- Although order nisi of one creditor was about to expire and foreclosure proceedings were possibility, process was ongoing and before court -- Existence of equity in lands was not determinative factor in granting protection under Act, rather lack of pending moves by creditor was important factor -- Possibility existed that land held little to no equity -- No circumstances existed which made it appropriate to continue order -- Extremely unlikely that any arrangement would be acceptable -- Debtor had been unable to secure financing -- Interest on various loans of creditors approached $500,000 monthly and proceedings could create unnecessary expenses -- Debtors undertook protection under Act to attempt to secure new funding at expense of current creditors -- Development project had halted and was not ongoing business -- Ordering partial stay inappropriate -- Potential benefit to community not important factor for consideration.

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

Debtor wished to develop property -- Debtor became insolvent and entered protection under Companies' Creditors Arrangement Act on ex parte proceedings -- Creditors brought application to set aside order -- Application granted -- Application for original order should not have been made on ex parte basis -- Creditors were known and service on them was not impracticable -- Situation was not so urgent as to require ex parte proceedings -- Although order nisi of one creditor was about to expire and foreclosure proceedings were possibility, process was ongoing and before court -- Existence of equity in lands was not determinative factor in granting protection under Act, rather lack of pending moves by creditor was important factor -- Possibility existed that land held little to no equity -- No circumstances existed which made it appropriate to continue order -- Extremely unlikely that any arrangement would be acceptable -- Debtor had been unable to secure financing -- Interest on various loans of creditors approached $500,000 monthly and proceedings could create unnecessary expenses -- Debtors undertook protection under Act to attempt to secure new funding at expense of current creditors -- Development project had halted and was not ongoing business -- Ordering partial stay inappropriate -- Potential benefit to community not important factor for consideration.

Cases considered by Butler J.:

> Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) -- considered
>
> Encore Developments Ltd., Re (2009), 2009 BCSC 13, 2009 CarswellBC 84 (B.C. S.C.) -- considered
>
> Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada) [1991] 2 W.W.R. 136 (B.C. C.A.) -- referred to
>
> Redekop Properties Inc., Re (2001), 2001 BCSC 1892, 2001 CarswellBC 3560, 40 C.B.R. (5th) 62 (B.C. S.C. [In Chambers]) -- considered
>
> Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) -- distinguished

Statutes considered:

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

Generally -- referred to

s. 11 -- considered

s. 11(1) -- referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 52(12.1) [en. B.C. Reg. 191/2000] -- referred to

APPLICATION by creditors to set aside order under Companies' Creditors Arrangement Act.

***Butler J.*:**

1 On January 15, 2009, I granted an initial order in this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") proceeding ("the Order"). The Order authorized Marine Drive Properties Ltd. ("Marine Drive"), Wyndansea Hotel Inc. ("Wyndansea"), and 0707624 B.C. Ltd. (collectively "the Petitioners") to file a formal plan of compromise or arrangement and stayed all proceedings against the Petitioners. The Petitioners appointed Ernst & Young Inc. as monitor and created a directors' charge of $75,000 and an administration charge of $500,000. The Order gave both of these charges rank in priority to the existing registered mortgage security interests against the Petitioners' real property. The Order provided that the Petitioners' application for debtor in possession ("DIP") financing be heard after service on the Petitioners' creditors of the Order and the originating materials.

2 The Petitioners brought their application on an *ex parte* basis. A number of the Petitioners' secured creditors have now brought this application to set aside the Order on a *nunc pro tunc* basis or, alternatively, to amend its terms to limit the administrative charge to $50,000 and to require a meeting of creditors to take place on February 13, 2009. The Petitioners oppose that application. They seek an order granting $1.7 million of DIP financing having priority over all other registered charges.

3 The Petitioners are all private companies incorporated under the laws of British Columbia. Elke Loof-Koehler is the sole director of all three companies. Marine Drive is a developer of resort and residential property on Vancouver Island. 0707624 B.C. Ltd. holds land in Rocky Point subdivision near Nanaimo as a bare trustee for Marine Drive. Wyndansea holds lands near Ucluelet, B.C. as a bare trustee for Marine Drive ("the Wyndansea Lands"). Marine Drive intends to develop the Wyndansea Lands as a luxury resort, including a Jack Nicklaus golf course, a 275 unit hotel, a lodge with 125 units, 561 resort condominiums, a deep-water marina, and 30 exclusive oceanfront home sites, referred to as "the Signature Circle".

4 Marine Drive has a number of additional real estate holdings. These include strata lots in the Tauca Lea Resort and Spa, unsold condominiums in The Ridge ocean view development, other oceanfront and ocean view lots on the West Coast, ocean view home sites near Nanaimo, and five 10-acre home sites in the Cariboo.

5 The Order covered all of the business interests of the Petitioners and stayed proceedings in respect of all of the assets of the Petitioners.

6 The Petitioners have six primarily first mortgage lenders. By far, the largest is a syndicate headed by Bancorp Financial Services Inc. (the "Syndicate"). The Syndicate mortgages secure approximately $37.5 million of debt. The loans of the other five first mortgagees total about $6.1 million. The total liabilities of the Petitioners, as set out in the petition, are $52,097,498. This includes second charges and liens of about $6.1 million and unsecured debt of about $3.3 million. The petition stated that the value of the property, based on appraisals or assessments from 2007 and 2008, was approximately $139,500,000. Based on these figures there would be equity of about $87,000,000.

Positions of the Parties

The Syndicate

7 The Syndicate argues that the Order should be set aside because:

> (a) the Petitioners failed to make full and frank disclosure at the *ex parte* hearing;
>
> (b) the application for the Order should not have been brought on an *ex parte* basis as there was no urgency; or
>
> (c) the Petitioners, in any event, did not meet the test under s. 11 of the *CCAA*.

8 The Syndicate alleges that some of the factual assertions put forward by the Petitioners at the *ex parte* hearing were not correct. As a result, it says that there was no proper underpinning for the Order. In addition, it says that the assertions failed to highlight the true status of other proceedings and wrongly characterized the Petitioners' situation as urgent. There is some overlap in these arguments, but the main features of these two arguments include:

> (1) the Petitioners' assertion that there was substantial equity in their real estate holdings was incorrect. In particular, the Syndicate says that the Wyndansea Lands had no equity and that this was known to the Petitioners as a result of their futile efforts to sell the properties, or to refinance or find an equity partner for the development. The Syndicate submitted an appraisal of the Wyndansea Lands dated January 27, 2009, prepared by Altus Group Ltd., in support of its argument that there is no equity in the real property holdings ("the Altus appraisal");
>
> (2) the Petitioners' assertion that it was imperative that their business and the development work on the Wyndansea Lands continue to be maintained and operated in the upcoming months was false. The Syndicate says that there is, in fact, no ongoing business or development work at the Wyndansea Lands; no such work has been carried on for more than a year. The Petitioners have almost no employees. The only ongoing work is the attempt to sell or refinance the properties;
>
> (3) the Petitioners' assertion that the current difficulties were caused by the credit crunch that occurred in the last few months, just as the prime Signature Circle lots were being released for sale, was false. The Syndicate notes that the work on the golf course stopped in 2007. A $1.9 million lien by the golf course contractor was filed in November 2007. The Signature Circle lots have been marketed since early 2007. While a number were sold, those sales, with one exception, did not

complete. The marketing consultant, S & P, has a $900,000 charge filed against the lands. The Syndicate argues that the Petitioners ran out of money long ago and it was disingenuous to blame their difficulties on the global credit crunch;

(4) the Petitioners' assertion that any plan or arrangement would be acceptable to the creditors was simply not true. In July 2008, the Syndicate and the Petitioners came to a tentative arrangement that was predicated on the agreement of the subsequent Wyndansea chargeholders. Their agreement could not be obtained. The Syndicate also notes that at the present time, the *CCAA* proceedings are opposed by more than 90% of the creditors, so it is extremely unlikely that any plan could receive the necessary support;

(5) the Petitioners' assertion that there was an immediate risk of the lenders attempting to enforce their security and realize on the Wyndansea Lands to the detriment of the overall development is inaccurate. The Syndicate says that foreclosure proceedings had been commenced by all lenders between April and August 2008. The Syndicate obtained an order nisi and a $23 million judgment against the Petitioners in July 2008. No further steps had been taken, but the Syndicate advised the Petitioners that it had ordered an appraisal and that it would be applying for an order for conduct of sale. Of course, to bring that application, the Syndicate would have had to give at least 11 days' notice. The other foreclosure proceedings were at a similar stage to the Syndicate's proceedings; and

(6) while there was no urgent reason for an *ex parte* application, the Petitioners would also have had no difficulty serving the respondents.

9 The Syndicate argues that even if there was proper disclosure, the Petitioners cannot show that they have met the test under s. 11 of the *CCAA*. It says that the Petitioners do not have an active business operation, only land holdings. There is no ongoing development work and no circumstances that justify *CCAA* protection. It says that the foreclosure proceedings provide sufficient protection to the Petitioners. The court can regulate the appropriate length of the redemption period, and oversee the conduct of sale and sale approvals. The Petitioners will continue to have the opportunity to seek joint venture partners or raise additional financing. Of course, under the foreclosure proceedings, this can be done without the additional cost of the directors' and administration charges and the DIP financing.

The Petitioners

10 The Petitioners argue that the Order can only be set aside on two bases: 1) non-disclosure of material facts that, had they been known, the Order would not have been made; or 2) new facts have been presented that convince the Court that the Order ought not to continue. With regard to the latter, the Petitioners say that the test is whether the restructuring is doomed to failure.

11 The Petitioners say that the standard for disclosure is not perfection but, rather, realistic full and frank disclosure. They say that standard has been met here. In response to the suggestion that the Petitioners should not have brought the motion without notice, they argue that it would have been impractical to have done so. In support, they state at para. 13 of their argument, the fact that "none of the parties were willing to proceed last Wednesday, January 21, 2009 (six days after the Order was pronounced), illustrates that none of the parties would have been willing to proceed on a day or two's notice of the application for the Initial Order".

12 The Petitioners rely on the first report of the monitor of January 28, 2009. In that report, the monitor says

that in its view "the Petitioners are acting in good faith and with due diligence during this *CCAA* proceeding". The monitor says that this is demonstrated by the Petitioners' agreement to release 0707624 B.C. Ltd. and the assets of Marine Drive from the stay of proceedings. The Petitioners ask that the Order be amended to reflect this change. This would leave only the Wyndansea Lands subject to the stay and the terms of the Order. The Petitioners acknowledge that it would be novel to have a stay order that operates only against some of the assets of a debtor company. However, they say that novelty alone is no reason to refuse to make the order.

13 In response to the suggestion that there is no equity in the Wyndansea Lands, the Petitioners say that they have not had an opportunity to respond to the Altus appraisal, which was delivered to them only a day before this application. While they admit to knowing for some time that the Syndicate had commissioned an appraisal, they do not have funds to retain an appraiser to respond. One of the proposed uses of the DIP mortgage funds is to retain an appraiser for this purpose. They also say that it cannot be concluded that there is no equity in the Wyndansea Lands in the face of the appraisal information put forward by the Petitioners. While the Altus appraisal opines that there is little or no equity, the information relied upon by the Petitioners suggests that there is substantial equity.

14 In response to the suggestion that there is no possibility of a plan being acceptable to creditors, it says that a number of the unsecured creditors support the *CCAA* proceedings. Further, the Court is entitled to take into account the stakeholders in the community who stand to benefit from the economic activity and municipal infrastructure that the project will bring to Ucluelet.

15 Finally, the Petitioners argue that it is appropriate for them to be given an opportunity to attempt a restructuring during the initial 30 day stay period. The intent of that initial 30 day stay is to give the debtor the chance to muster support for and justify the relief granted in the Order. It has not had the time it needs to do that, given the need to respond to the Syndicate's application. The Petitioners say that the stay should continue at least until the comeback hearing scheduled for February 12, 2009. In the meantime, the order for DIP financing should be made to allow them to respond to the Altus appraisal.

Issues

16 There are numerous contentious issues raised by these applications. The question of whether full and frank disclosure was made would require careful examination of the materials relied upon at the hearing on January 15, 2009, and careful review of the statements made by counsel. I do have serious concerns regarding the disclosure made at the time of the initial application. However, given the conclusions I have reached on the other issues, I have not undertaken that close review. I have considered the following two issues:

> (1) Should the application for the Order have been made on an *ex parte* basis?
>
> (2) Have the Petitioners met the test under s. 11 of the *CCAA* for an order such that the stay should continue?

17 For the reasons set out below, I have concluded that the application should not have been brought without notice and that, in any event, the Petitioners cannot meet the test under s. 11 of the *CCAA*. Accordingly, I am setting aside the Order.

Issue 1: Should the application for the Order have been made on an ex parte basis?

18 The *CCAA* provides in s. 11(1) that an application may be made "on notice to any other person or without notice as it may seem fit". The Petitioners took the position on both applications that it is the norm for *CCAA* proceedings to be commenced by an *ex parte* application.

19 While the Order on many *CCAA* proceedings is obtained on an *ex parte* application, that does not mean that an applicant does not have to establish that it was appropriate or "fit" to have the application heard without notice.

20 These proceedings are brought by petition. Rule 52(12.1) of the *Rules of Court*, B.C. Reg. 221/90, provides as follows:

> If the nature of the application or the circumstances render service of a petition or notice of motion impracticable or unnecessary, or in case of urgency, the court may make an order without notice.

21 The Rule sets out the circumstances under which it is appropriate or fit that an order be made without notice. In this case, the Petitioners were required to show that service of the petition was impracticable or that there was urgency requiring an immediate order.

22 Here, there could be no suggestion that service of the petition on the respondents was impracticable. All of the secured creditors and lien claimants had counsel known to the Petitioners. The Petitioners' rationale for the *ex parte* application was the existence of an urgent situation. In Ms. Loof-Koehler's affidavit, she referred to the Syndicate's order nisi, obtained on July 14, 2008, and to the existence of orders in the other foreclosure proceedings. She described the urgency in the following way:

> Given these orders, there is immediate risk that the lenders will attempt to enforce their security and realize on the Wyndansea lands. Such an application would be very detrimental to the overall development and would prejudice all of the stakeholders from maximizing realization from the assets.

23 While the redemption period in the order nisi was about to expire, there was no real urgency in the situation. As noted by the Syndicate, they were in a position to apply for an order for conduct of sale or for an order absolute of foreclosure, but in either case, the Petitioners would have notice and a full opportunity to respond. I was not told at the initial application that the Syndicate had advised the Petitioners that it was in the process of having the Wyndansea Lands appraised and that it would be applying for an order for conduct of sale. Indeed, the Petitioners had been supplying information to the appraiser for some time prior to the initial application. They had also advised the Syndicate that they would oppose the order for conduct of sale. The foreclosure proceedings were ongoing under the supervision of the court. There was no reason for the Petitioners not to give notice of the *CCAA* application, just as the Syndicate would have to give notice of the application for conduct of sale.

24 The Syndicate relies on *Encore Developments Ltd., Re*, 2009 BCSC 13 (B.C. S.C.), a very recent decision of Brenner C.J. that was not available at the time of the Order. In *Encore*, an order had been obtained in circumstances similar to the present case. The debtor was a real estate developer with a number of development projects in the Okanagan area. When the order was made, "no work was underway on any of the projects: a number were substantially completed; the others consisted of bare land": *Encore* at para. 2.

25 The Chief Justice set aside the order on a *nunc pro tunc* basis. He found that the application should not have been brought without notice to the respondents. His reasoning is set out at paras. 27-30, which I have set

out in full:

> This application was filed and heard on an *ex parte* basis. On such an application where the relief sought affects the rights of others, the applicant must demonstrate to the court the need for urgency and the reason why those against whom relief is sought *ex parte* are not being given notice. In addition, the applicant must use utmost good faith to disclose to the court fairly and frankly all of the relevant information, particularly as to urgency and the reason as to why notice should not be given.
>
> Here there was no urgency. Encore was not operating; it was effectively shut down. Because of Encore's representation to the court that it had equity of approximately $2.5 million, the true exposure of the secured lenders to the costs of the ***CCAA*** was not disclosed. With the true equity being zero or negative, it is clear that this ***CCAA*** could only be run by priming the mortgage lenders.
>
> In this case where the cost of the ***CCAA*** proceeding was to fall solely on the shoulders of one creditor group, there was no justification for filing and proceeding *ex parte*. If Encore were an operating company with many employees, and if it were faced with being shutdown by the security enforcement steps of one or more of its lenders, then an *ex parte* application might have been understandable. No such circumstances exist in this case.
>
> In the absence of such factors, proceeding *ex parte* was simply unjustified. There was no evidence that any creditor had seized any assets, or was on the verge of seizing any assets. Neither was the petitioner's condition emergent, in the sense that a payroll was about to be missed or that Encore's viability was about to end.

26 The Petitioners say that *Encore* is distinguishable because, in this case, there is equity in the Wyndansea Lands and the secured creditors cannot say that they are being "primed". I will comment on the issue of equity below, but in the present circumstances, whether notice should have been given does not depend upon the existence, if any, of equity in the Wyndansea Lands. Here, as in *Encore*, there was no operating business, no ongoing development work, and no group of employees facing the sudden loss of their jobs. There were no pending moves by the creditors that required an *ex parte* order.

27 This application should not have been brought without notice to the respondents. Initial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation. Counsel must be careful to fairly present the situation to the court if the application is made on an *ex parte* basis.

28 As I have determined that there is no basis for an order under the *CCAA*, I do not have to decide what remedy flows from the failure to give notice.

Issue 2: Have the Petitioners met the test under s. 11 of the CCAA for an order such that the stay should continue?

29 I do not accept the Petitioners' submission that the only two bases for setting aside the Order at this time are material non-disclosure at the time of the Order or new facts that convince me that it should not be continued. A court may set aside an order made under s. 11 of the *CCAA* at any time if it concludes that the circumstances do not exist, or no longer exist, to make such an order appropriate. In this case, there are particular reasons to consider the respondents' applications to set aside the Order at this time. These are:

(1) the changes to the Order that are proposed by the Petitioners are so significant that a reconsideration is appropriate;

(2) the Order was granted on an *ex parte* basis; and

(3) the application for DIP financing would result in an additional $1.7 million of debt ranking in priority to other creditors. In order to consider that application, I must determine if it is appropriate for the Order to continue.

30 I have concluded that there are no circumstances present in this case that make it appropriate to continue the Order under the *CCAA*. I now turn to the circumstances and factors that I considered in arriving at this conclusion.

Purpose of the CCAA

31 The purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident that it is doomed to failure: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (B.C. C.A.).

32 In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the secured creditors. In these circumstances, there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.

Equity Situation

33 When the Order was made the Petitioners submitted that there was likely significant equity in the Wyndansea Lands based on appraisals from 2006 and 2007. The Petitioners argued that if those appraisals were discounted by 50% and the Signature Circle lots were discounted by an additional 30%, there would still be more than $8 million in equity. It was clear that these "discount" figures were arbitrary choices. The Altus appraisal raises serious doubt about the Petitioners' assertion. The Petitioners argue that I should not place any reliance on the Altus appraisal, in part because they have not had an opportunity to respond to it.

34 I have reviewed the new Altus appraisal and find it to be a considered, detailed, current appraisal of the Wyndansea Lands. There is no reason for me to disregard it. I can place much more reliance on the opinion contained in the Altus appraisal than I can on the values asserted on the basis of the older appraisals discounted arbitrarily. It is evident from the length of time that the Petitioners have attempted to raise financing or sell the

properties that the older appraisals should be disregarded. While I cannot conclude that there is no equity in those lands, I can conclude that there is a serious risk of that.

35 In addition, I note that interest on the two Syndicate loans amounts to approximately $460,000 per month. Taking into account the other debt owing, the total interest charges per month will approach $500,000. The position of the creditors will erode rapidly with the passage of time. This is especially so in the current market. The risk that there is no equity in the assets would, of course, be increased if the DIP financing is approved. While I cannot say, as Brenner C.J. noted in *Encore* at para. 28, that the *CCAA* proceeding "could only be run by priming the mortgage lenders", I can conclude that there is a serious risk that the *CCAA* proceeding could only be run at the expense of many of the creditors.

Nature of the Petitioners' Business

36 The Petitioners argued strenuously that there is no reason why the *CCAA* should not apply to a real estate development company. They stressed that the decisions in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* , 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.), and *Encore* do not prevent a real estate developer from making application for protection. I agree. As noted by Tysoe J.A. in *Cliffs* at para. 25, "the nature and state of [the debtor's] business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay".

37 The present circumstances are similar to those in both *Cliffs* and *Encore*. There is no development work in progress on any of the Petitioners' properties. The work on the golf course ceased long ago. The Signature Circle lots have been the subject of an extensive and expensive marketing program for at least 1 1/2 years. The hotel site is subdivided and serviced. The first subdivision plan is complete and serviced. However, the only real ongoing work is an attempt to raise new financing or sell properties. The development work on the properties, other than the Wyndansea Lands, was completed some time ago. On those properties, the Petitioners are attempting to sell either serviced lots or completed strata lots.

38 To put it bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding. As counsel for the Petitioners stated in argument, they need time to "try to pull something out of the hat". They have sought DIP financing so that they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the *CCAA*.

39 In *Redekop Properties Inc., Re*, 2001 BCSC 1892, 40 C.B.R. (5th) 62 (B.C. S.C. [In Chambers]), Sigurdson J. came to the same conclusion while considering the applicability of a *CCAA* proceeding to a company that was effectively a real estate holding and development business. He stated as follows at para. 63:

> It is also a factor that this type of company is not the classic ongoing business to which ***C.C.A.A.*** protection is often afforded. I do not say that protection might not, in appropriate circumstances, be extended to companies with few unsecured creditors and no real ongoing business, but I think that the relative absence of these things are factors to consider in determining whether to continue an order involving a company or to allow the secured creditors to foreclose.

40 Similar observations were made by Tysoe J.A. in *Cliffs* at para. 36:

> Although the ***CCAA*** can apply to companies whose sole business is a single land development as long as the requirements set out in the ***CCAA*** are met, it may be that, in view of the nature of its business and

> financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

41 The nature of the Petitioners' business and financing arrangements are such that it is extremely unlikely that the protection of the *CCAA* could facilitate a compromise or arrangement between the Petitioners and their creditors.

Foreclosure Proceedings

42 All of the Petitioners' developments are currently subject to ongoing foreclosure proceedings. The Petitioners' desires to raise new funding or sell some of their assets can be, and are being, pursued in the course of those proceedings. Their desire to buy time to do so can be the subject of application in the foreclosures. They already have sufficient protection of their interests in the existing court proceedings.

43 This issue was dealt with in *Redekop*, where Sigurdson J. stated at para. 61:

> ... I am satisfied that the protection the company wishes to obtain is equally available in practical terms in a foreclosure proceeding, and the foreclosure proceeding allows the secured creditors to begin to enforce their security. The options of seeking a joint venture partner or selling are just as available in a foreclosure as they are under the protection of a ***C.C.A.A.*** proceeding.

Limiting the Proceedings to the Wyndansea Lands

44 The Petitioners sought an order amending the Order to limit it to only the Wyndansea Lands. This is opposed by the Syndicate. I am not aware of any precedent for such an order. I have not seriously considered how a partial stay might work in this case. Even on a cursory review, it would appear to create unnecessary disputes between creditors as the realization progressed on other assets of the Petitioners. This would complicate and prolong resolution of those proceedings. I question whether the *CCAA* can apply to only one part of the operations of a company rather than to all of it. I do not have to decide that issue here as I am not prepared to make such an order.

Other Stakeholders

45 The Petitioners have argued that the interests of the community should be a significant factor in the decision made on this application. I do not agree. While the development will bring employment and other benefits to the community of Ucluelet when it proceeds, the interests of the community are not directly engaged by the dispute that is currently before me.

46 The Petitioners' reliance on *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), is misplaced. The situation here bears no similarity to the circumstances that were faced by the com-

munities affected by the Skeena Cellulose operations. It was estimated that 8,000 direct and indirect jobs depended upon the continuation of that business. Here, there are no existing jobs that will be impacted by a failure to continue the stay of proceedings. Further, the potential of future benefits for the community remains the same whether or not the stay is continued. If the golf resort is the best use of the lands, then it is likely that the project will proceed in the future when circumstances permit.

Summary

47 There are no circumstances present that make it appropriate to continue the Order. In addition, the Order should not have been sought on an *ex parte* basis. The Order will accordingly be set aside. As I have not found a failure to make full and frank disclosure on the part of the Petitioners, I decline to make the order effective *nunc pro tunc*.

48 The parties are scheduled to appear before me on February 12, 2009, at 9:00 a.m. I will consider arguments regarding costs at that time.

Application granted.

END OF DOCUMENT

Tab 5

2004 BCSC 345, 50 C.B.R. (4th) 73, [2004] B.C.W.L.D. 782

C
2004 CarswellBC 542

Hester Creek Estate Winery Ltd., Re
IN THE MATTER OF THE COMPANIES CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended
And IN THE MATTER OF HESTER CREEK ESTATE WINERY LTD. (PETITIONER)
British Columbia Supreme Court [In Chambers]
Burnyeat J.
Heard: March 1-2, 4, 2004
Judgment: March 17, 2004
Docket: Vancouver L040416

Counsel: W.E.J. Skelly for Petitioner

J.I. McLean for 658302 B.C. Ltd.

H.M.B. Ferris for Bank of Montreal

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial

Civil practice and procedure --- Judgments and orders -- Ex parte orders -- Setting aside -- General principles

Petitioner winery obtained ex parte order under Companies' Creditors Arrangement Act related to procedures and timing for plan of reorganization of winery's debt and including stay of proceedings -- Winery brought motion to confirm and extend certain terms of order -- Respondent bank was secured creditor claiming 98 per cent of winery's debt and brought cross-motion to dismiss proceedings under Act and to set aside ex parte order -- Bank took position that ex parte order would not have been granted had winery not failed to disclose numerous matters -- Motion by winery dismissed -- Cross motion by bank granted; ex parte order discharged -- Had winery made full and fair disclosure of information relevant to largely unsuccessful two-year effort to make arrangements with its creditors, ex parte order would not have been made -- Overall debt reportedly owed by winery to particular corporations was really shareholder loan, not debt, and left secured creditor bank with 98 per cent of debt rather than only 80 per cent as reported by winery -- Other debts reported by winery lacked sufficient certainty and total amount of debt was unlikely to meet $5 million threshold required under Act -- Winery knew but failed to disclose bank's negative views regarding any plan of reorganization rendering any plan unlikely to succeed -- Winery failed to make full and fair disclosure of slim possibility of loan from Farm Credit Corporation or from other apparent sources of financing -- Winery's failure to make full and fair disclosure amounted to misleading court.

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

Petitioner winery obtained ex parte order under Companies' Creditors Arrangement Act related to procedures

and timing for plan of reorganization of winery's debt and including stay of proceedings -- Winery brought motion to confirm and extend certain terms of order -- Respondent bank was secured creditor claiming 98 per cent of winery's debt and brought cross-motion to dismiss proceedings under Act and to set aside ex parte order -- Bank took position that ex parte order would not have been granted had winery not failed to disclose numerous matters -- Motion by winery dismissed -- Cross motion by bank granted; ex parte order discharged -- Had winery made full and fair disclosure of information relevant to largely unsuccessful two-year effort to make arrangements with its creditors, ex parte order would not have been made -- Overall debt reportedly owed by winery to particular corporations was really shareholder loan, not debt, and left secured creditor bank with 98 per cent of debt rather than only 80 per cent as reported by winery -- Other debts reported by winery lacked sufficient certainty and total amount of debt was unlikely to meet $5 million threshold required under Act -- Winery knew but failed to disclose bank's negative views regarding any plan of reorganization rendering any plan unlikely to succeed -- Winery failed to make full and fair disclosure of slim possibility of loan from Farm Credit Corporation or from other apparent sources of financing -- Winery's failure to make full and fair disclosure amounted to misleading court.

Cases considered by Burnyeat J.:

> Mooney v. Orr (1994), 33 C.P.C. (3d) 31, [1995] 3 W.W.R. 116, 100 B.C.L.R. (2d) 335, 1994 CarswellBC 26 (B.C. S.C.) -- followed
>
> Philip's Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1, [1992] 1 W.W.R. 651, 60 B.C.L.R. (2d) 311, 1991 CarswellBC 502 (B.C. S.C.) -- followed

Statutes considered:

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

> Generally -- referred to

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

> Generally -- referred to
>
> s. 11(3) -- referred to
>
> s. 11(6) -- referred to

Farm Debt Mediation Act, S.C. 1997, c. 21

> Generally -- referred to

MOTION by winery to extend and confirm ex parte order related to reorganization proceedings; CROSS-MOTION by bank to set aside ex parte order.

Burnyeat J.:

1 This is a motion on behalf of the Petitioner that the relief provided in the February 16, 2004 Order be confirmed and extended under certain terms, including that, first, the Petitioner call a meeting for no later than May 14, 2004 for the purpose of considering and voting on a plan of arrangement and compromise and, second, that

the Monitor appointed on February 16, 2004 prepare what is referred to as a solicitation package to solicit offers for the assets of the Petitioner, with any such offers to be received by April 21, 2004.

2 There is also a motion by the Bank of Montreal and 658302 B.C. Ltd. that, first, this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 ("*C.C.A.A.*") be dismissed and, second, the *ex parte* order made February 16, 2004 pursuant to s. 11(3) of the *C.C.A.A.* be set aside. While I will deal with the Motion of the Bank of Montreal and 658302 B.C. Ltd. first, many of the conclusions I have reached also apply to the question of whether the Petitioner should be granted the extension of time it seeks.

3 The primary basis upon which the order is sought by the Bank of Montreal and 658302 B.C. Ltd. is that a number of matters were not disclosed by the Petitioner when the February 16, 2004 Order was made, that these matters were collectively of a material nature, that they should have been disclosed, that the Order would not have been made if they had been disclosed, and that the Order now sought by the Petitioner should not be gran- ted.

4 I am satisfied that I am bound by the decision in *Philip's Manufacturing Ltd., Re* (1991), 60 B.C.L.R. (2d) 311 (B.C. S.C.), regarding the question of whether the order should have been granted on February 16, 2004. In *Philip's Manufacturing Ltd.*, Macdonald, J. dealt with a similar application and stated:

> I have concluded that none of the facts alleged, or where all of them taken together, would have influenced my decision to grant the *ex parte* order in the first place.

5 I am also satisfied that the obligation of a Petitioner on an *ex parte* application under the *C.C.A.A.* can be likened to the obligation of an applicant for a Mareva injunction. In *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C. S.C.), that obligation was described as follows by Huddart, J., as she then was, as being that the Applicant: " . . . must make full and fair disclosure of all material facts known to him and make proper inquiries for any additional relevant facts before making the application." I am also satisfied that the obligation includes the requirement to disclose what Huddart,J. described as "facts relevant to the defendant's position to the extent it is known."

6 Huddart, J. then concluded in *Mooney* as follows:

> If there is less than full disclosure, or if there is a misleading of the court about material facts, the order should be discharged.

7 The material facts said to have been withheld to the court in the original materials are said to be numerous. If known by me, I have concluded that a number of factors would have led me to a contrary decision to the one I made February 16, 2004 as I have concluded that there was not a full and fair disclosure of all material facts.

8 Dealing first with the government debt, the Petition states it to be $227,000, whereas the material now indicates it to be $340,000. In this regard, I am satisfied that this is not a fact which could have been known after making proper inquiries, and, therefore, the fact that the figure has changed would not have influenced my decision at the time as it does not appreciably increase the debt that is owing by the Petitioner.

9 Regarding the overall debt owed by the Petitioner, I find that the debt owed and how the debt was owed to the parent company of Hester Creek was a material fact not disclosed. I am also satisfied the overall debt was not sufficiently described because potential amounts owing to three employees whose employment had been ter-

minated were not included in the list of debts. The Petition showed that the secured debt included $875,000 owing to European and Allied Commerce Ltd. ("European"). In fact and well within the knowledge of Mr. Odishaw who swore the Affidavit verifying the information set out in the Petition, there was no debt owing to European. The debt described was actually a shareholders loan to the parent company of Hester Creek, being Valtera Wines Ltd. ("Valtera").

10 The significance of this fact is twofold. First, the debt is owing by shareholders loan and it would undoubtedly be the case that a shareholder would not be in the same class of creditors as would secured creditors, so that the likelihood of any plan of arrangement being approved may well be diminished, taking into account that the Bank of Montreal and 658302 B.C. Ltd. would then represent almost 98% of the secured debt, rather than only about 80%. This percentage change combined with the known but undisclosed views of the Bank of Montreal and 658302 B.C. Ltd. make it almost impossible to conclude that any plan of reorganization will be successful.

11 Second, the debt owing to Valtera becomes suspect in the context of whether the total debt of Hester Creek reaches the minimum of $5 million which is required under the *C.C.A.A.* The debt set out in the petition materials totals $5,315,000, of which $4,759,000 is secured debt. Now that it is apparent that $875,000 is not owed to European as a secured debt but is owed to Valtera as a shareholders loan, the amount said to be owing has decreased from $875,000 to what the Petitioner now says and what the Monitor appointed under the February 16, 2004 Order says is $686,922. While the total debt is then reduced only $188,000 to $5,126,922, the $686,922 figure does not have the sufficient certainty which would have allowed me to conclude that the Petitioner had met the $5 million threshold required under the C.C.A.A.

12 First, the financial statements which were part of the Petition materials show the shareholders loan to Valtera as being $927,528 at December 31, 2001, $487,411 at December 31, 2002, and $556,003 at September 30, 2003. There is no explanation why no amount was shown as owing to Valtera in the Petition despite the fact that the financial statements were available to the Petitioner and were included in the Petition materials. There is no certainty that the shareholders loan was at least $560,000 when the Petition was filed in order that the total debt, including the shareholders loan, would be at least $5 million.

13 Second, there is no credible explanation from Mr. Odishaw why he would omit any debt as owing to Valtera while stating that there was secured debt owing to European. By December 2003, Mr. Odershaw was a director of both Valtera and Hester Creek. I cannot conclude his affidavit sworn February 16, 2004 constitutes full and fair disclosure of all material facts known to him or that it could be said that he had made proper inquiries about relevant facts before he swore his misleading affidavit.

14 Third, it appears that Valtera was able to obtain funds from European and that those funds were used either to pay debts of Hester Creek directly or to advance funds to Hester Creek so that Hester Creek could pay its debts directly. It is not clear whether funds advanced to Hester Creek were advanced by shareholders loan, whether the balances reflected in the financial records of Hester Creek reflect all such advances made, or whether funds paid directly by Valtera to creditors of Hester Creek are reflected as shareholders loans.

15 In this regard, I note the following. In his December 17, 2003 letter to the Farm Debt Mediation Service, Mr. Odishaw states that Valtera will pay "back salaries" of various Hester Creek employees on an "*ex gratia* basis", and that "all advances" made on behalf of Hester Creek by Valtera are "and will be on an *ex gratia* basis." In the February 27, 2004 report of the Monitor appointed in the February 16, 2004 Order, the Monitor

states that the $686,922 now stated to be the balance owing under the shareholders loan includes all payments made by Valtera on behalf of Hester Creek since the new management took over in November 2003, and that this amount is $106,999. If this sum represents *ex gratia* payments not to be included in the amount of the shareholders loan, then the total debt owing may well be reduced to an amount which is perilously close to the $5 million minimum.

16 Fourth, it is difficult to see how $875,000 advanced by European to Valtera so that Valtera could purchase the shares of Hester Creek could end up being part of any shareholders loan owed by Hester Creek to Valtera. Accordingly, any part of the shareholders loan representing the original $875,000 advanced by European to Valtera would have to be removed from the balance owing under the shareholders loan balance said to be owing.

17 Accordingly, I have concluded that there was less than full disclosure and a misleading of the Court about material facts regarding the overall debt owed by the Petitioner and that, if those facts had been known, the Order made February 16, 2004 would not have been made.

18 Regarding the possibility of a Farm Credit Corporation Loan as a possible source of financing, the Petition materials state:

> The management of Hester Creek has also recently had discussions with Mr. Raymond Wagner of Farm Credit Corporation of Canada ("F.C.C.C."). In respect of potential financing, Mr. Wagner indicated that F.C.C.C. may be prepared to extend as much as $2,500,000, representing approximately 50% of the value of Hester Creek's hard assets.

19 What was not disclosed was that an application had been made to F.C.C.C. in the summer of 2003 and that this application had been turned down by F.C.C.C. I consider that material as it appears to close the door on F.C.C.C. being a realistic source of funding in any restructuring plan to be advanced by Hester Creek. Also, the impression left by Mr. Odishaw and the Petition that possible F.C.C.C. financing is a recent possibility is adversely affected by the knowledge that this is the second time around for such an application.

20 Regarding the role of European in these matters, European is described in the Petition materials as having provided Valtera with some of the financing for the acquisition of the shares of Hester Creek and as being a company that might be willing to invest $1 million in Hester Creek. In what Mr. Odershaw describes as a February 16, 2004 letter, but which is, in fact, undated, European states that it is reviewing "a financial restructuring package," that any decision would depend on "further due diligence by us and a further review of the business plan," and that a decision would be made in 30 to 45 days. Full disclosure would have required that Hester Creek provide some explanation about the business plan referred to as that plan has not been made available to the court, about why it would be necessary for European to undertake due diligence on a company that it had been involved with for over 5 years, and about why European was a likely candidate for $1 million of investment. In this latter regard, I note that the former President of Hester Creek in her February 26, 2004 affidavit states that the principal of European advised her in 2003 that European "had no further funds to invest in Valtera or Hester Creek." The failure to disclose that there might be some doubts about whether an undated letter represented a realistic source of funds was material to the question of whether the plan of reorganization had any likelihood of success and was material to the question of whether or not I would have granted the February 26, 2004 order.

21 The statement in the Petition that Hester Creek has "excellent prospects of obtaining financing" cannot be sustained if Hester Creek is relying only on European. However, that statement may also apply to the possibility

of financing through Fog Cutter Capital Group ("Fog Cutter") of Portland, Oregon. In the Petition materials, Fog Cutter is described as an investment banker lender who had expressed a great deal of interest and who was in the process of completing due diligence with respect to the potential investment of $3,500,000. In his affidavit, Mr. Odishaw states that, but for a holiday on February 16, 2004 in the United States, Hester Creek would have had a letter available outlining the intention of Fog Cutter. The possible financing from this source also appears to be illusory. No such letter was subsequently produced. Nothing is filed to refute the statement in the February 26, 2004 affidavit of the former President of Hester Creek that one of the principals of Hester Creek has mentioned Fog Cutter since 2003 as a potential source of funds and that some of the principals of Fog Cutter are also principals of Valtera.

22 Regarding the financial position of Valtera, the following statement is made in the Petition:

> From a short-term perspective, Valtera has indicated that it would be prepared to provide up to $100,000 in debtor-in-possession financing to allow Hester Creek to satisfy its post-filing obligations until sufficient cash flow is generated for that purpose.

23 What is not set out in the materials was a material failure to disclose the following. First, the shares of Valtera are pledged to European so that Valtera is not in a position to provide any security by the hypothecation of its shares in Hester Creek when and if Valtera seeks funds. Second, the Bank of Montreal obtained a judgment against Valtera on January 15, 2004 which totals $3,217,335.14 as at February 18, 2004. The failure to disclose these facts would have resulted in the Order granted on February 16, 2004 not being made as there could be no assurance that the financial status of Valtera would allow the debtor-in-possession financing which is so critical to the expense of the Monitor and to the cost of running Hester Creek. The judgment in favour of the Bank of Montreal was granted more than a month before Mr. Odishaw swore his affidavit. The failure to advise the Court regarding this judgment is inexcusable.

24 The details provided about the foreclosure proceedings of 657302 B.C. Ltd. do not constitute full disclosure. The Petition materials indicate that a June 2002 mortgage was granted, Hester Creek breached its obligations under that mortgage within six months, that foreclosure proceedings were commenced in December 2002, that the original debt was assigned to 657302 B.C. Ltd., and that Hester Creek entered into a forbearance agreement with 657302 B.C. Ltd. What was not revealed was that a three-month redemption period was granted. I take that to be a reflection of the court's determination of the jeopardy being faced by the mortgagee about whether the balance owing under all three charges against the land could be satisfied. Also not revealed in the Petition materials was that there was an order absolute of foreclosure application pending, that a June 2003 appraisal of $3,400,000 was filed in the foreclosure proceedings, that the forbearance agreement with 657302 B.C. Ltd. was signed by both Hester Creek and Valtera, and that Valtera agreed not to displace Ms. Warwick as a director and President of Hester Creek. I consider the failure to disclose those facts as a failure to make full and fair disclosure and to set out the facts about the likely views of a major creditor when that view was well known by the Petitioner.

25 The other matters about the foreclosure action which were not disclosed also constitute a failure to make full and fair disclosure of all material facts. First, the January 20, 2004 appraisal material revealed in the Petition materials showed a value of $5,030,000 while the appraisal that was filed in the foreclosure proceedings indicating a value of $3,400,000. The difference of an appraisal obtained only about eight months earlier is significant. Second, in view of the engineered departure of Ms. Warwick who had solicited the take-out financing by 657302 B.C. Ltd. and whose presence was demanded by 657302 B.C. Ltd., it might well be unlikely that 657302 B.C.

Ltd. would vote in favour of any plan of reorganization. Third, the assessment by the court that a three-month redemption period was warranted and the fact that an order absolute of foreclosure application was available to 657302 B.C. Ltd. should have been revealed. Fourth, if the $3,400,000 appraisal of land was accurate, there was considerably less, if not very little certainty that any plan of reorganization could be successful without great amounts of equity participation being available. Certainly Hester Creek could not borrow itself out of its problems with both debt and assets of about $5,000,000 to $5,500,000. Fifth, the picture presented in the Petition materials that the future would be better for Hester Creek now that Ms. Warwick was gone ignored the added complication of the unhappiness of 657302 B.C. Ltd. that Ms. Warwick was no longer President.

26 There was also not full and fair disclosure regarding the forbearance agreements that were in place. The Petition materials indicate forbearance agreements with the Bank of Montreal and 658302 B.C. Ltd. but do not disclose the following. First, there were four forbearance agreements with the Bank of Montreal not one. Second, the first forbearance agreement with the Bank of Montreal provided that Valtera would seek equity partners and inject a minimum of $500,000 into Hester Creek. Third, the four forbearance agreements generally acknowledge that Hester Creek was in default of conditions surrounding its indebtedness to the Bank of Montreal back to 2002. Fourth, the third and fourth forbearance agreements provided that Hester Creek would not seek relief under the *C.C.A.A.* or the *Bankruptcy and Insolvency Act* ("*B.I.A.*") without the prior written consent of the Bank of Montreal. Fifth, that same provision is in the forbearance agreement between Valtera, Hester Creek and 658302 B.C. Ltd.

27 I consider these matters to be material non-disclosures because the Petition materials fail to set out that: (a) Hester Creek and Valtera have been attempting to arrange new financing since April 2002 and have been unsuccessful in doing so; (b) that the indulgences granted by the Bank of Montreal were gained partially on the agreement of Hester Creek not to seek *C.C.A.A.* or *B.I.A.* protection; and (c) that Hester Creek has been in default since April 2002 whereas the Petition materials leave the impression that the financial problems have only resulted as a result of poor management. Although it may be that the covenant not to seek *C.C.A.A.* or *B.I.A.* relief is unenforceable against Hester Creek, it is a factor that I would have taken into account in determining the possibility of any plan of reorganization being successful in view of the position taken by the Bank of Montreal and 658302 B.C. Ltd., who represent somewhere between 98% and 100% of what I now know to be three and not four secured creditors.

28 I am also satisfied that there was not full and fair disclosure about an application made by Hester Creek under the Federal *Farm Debt Mediation Act*. Nothing is set out in the Petition materials about such a filing. I consider that a material non-disclosure having the effect of misleading the Court. An application for the appointment of a Receiver Manager by the Bank of Montreal in its action to enforce its security was to be heard on December 12, 2003 and was then adjourned to December 16, 2003. On December 13, 2003, Hester Creek applied under the *Farm Debt Mediation Act* for a stay of proceedings, a review of its financial affairs, and for a mediation with its creditors. A stay of proceedings was granted automatically on December 16, 2003 but, after counsel for the Bank of Montreal made representations, the stay was terminated by Agricultural and Agri-Food Canada as at January 9, 2004. On January 8, 2004, Hester Creek appealed that termination of the stay of proceedings, stating that it had not had the opportunity "to present to all creditors or the majority thereof any arrangement for consideration." The appeal of Hester Creek produced a further stay to February 14, 2004. However, the appeal board reached its decision on January 19, 2004 and determined that the original decision to terminate the stay of proceedings should be upheld.

29 All of this information was known to Hester Creek when the Petition materials were filed on February 16,

2004. All of this information should have been revealed in the Petition materials as it goes to provide background to the longstanding efforts of Hester Creek to make arrangements with its creditors and to fully advise the court of the position which would have been taken by the Bank of Montreal regarding a potential restructuring. The refusal of the Bank of Montreal to enter into further discussions would have been apparent if there had been full disclosure. This knowledge about the likely position of the Bank of Montreal regarding a possible restructuring would have influenced my decision about whether the Order made February 16, 2004 should have been made or not. This information was also relevant regarding whether any plan of reorganization would have any chance of approval. This failure to provide full and fair disclosure of all material facts and to set out the likely position of the Bank of Montreal on a potential reorganization was less than full disclosure and amounted to misleading the Court about material facts.

30 For the reasons set out above, I have concluded that if there had been full and fair disclosure or if the Petitioner had not inadvertently or advertently misled the court, the order that was made on February 16, 2004 would not have been made. On ex parte applications and in all materials which will be presented to the Court and to the creditors of a company seeking protection under the *C.C.A.A.*, it is unacceptable for the materials to constitute anything less than full and fair disclosure. Affidavit material prepared by counsel for a petitioner should not be presented to the Court without counsel making proper inquiries about all material facts. Affidavits should not be sworn in support of a petition without the affiant making proper inquiries about all material facts. Materials which constitute less than full disclosure or which mislead the Court about material facts are unacceptable. In the case at bar, the materials prepared and filed were not only woefully inadequate but were also purposely misleading. In the circumstances, the Order will be discharged.

31 After notice to Valtera as to the charge created for the debtor-in-possession advances and to the Monitor as to the administrative charge set out in the February 16, 2004 Order, the Petitioner, the Bank of Montreal, 658302 B.C. Ltd. or the Monitor will be at liberty to speak to the question of whether the debtor-in-possession financing charge and the administrative charge will or will not retain the priority ranking set out in the February 16, 2004 Order. The granting of the Order today will not affect that question. The question of who should bear the costs of the Motion of the Bank of Montreal and 658302 B.C. Ltd. will also not be dealt with today. The Bank of Montreal and 658302 B.C. Ltd. will be at liberty to speak to that question in due course.

32 The stay of proceedings set out in the February 16, 2004 Order and by the March 2, 2004 Order will expire at 12 o'clock noon today. The Petitioner shall deliver up its assets to the Receiver Manager appointed in the Bank of Montreal proceedings.

33 If I am found to be wrong in deciding that the February 16, 2004 Order should be discharged, then I have also reached the conclusion that the test set out under s. 11(6) of the *C.C.A.A.* has not been met as I cannot be satisfied that the circumstances which exist are such that the order sought by Hester Creek is appropriate or that Hester Creek has acted and is acting in good faith and with due diligence. I cannot be satisfied that continued protection under the *C.C.A.A.* is appropriate. I am satisfied that any plan of reorganization of Hester Creek is doomed to fail. Hester Creek has reached the end of a two-year road and the creditors of Hester Creek should no longer be delayed. The application of Hester Creek is therefore dismissed.

34 The application to join Valtera as a co-Petitioner is also dismissed. That dismissal will not affect the ability of Valtera to file its own proceedings under the *C.C.A.A.* if it so wishes. I will hear any such application by Valtera. Any such application will be heard only upon notice to the secured creditors of Valtera, to the Bank of Montreal, and, if it is a creditor of Valtera, to 658302 B.C. Ltd.

Order accordingly.

END OF DOCUMENT

Tab 6

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-022070-037

DATE: DECEMBER 17, 2003

IN THE PRESENCE OF: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON

LES BOUTIQUES SAN FRANCISCO INCORPORÉES
and
LES AILES DE LA MODE INCORPORÉES
and
LES ÉDITIONS SAN FRANCISCO INCORPORÉE
Petitioners
and
RICHTER & ASSOCIÉS INC.
Monitor

REASONS FOR JUDGMENT GIVEN ORALLY AND INITIAL ORDER

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[1] The Court is seized of two Motions.

[2] The first one, presented by the BSF Group, is for the issuance of an Initial Order under Section 11 of the Companies Creditors Arrangement Act ("CCAA"). BSF Group is involved in the retail sale of men's, women's and children's apparel and accessories through boutiques and stores located primarily in Quebec but also in Ontario.

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[3] The second one, presented by the Bank Syndicate of the BSF Group, is for the appointment of an Interim Receiver. It is filed under a separate court number from this one.

[4] As the Court concludes that there are justifications to issue here an Initial Order under the CCAA, the Motion of the Bank Syndicate will be simply continued *sine die* at this stage. This will be noted separately on the original of the Motion itself and on the "Procès-verbal d'audience" and will not form part of the conclusions of this judgment.

[5] The Court is of the view that the Bank Syndicate has not established that it is presently necessary, be it for the protection of the debtor estate or in the interest of the creditor, to proceed with the appointment of an Interim Receiver.

[6] Turning now to the BSF Group application, the Motion establishes that the BSF Group is entitled to make use of the CCAA. On the face of the application, the BSF Group is insolvent and is indebted for more than $5M to various secured and non-secured creditors.

[7] Prior to rendering judgment, the Court has indeed heard not only counsel for the BSF Group, but also counsels for the Bank Syndicate and for two of its landlords, namely Ivanhoe Cambridge and Cadillac Fairview.

[8] Briefly summarized, the secured creditors include the Bank Syndicate, RoyNat Inc. and Ivanhoe Cambridge Inc. for amounts in excess of $24M. The unsecured creditors include debenture holders and trade creditors for more than $45M and inter-company advances exceeding $37M.

[9] Although the BSF Group made this application under the CCAA, neither the Motion nor the exhibits filed include a plan or an arrangement, not even a preliminary one or what can be described as an "*esquisse*" or an "*avant-goût*" thereof.

[10] With respect to the arrangement, only two paragraphs of the Motion refer to it, paragraphs 4 and 57. They state:

> 4. BSF Group intends to file with this Court proposed arrangements with the whole or part of its secured and unsecured creditors according to the classes to which they belong and seek an order from this Court to convene a meeting of its creditors to vote on the proposed arrangements, the whole within 30 days following the issuance of the order being sought or such further delay as may be determined by this Court.
>
> 57. Although the exact form of the restructuring that will take place is in the process of being determined, it is likely to include the closing of a significant number of stores operating under various banners in BSF, the significant downsizing of Les Ailes Downtown Store in order to make it a viable location, the dismissal of employees and the resiliation of a number of leases.

[11] These paragraphs refer to a mere «intent to file» a proposed arrangement and to the contemplation of potential closures and termination of leases, albeit general in nature. These allegations do not include any indications of the nature of any arrangement to be proposed to either the secured or unsecured creditors.

[12] The Court is doubly cautious here as there is no indication of much support at this stage for the process followed by the BSF Group under the CCAA. For one, the Bank Syndicate does not appear to support it.

[13] The Court is reminded of the comments of Mr. Justice Lebel in *Banque Laurentienne du Canada* c. *Groupe Bovac ltée*[1], where he stated:

> [...] Si les articles 4 et 5 indiquent que l'ordre de convoquer les créanciers ou, le cas échéant, les actionnaires de la compagnie dépend de la discrétion du Juge, l'exercice de celui-ci suppose l'existence d'un élément de base. Cet événement survient lorsqu'une transaction ou un arrangement «est proposé». Il faut que, matériellement, existe un projet d'arrangement. L'on ne peut se satisfaire d'une simple déclaration d'intention. Autrement l'on transforme radicalement les mécanismes de la loi. On fait de celle-ci une méthode pour obtenir un simple sursis sans que l'on ait à établir qu'il existe un projet d'arrangement et sans que l'on puisse faire évaluer sa plausibilité. La loi n'est pas formaliste, elle n'exige pas que le projet d'arrangement soit incorporé dans le texte de la requête. Il peut se retrouver dans des documents annexes, dans des projets de lettres aux créanciers, pourvu que l'on puisse indiquer au Juge auquel on demande la convocation de l'assemblée, qu'il existe et que l'on puisse en décrire les éléments principaux. [...]

[14] Further down, Mr. Justice Lebel adds:

> En l'absence d'une description d'un projet d'arrangement des éléments principaux, certaines des informations nécessaires pour permettre au tribunal d'exercer sa discrétion en connaissance de cause font défaut.

[15] And finally:

> Le recours à la loi suppose un contrôle judiciaire. Il appartient au Juge de peser, au départ, l'intérêt pour l'entreprise de présenter une proposition, la plausibilité de sa réussite, les conséquences de cette proposition et des ordres de sursis qui sont demandés pour les créanciers, les risques qu'elle ferait courir pour ses créanciers garantis, le Juge doit examiner ces intérêts divers avant d'autoriser la convocation des créanciers et de déclencher la mise en œuvre de la loi. La loi n'est pas une législation conçue pour accorder sans conditions ni réserves des termes de grâce à des débiteurs en difficulté. Elle se veut une loi de réorganisation d'entreprises en difficulté. À ce titre, saisi de la demande de convocation d'une assemblée et de sursis, le Juge doit être en mesure d'apprécier d'abord si l'entreprise est susceptible de survie pendant la période

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1 [1991] R.L. 593 (C.A.).

> intermédiaire jusqu'à l'approbation du contrat promis puis s'il est raisonnable d'estimer que l'accord projeté est réalisable. Pour savoir s'il est réalisable, l'une des conditions de base est d'en connaître les termes essentiels, quitte à ce que ceux-ci soient précisés ou modifiés par la suite. [...]

[16] The Court notes that in a subsequent case, *3915611 Canada Inc.* and *Eicon Networks Corporation*[2], Mr. Justice Chamberland of the Court of Appeal also mentioned, in commenting on an application under Section 11 of the CCAA, that the application "*donnait déjà un avant-goût assez précis de ce que sera la proposition d'arrangement*".

[17] Furthermore, in the *Mine Jeffrey Inc.* decision[3], commenting on the plan, the Court of Appeal (Mr. Justice Dalphond) mentioned that, at the very least, there was an "*esquisse*" of the plan being contemplated, which the decision indeed summarized.

[18] Finally, in *The 2004 Annotated Bankruptcy and Insolvency Act* by Houlden and Morawetz[4], there is a reference to a decision rendered in Ontario in 1999 which is summarized as follows:

> When an application is made by a group of creditors, the applicants should be in a position to submit an outline of a plan of compromise or arrangement. In the absence of a plan which would permit the continued operation of the debtor and its subsidiaries, the Court will dismiss the application.

[19] While it is true that some Courts in other provinces consider that a mere "intent to file a plan" is sufficient at the Initial order stage, this Court cannot ignore the abovementioned comments made by the Court of Appeal in these three decisions.

[20] As a result, while it is receptive to issue some Initial Order to allow the BSF Group the possibility to avail itself of some of the protections of the CCAA under the circumstances, the Court will not grant all the conclusions sought at this stage because of this situation and the lack of information on the proposed plan.

[21] The Court will now comment on the various sections of the conclusions sought by the BSF Group.

AUTHORIZATION TO FILE A PLAN

[22] The Court will be more precise than that. It will order Petitioners to file either a plan or at least a preliminary plan before January 15, 2004. It will also reconvene the Petitioners in front of this Court on January 15, 2004 to see what the situation is and determine then if the Initial Order is to be renewed and if so, on what conditions.

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2 C.A. Montreal, nº 500-09-012346-029, June 11, 2002, j. Chamberland, p. 2.

3 *Syndicat national de l'amiante d'Asbestos inc.* c. *Mine Jeffrey inc.*, [2003] R.J.Q., 420

4 Lloyd W. Houlden and Geoffrey B. Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act*, Toronto, Thomson Carswell, 2004.

STAY OF PROCEEDINGS

[23] These conclusions will be granted but only until January 15, 2004 so that the situation be reassessed then. It appears reasonable to allow the BSF Group to continue its operations in the meantime.

THE LIMITATION OF RIGHTS

[24] These conclusions will also be granted but only until January 15, 2004 so that again the situation be reassessed at that time. These conclusions appear reasonable as the Petitioners agree to pay the landlords and suppliers for the future occupation of the premises or for the future supply of goods. The same is true for the insurance companies and the credit cards companies. The other conclusions of that section also appear reasonable at this stage.

OPERATIONS

[25] Some of the conclusions pertaining to operations appear too broad at this stage, notably in view of the absence of any plan or arrangement, even preliminary.

[26] The Court will simply "reserve" at this stage the rights of Petitioners, if any, to close stores and terminate agreements. While it is true that a vast majority of Courts in Canada appear to support the authority of the tribunal in CCAA proceedings to permit the unilateral termination of contracts by the debtor, this discretion has been exercised when faced with either a plan or a preliminary plan, and if not at the very least with an "*esquisse*" or an "*avant-goût*" thereof.

[27] The Court refers more specifically to the decision of this Court in *PCI Chemicals Canada Inc.*[5] and the decisions of the Court of Appeal in *Mine Jeffrey*[6], *Uniforêt*[7], *Eicon*[8] and *Les Ordinateurs Hypocrat Inc.*[9].

[28] Without at least some kind of a preliminary plan, the Court is not willing to give a "blank cheque" to Petitioners to close stores and terminate agreements at this stage. The situation will be reassessed on that issue on January 15, 2004.

[29] The Court adds that there has simply been no urgency established which would require the immediate granting of such broad powers to the Petitioners.

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5 *P.C.I. Chemicals Canada inc. (Plan d'arrangement de transaction ou d'arrangement relatif à)*, [2002] R.J.Q. 1093 (C.S.)

6 *Syndicat national de l'amiante d'Asbestos inc.* c. *Mine Jeffrey inc.*, *supra*, note 3.

7 Uniforêt inc. c. *9027-1875 Québec inc.*, [2003] R.J.Q. 2073 (C.A.).

8 *3915611 Canada Inc.* and *Eicon Networks Corporation*, supra, note 2.

9 *Les Immeubles Wilfrid Poulin ltée* c. *Les Ordinateurs hypocrat inc.*, [1998] R.D.I. 189 (C.A.).

[30] As for the other conclusions on operations, some changes to the wording of the conclusions are necessary to protect the creditors. Some other wording will be deleted as unnecessary in the Court's opinion. The Court notes that there are some protections for the suppliers in the conclusions sought if a plan is not pursued and BSF Group goes in bankruptcy or receivership.

THE DIRECTORS AND OFFICERS INDEMNIFICATION HYPOTHEC AND THE MONITOR AND COUNSEL FEES HYPOTHEC

[31] BSF Group asks for priority charges for the directors and officers indemnification and for the monitor and counsel fees. BSF Group wants these priority charges to rank ahead of all secured and unsecured creditors. The first one is for $7,500,000, the second is for $1,000,000.

[32] The Court agrees with Professor Janis Sarra of the Faculty of Law of the University of British Columbia that five principles should govern a court in considering applications for priority charges of this nature.

- There should be adequate notice to creditors so that they be heard fully on the issue. It should only be considered on an ex parte basis for what is required to keep the debtor's "lights on" pending notice to all and every interested parties.

- There should be sufficient disclosure for the benefit of all creditors of what is likely to be the impact of these priority charges on their claims and securities.

- The request must be made in a timely fashion, with proper demonstration that there is a real possibility of achieving a plan. To quote Professor Sarra[10]:

> [...] There is a difference between good faith efforts to make arrangements with creditors and then seeking the protection of the court in aid of these efforts and a situation where the debtor engages the court only to defer liquidation without any real prospect of devising a business plan acceptable to creditors.

- The Court must balance the prejudice to all creditors with the priority charges and be satisfied for an urgent need thereof. For example, courts are more lenient towards a priority for monitor fees and disbursements than for a DIP financing.

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[10] Janis SARRA, *Steel, Sulphur and Coal, Update on Debtor in Possession Financing and Priming Liens in CCAA Applications,* September 2002.

- Finally, the priority charges are an extraordinary remedy available for limited amounts and for limited time. There must be judicial control over amounts of priority charges, their precise purpose and their use.

[33] With these in mind, the Court agrees to give here a priority charge for the directors and officers indemnification. There are authorities which support it and the circumstances appear to justify it.

[34] However, it will not be for $7,500,000. From the evidence presented, there is some coverage of insurance for the directors and officers for at least $4,000,000. The Order as drafted also asks for the maintaining of insurance policies as if the BSF Group were solvent.

[35] For the period of this Order, a protection of $5,000,000 for such directors and officers indemnification appears sufficient. It will also only cover directors and officers on a «go-forward basis», for claims made after the filing of this application. The insurance policies presently in place should protect them for the past.

[36] As for the priority charges for the monitor and counsel fees, the amount claimed of $1,000,000 seems very high. An amount of $500,000 appears amply sufficient at this stage.

OTHERS

With respect to the other conclusions sought, they will be granted with slight modifications, notably for any application to vary or rescind this Order which will be permitted upon a five-day notice.

[37] **FOR THESE REASONS, THE COURT :**

APPLICATION OF THE CCAA

[38] **DECLARES** that the Petitioners, Les Boutiques San Francisco Incorporées, Les Ailes de la Mode Incorporées and Les Éditions San Francisco Incorporées (the "Petitioners") are companies to which the Companies' Creditors Arrangement Act ("CCAA") applies;

PLAN

[39] **ORDERS** the Petitioners to file with this Court on or before January 15, 2004 a plan or plans of compromise or arrangement, or, at the very least, a preliminary plan or a precise description thereof containing its key elements (the "Arrangement") between the Petitioners or any of them and one or more classes of their creditors, as the Petitioners deem advisable;

[40] **AUTHORIZES** the Petitioners to request this Court to order the calling of one or more meetings of such creditors to consider such Arrangement, at such date as this Court may determine;

[41] **RECONVENES** the Petitioners in front of this Court on January 15, 2004, at 9:00 a.m., in room 16.10, to assess the situation and determine if this Initial Order is to be renewed or extended and if so on what conditions;

STAY OF PROCEEDINGS

[42] **ORDERS** that from 12:01 o'clock A.M. on the day of issuance of this Order until January 15, 2004 at 11:59 p.m. (the "Stay Termination Date"):

a) The commencement or continuance of any and all proceedings against any of the Petitioners pursuant to the *Bankruptcy and Insolvency Act*, (R.S.C., (1985), c. P-3) ("BIA") or the *Winding-up and Restructuring Act*, (R.S.C., (1985), c. W-9) is hereby stayed and restrained;

b) The commencement or continuance of any and all suits, actions or other judicial or extra-judicial proceedings, including without limitation any and all enforcement processes or remedies of any kind and the issuance or enforcement of any and all assessments or notice of assessments of any kind, against the Petitioners or any of their property, assets and undertakings is hereby stayed and restrained;

c) The commencement or continuance of any and all arbitration proceedings or ancillary proceedings with a view to homologate or enforce any arbitration award against or respecting any of the Petitioners or any of their property, assets and undertakings is hereby stayed and restrained;

d) All persons, including employees, are enjoined and restrained from implementing or enforcing any decision, ruling or award resulting from any process, grievance or arbitration involving any of the Petitioners pursuant to the provisions of the *Loi sur les normes du travail* (R.S.Q., N-1.1) or other similar legislation of any jurisdiction, provided that such employees or other persons are entitled to initiate, continue or pursue grievances, arbitration or similar proceedings short of enforcement;

e) All persons are enjoined and restrained from realizing upon or otherwise enforcing their security on any or all of the property, assets and undertakings of the Petitioners or any of them, whether by way of Court proceedings, notice to third parties or otherwise;

f) All persons are enjoined and restrained from seizing before judgment or in execution of any judgment any or all of the property, assets and undertakings of the Petitioners or any of them and from otherwise seizing, garnishing or

taking, re-taking or retaining possession of any or all of the property, assets and undertaking of the Petitioners or any of them, including, without limiting the generality of the foregoing, any property consigned to or otherwise placed in the possession of or located in any of the premises, stores or boutiques of any of the Petitioners;

g) Her Majesty in right of Canada shall not exercise rights under subsection 224 (1.2) of the Income Tax Act in respect of any of the Petitioners and Her Majesty in right of a Province may not exercise rights in respect of any of the Petitioners under any provincial legislation substantially similar to subsection 224 (1.2) of the Income Tax Act;

h) The commencement or continuance of any and all judicial or extra-judicial proceedings, including without limitation any and all enforcement processes or remedies of any kind and the issuance or enforcement of any and all assessments or notice of assessments of any kind, against any of the past, present or future directors or officers of any of the Petitioners for any claim against such person that arose before, or is based, in whole or part, on facts in existence prior to, the issuance of this Order and relates to obligations of the Petitioners where directors or officers are under any law liable in their capacity as directors or officers for the payment of such obligations is stayed and restrained;

i) All debenture holders and the trustee are enjoined and restrained from exercising any right of conversion under the Trust Indenture dated December 14, 2001 between Petitioner Les Boutiques San Francisco Incorporées ("BSF") and Desjardins Trust Inc.;

[43] **ORDERS** that, up to and including the Stay Termination Date, no person having any agreement, lease, sublease or arrangement with the owners, operators, managers or landlords of retail commercial shopping centres or other commercial properties located adjacent to or in which there is located a store owned or operated by any of the Petitioners shall purport to take any proceedings or to exercise any rights as described in the Stay of proceedings section of this Order under such agreement, lease, sublease or arrangement that may arise upon the making of this Order or as a result of any steps taken by any of the Petitioners pursuant to this Order and, without limiting the generality of the foregoing, no person shall terminate, accelerate, suspend, modify, determine or cancel any such agreement, lease, sublease or arrangement;

LIMITATION OF CERTAIN RIGHTS

[44] **ORDERS** that from 12:01 o'clock A.M. on the day of issuance of this Order until the Stay Termination Date, no person may discontinue, dishonour, terminate (except in the circumstances contemplated and to the extent and in the manner permitted by section 18.3 of the CCAA), suspend, accelerate, amend, interfere with or fail to extend

or renew in accordance with any existing terms or renewal or extension any contract, agreement, arrangement, licence, sublicence, lease, sublease or permit with or in favour of the Petitioners or any of them (whether written or oral and including, without limitation, any statutory or regulatory mandate for the supply of utilities or any other goods or services to the Petitioners or any of them) by reason that the Petitioners or any other person or persons related thereto are insolvent, by reason of the commencement of this proceeding or any admission or evidence in this proceeding or by reason of any default or non-performance by the Petitioners or any of them, and, without limiting the generality of the foregoing:

a) All persons having access to or being in possession of information (in any form or medium) or documents relating to the businesses of the Petitioners or any of them are enjoined and restrained from removing such information or documents from any premises, store or boutique of any of the Petitioners, from restricting access by or on behalf of any of the Petitioners to such information or documents, from using any such information and documents otherwise than for the ordinary course of business of one or more of the Petitioners and from terminating any existing agreements or arrangements, written or oral, concerning the transmission, use, processing or distribution of such information or documentation;

b) All persons are enjoined and restrained, unless otherwise agreed to in writing by the Petitioners, from disturbing or otherwise interfering with the use, occupation or possession by the Petitioners or any of them of any premises leased, subleased or otherwise occupied by the any of the Petitioners and landlords and head tenants of premises leased or subleased by any of the Petitioners are hereby enjoined and restrained from exercising any right to terminate or vary such lease or sublease or accelerating or otherwise increase the rent due for such premises and from enforcing any security or other right on the property of any of the Petitioners situated on the leased or the subleased premises or on the property of third parties situated on the leased or subleased premises with the consent of the Petitioners, provided that the relevant Petitioner pays occupation rent for any such premises of which the Petitioner enjoys actual occupation and undisturbed use, but not arrears or rent in dispute, bi-monthly, on the 1st and 15th days of each month, in advance, for the period commencing with the day of issuance of this Order, at the contractual rate of rent stipulated for such premises, calculated on a per diem basis applied proportionately to the period of actual occupation and undisturbed use;

c) All persons having contracts, agreements or arrangements with the Petitioners or any of them (whether written or oral and including, without limitation, any statutory or regulatory mandates) for the supply to or use by the Petitioners or any of them of goods, services or other rights or property, whether corporeal or incorporeal, are enjoined and restrained, unless

otherwise agreed to in writing by the Petitioners, from accelerating, terminating, suspending, modifying, cancelling, discontinuing, interfering with or failing to extend or renew in accordance with any existing terms or renewal or extension such supply or the use of such goods, services or other rights or property and must continue to perform and observe the terms and conditions contained in such contracts, agreements or arrangements, provided that the relevant Petitioners pay the price, charges, royalties or other consideration payable under such contracts, agreements or other arrangements for goods, services or other rights or property supplied after the issuance of this Order when the same become due in accordance with the existing payment terms;

d) All persons party to any contract of insurance or indemnity with or for the benefit of the Petitioners or any of them are enjoined and restrained from terminating, suspending, modifying, determining or cancelling such policies and contracts, notwithstanding any provisions contained therein to the contrary, except with the prior written consent of the Petitioners, provided that any premium or other consideration payable on account of such policies or other contracts, or as are customarily chargeable on account of such insurance or indemnity, for the period commencing with the date of this Order are paid when the same become due in accordance with the existing payment terms;

e) All credit card issuers or merchant service providers are enjoined and restrained from cancelling or otherwise terminating or varying any contract, agreement or arrangement (oral or written) with the Petitioners or any of them with respect to the acceptance of credit cards as a means of payment and from stopping, withholding, redirecting, interfering or otherwise varying the conditions of payment to the Petitioners or any of them for goods and services charged to such credit cards in accordance with the usual practice between the relevant Petitioners and such merchant service providers as they existed immediately prior to the issuance of this Order, provided that the relevant Petitioners make all payments, if any, accruing, and perform all other acts required from them, in accordance with such contracts, agreements or arrangements after the date of this Order, when the same become due in accordance with the existing terms;

[45] **ORDERS** that for the period commencing with the day of issuance of this Order until the Stay Termination Date, and subject to the other provisions of this Order, no person shall be under any obligation to make any further advances of money or credit to any of the Petitioners;

[46] **ORDERS** that:

a) Any person who has provided insurance policies or indemnity at the request of the Petitioners shall be required to continue or to renew such insurance

policies or indemnity provided that the Petitioners make payment of the premiums on the usual commercial terms, as if Petitioners were solvent and these proceedings had not been commenced, and otherwise comply with the provisions of such policies;

b) Any person and authority supplying goods or services (including, without limitation, utilities) under contracts, agreements or arrangements for an indefinite period of time or customarily renewed or extended from time to time shall be required to continue or to renew or extend such contract, agreement or arrangement for the provision of such goods and services, provided that the Petitioners comply with the usual or common commercial terms applied by such persons to others for the same or similar supplies of goods or services;

c) Any bank or other financial institution operating any accounts of the Petitioners or any of them as at the date of the issuance of this Order shall continue the operation of such accounts under the existing contracts, agreements or arrangements concerning the operation of such accounts and such further conditions as are customary between such bank or other financial institution and its customers in general. Any deposits made by any of the Petitioners from and after 12:01 o'clock A.M. on the day of issuance of this Order to any of its accounts shall not be applied by the applicable bank or other financial institution in reduction or repayment of any amounts owing on account of any loan, interest, reimbursable expense or any other amount due or accrued prior to the issuance of this Order, except with the written consent of the Petitioners, but this Order shall not otherwise prohibit any bank or other financial institution from taking such customary measures as are appropriate to protect against charge-back risk on uncertified cheques deposited to an account and the involuntary extension of new credit, including holding deposits until cleared, and otherwise collecting all fees and service charges relating to such accounts, by way of debits to such accounts and making debit and credit entries to the relevant accounts of the Petitioners and transferring balances between such accounts;

d) Notwithstanding the above, the Petitioners will pay the interest owed pursuant to the credit agreement dated May 2, 2003 between National Bank of Canada, Royal Bank of Canada, Canadian Imperial Bank of Commerce and Laurentian Bank of Canada and Petitioners and BSF will pay the interest owed pursuant to the secured note entered into between Roynat Inc. and BSF and Petitioners or any of them will be at liberty, but not required, to pay any principal amount and any other interest owed pursuant to any loan, term loan, leasehold improvement loan, secured note, debenture or other like instrument for the period starting from the day of issuance of this Order and ending on the Stay Termination Date. No person being a party to or holder of any such loan, term loan, leasehold improvement loan, secured note,

debenture or other like instrument with one or more of the Petitioners may terminate, suspend, accelerate, amend or otherwise vary the performance of such loan, term loan, leasehold improvement loan, secured note, debenture or other like instrument by reason that the Petitioners or any other person or persons related thereto are insolvent, by reason of the commencement of this proceeding or any admission or evidence in this proceeding or by reason of any default or non-performance by the Petitioners or any of them;

e) Any person who has provided a letter of credit, standby letter of credit, performance bond, payment bond or guarantee (the "Issuing Party") at the request of any of the Petitioners shall be required to continue honouring such letter of credit, bond or guarantee in accordance with its terms. For greater certainty, the Issuing Party shall be prohibited from terminating, suspending, modifying, determining, refusing to honour, accelerating or cancelling any such letter of credit, bond or guarantee and the beneficiary of such letter of credit, bond or guarantee shall be entitled to draw on it in accordance with their respective terms and conditions;

f) Subject to sections 18.1 and 18.3 of the CCAA, no person shall exercise any right of lien, compensation, set-off, counterclaim or consolidation with respect to any amount which may be owing and due by any of the Petitioners and more precisely, but without limiting the generality of the foregoing, any deposit made by any of the Petitioners with any person from and after the making of this Order, whether in an operating account or as a security deposit or prepayment or otherwise and whether for its own account or for the account of any other person, shall not be applied by such person in reduction or repayment of any amount owing as of the date of this Order and such person shall have no right of lien, compensation, set-off, counterclaim, consolidation, or other right in respect of such deposit;

[47] **ORDERS** and **DECLARES** that the application of the Petitioners for the issuance of this Order, and admission or evidence in this proceeding, and any further proceedings entered or action taken by any of the Petitioners or any other person in respect of the Arrangement shall not in themselves constitute or be relied upon in evidence or otherwise as constituting an event of default or a default or failure on the part of any of the Petitioners or any person related thereto pursuant to any statute, regulation, licence, sublicence, permit, contract, agreement or arrangement or any other instrument or requirement;

OPERATIONS

[48] **ORDERS** that until the Stay Termination Date, the Petitioners shall remain in possession and control of their property, assets and undertakings and shall continue to carry on their businesses and:

a) May continue to enter into contracts with other persons and acquire goods and services necessary or desirable to continue to operate their businesses;

b) May continue to direct investment in respect of any pension funds and perform all other obligations in connection therewith and make payments with respect to the same;

c) Shall continue to operate, maintain and sell merchandise from their stores and boutiques under the banners San Francisco, New York-New York, Bikini Village, San Francisco Maillots, Victoire Delage, Moments Intimes and Les Ailes de la Mode;

[49] **ORDERS** that for the period commencing with the day of issuance of this Order until the Stay Termination Date, none of the Petitioners:

a) Shall, other than in accordance with existing agreements and in the ordinary course of business, or pursuant to the other provisions of this Order, sell, dispose of, convey, transfer, release, discharge, assign, hypothec, pledge or grant security on any of their property, assets and undertakings involving an amount of consideration (in any one transaction or series of inter-related transactions) without prior leave of this Court;

b) Shall enter into any new material transaction or incur any new debt or other obligation except in the ordinary course of business or as otherwise provided for in this Order or any subsequent order;

[50] **ORDERS** that, after the date of this Order and except as otherwise provided to the contrary herein, the Petitioners shall be entitled to pay all reasonable expenses incurred in the carrying on of business in the ordinary course and after the present Order, and that, pending any subsequent order of this Court, such expenses shall include, without limitation:

a) All amounts owing for goods and services supplied to any of the Petitioners after the date of this Order;

b) All wages, benefits, vacation pay and other amounts due or accruing due to employees of any of the Petitioners and all deductions at source and pension or other contributions in connection with such employees;

c) Principal and interest, interest only, lease payments, costs, fees, expenses or charges to creditors and lessors, including lessors of movable property and lessors of premises, accruing from the date of issuance of this Order;

d) All amounts due or becoming due by any of the Petitioners under any credit card arrangement including, without limitation, with respect to American Express, MasterCard and Visa cards;

e) All insurance premiums, payments under financing arrangements for insurance premiums and other sums payable pursuant to insurance contracts or policies;

f) All accounts of legal, accounting and other advisers and consultants advising the Petitioners in connection with the preparation of the Arrangement or generally advising the Petitioners in connection with possible restructuring, refinancing or recapitalisation;

g) All accounts of the Monitor and its counsel, advisers and consultants;

h) Amounts normally paid or transferred between the Petitioners and between the Petitioners and their respective subsidiaries in the ordinary course of business;

i) All amounts reasonably necessary for the preservation of the property, assets or undertakings of the Petitioners;

j) Any other amounts provided for by Arrangement or by the terms of this Order;

k) Any amount to be paid or credited pursuant to a gift certificate, credit note, loyalty program, return or layaway granted by any of the Petitioners;

l) All amounts due or become due by any of the Petitioners to their respective directors as fees and expenses;

[51] **ORDERS** that no amount shall be transferred or advanced by and between any of the Petitioners other than amounts transferred by Petitioner Les Ailes de la Mode Incorporées ("Les Ailes") to BSF in amounts consistent with the estimated cash flow, filed as Exhibit R-3 which shall not exceed $2,000,000 provided that BSF shall not exercise any right of lien, compensation set-off, counterclaim or consolidation with respect to any amount which may be owed by Les Ailes to BSF;

[52] **AUTHORIZES** the Petitioners to retain and employ and make payment to such agents, servants, attorneys and other advisers and consultants as they deem reasonably necessary or desirable in the ordinary course of their businesses, for the purpose of carrying out the terms of this Order or for the preparation, negotiation or implementation of the Arrangement;

[53] **ORDERS** that in the event that any of the Petitioners becomes bankrupt or a receiver within the meaning of subsection 243(2) of the BIA is appointed in respect of any of the Petitioners, the period between the date of this Order and the Stay Termination Date shall not be counted in determining the thirty-day period referred to in subsection 81.1(a) of the BIA or the 15-day time period referred to in section 81.2 of the BIA;

[54] Only **RESERVES**, at this stage, the rights, if any, of the Petitioners and each of them to, by notice to the other party or parties concerned, terminate, cancel, resile from or repudiate such contracts, agreements, arrangements, leases, subleases, licences or sublicences, in accordance with their terms or otherwise, as they deem appropriate, and to make provision for any consequences thereof in the Arrangement;

DIRECTORS AND OFFICERS INDEMNIFICATION HYPOTHEC

[55] **ORDERS** that the Petitioners shall and do hereby indemnify each of their respective directors and officers from and against :

a) All costs, claims, liabilities and obligations of any nature whatsoever that may be reasonably incurred after the date of this Order by any of such directors and officers as a result of his position as a director or officer of a Petitioner or the performance of his duties as a director or officer of a Petitioner, except to the extent that such director has actively participated in the breach of any fiduciary duty or has been grossly negligent or guilty of wilful misconduct; and

b) All costs, claims, liabilities and obligations which any such director or officer sustains and incurs after the date of this Order relating to the failure of the Petitioners or any of them at any time to make any payment in respect of which such director or officer may be liable under any law in his or her capacity as such;

(the "Director's and Officer's Liability")

Provided that the foregoing shall not constitute a contract of insurance and shall not alter in any way the application of existing insurance policies issued in favour of the Petitioners or any of their directors;

[56] **DECLARES** and **ORDERS** that amounts to be paid as a consequence of a Director's and Officer's Liability, shall be secured by a hypothec, ranking immediately after the Monitor and Counsel Hypothec but in priority to all other security, over the universality of all the movable and immovable property, corporeal and incorporeal, present and future of the Petitioners, for a maximum amount of $5,000,000 (the "D&O Hypothec");

[57] **ORDERS** that the Petitioners or their directors and officers shall not be required to file, register, record or perfect the D&O Hypothec to render it opposable to the Petitioners, creditors and third parties;

MONITOR

[58] **APPOINTS** Richter & Associés Inc. as Monitor of the Petitioners with the prescribed powers and duties of a monitor under the CCAA and such other powers and obligations as are provided in this Order;

[59] **ORDERS** the Petitioners, their shareholders, directors, officers, employees and mandatories and all persons having notice of this Order to cooperate fully with the Monitor in the performance of its duties and to provide the Monitor with such access to the Petitioners' books and records, property, assets and premises as the Monitor requires to exercise its powers and perform its duties under the CCAA or this Order;

[60] **ORDERS** that, without limiting the scope of the duties of the Monitor pursuant to the CCAA, the Monitor shall, until further order of this Court:

a) Notify, by regular mail, all of the known creditors of each of the Petitioners having claims of more than $250 of the present Order, within ten (10) days after the rendering of any such order;

b) Assist the Petitioners in the development and implementation of the Arrangement;

c) Assist the Petitioners, to the extent requested by them, in their negotiations with creditors and with the holding and administrating of any meetings to consider the Arrangement;

d) Seek, receive and determine the amount of the claims of the creditors (within the meaning of section 12 of the CCAA) of the Petitioners, the whole with the collaboration of the Petitioners, but any decision of the Monitor to disallow, in whole or in part, the claim of any purported creditor shall be review able by this Court on motion served on the Petitioner or Petitioners concerned and the Monitor and filed with this Court within ten (10) days of the issuance of such decision by the Monitor;

e) Report to the Court on the state of the business and financial affairs of the Petitioners at such times as are required by the CCAA and at such other times as the Court may order; and

f) Perform such other duties as are required by this Order or subsequent order of this Court;

but the Monitor shall not otherwise interfere with the businesses carried on by the Petitioners, and the Monitor is not empowered to take possession of the property, assets and undertakings of the Petitioners nor to manage any of the businesses or affairs of any of the Petitioners;

[61] **ORDERS** that the Monitor is not, nor is not deemed to be, solely as a result of this Order or the performance of its duties, an employer or a successor employer of the employees of the Petitioners or a related employer in respect of the Petitioners within the meaning of any federal, provincial or municipal legislation or regulation governing employment, labour relations, pay equity, employment equity, human rights or pensions or any other statute, regulation or rule of law and the Monitor shall not be, or be deemed

to be, solely as a result of this Order or the performance of its duties, in occupation, possession, charge, management or control of the property or business or affairs of the Petitioners pursuant to any federal, provincial or municipal legislation or regulation or rule of law which imposes liability on the basis of such status including, without limitation, any labour law or environmental legislation or regulation;

[62] **ORDERS** that the Monitor not be held liable for any act, omission or obligation of the Petitioners or any of them or any act or omission of the Monitor's in the actual or intended fulfillment of its duties or the carrying out of the provisions of the CCAA or this Order, save and except for gross negligence or wilful misconduct on its part, and no action, application or other proceeding shall be taken, made or continued against the Monitor without the leave of this Court first being obtained and upon further order securing, as security for costs, the judicial and extra-judicial costs and disbursements of the Monitor in connection with such any action, application or other proceeding;

[63] **GRANTS** the Monitor the liberty to:

a) Retain and employ such mandatories as are reasonably necessary for the purpose of carrying out the terms of this Order;

b) Engage legal counsel as is reasonably necessary for the performance of its duties under the CCAA or this Order;

c) Engage any persons related to the Monitor to assist it in the performance of its duties under the CCAA or this Order;

MONITOR AND COUNSEL HYPOTHEC

[64] **ORDERS** that the Monitor, as well as counsel to the Monitor and counsel to the Petitioners or counsel to the board of directors or any special committee thereof (collectively the "Counsel"), be paid their reasonable fees and disbursements (including, in the case of the Monitor, the cost to it of any liabilities incurred in the proper exercise of its powers or discharge of its duties in accordance with the CCAA or this Order), and that such fees and disbursements be part of the costs of these proceedings;

[65] **DECLARES** and **ORDERS** that the reasonable fees and disbursements of the Monitor and of the Counsel shall be secured by a hypothec, ranking in priority to the D&O Hypothec and in priority to all other security, over the universality of all of the movable and immovable property, corporeal and incorporeal, present and future of the Petitioners, for a maximum amount of $500,000;

[66] **ORDERS** that the Petitioners, the Monitor or Counsel shall not be required to file, register, record or perfect the Monitor and Counsel Hypothec in order to render it opposable to the Petitioners, creditors and third parties;

SERVICE AND NOTICE

[67] **DISPENSES** with service of the motion for this Order and of the supporting affidavit and exhibits and any notice and delay of presentation relating thereto;

[68] **ORDERS** that, in the event that any part or parts of, or all or substantially all of, the property, assets and undertakings of the Petitioners or any of them is sold, leased or otherwise disposed of or made subject to licence, the sale, lease or other disposition, or the interest of the licensee, shall be free and clear of the D&O Hypothec and the Monitor and Counsel Hypothec, which hypothecs shall continue instead as against the proceeds of sale, lease or other disposition or licensing;

[69] **ORDERS** that:

1) The Petitioners and the Monitor may serve this Order and, subject to further order of this Court, any other orders in these proceedings and any notices, including disallowance of claims, by pre-paid ordinary mail, courier, personal delivery or electronic transmission to the relevant creditors or other persons at their respective addresses as last shown on the records of the Petitioners and any such service or notice shall be deemed good and sufficient service;

2) For the purpose of calculating the period of notice, apart from personal service effected according to the *Code of Civil Procedure*, any service or notice effected by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date thereof, and any service or notice effected by ordinary mail shall be deemed to be received on the fourth (4^{th}) business day after mailing in Canada and in the United States or on the seventh (7^{th}) business day otherwise;

3) Except as otherwise provided herein or subsequently ordered by this Court, no document, order or other material need be served on any person in respect of these proceedings unless such person has filed an appearance in the present proceedings in the Court record and given notice of such appearance to the respective attorneys for the Petitioners and the Monitor, as the case may be;

GENERAL TERMS

[70] **PERMITS** the Petitioners or the Monitor to, from time to time, apply to this Court for directions regarding the exercise of the powers or the discharge of the duties of the Monitor pursuant to the CCAA or this Order or in respect of the proper execution of this Order;

[71] **PERMITS** any interested person to apply to this Court to vary or rescind this Order or any subsequent order in this proceedings, or to seek relief from any provision of this Order or any such subsequent order, or to seek any other relief, on five (5) days'

notice to the Petitioners concerned and to the Monitor and any other person or persons likely to be concerned by the order or relief being sought, or on such shorter period of notice as may be allowed by subsequent order of this Court;

[72] **DECLARES** that this Order, and any other orders in these proceedings, shall have full force and effect in all provinces and territories in Canada and as against all persons and corporations against whom it may otherwise be enforceable;

[73] **SEEKS** and **REQUESTS** the recognition, aid and assistance of any Court, tribunal, administrative body or other authority within any province or territory of Canada and whether constituted under the laws of Canada or any province or territory, including, without restricting the generality of the foregoing, any Court, tribunal, administrative body or other authority in Ontario, and that all such Courts and authorities make such orders and provide such assistance to the Petitioners and/or the Monitor as they may deem necessary or appropriate in aid of and complementary to this Court in carrying out the terms of this Order or any further order of this Court issued at the request of any of the Petitioners or the Monitor in the present proceedings.

[74] **ORDERS** provisional execution of this Order notwithstanding appeal and without the necessity of furnishing security;

[75] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

Me Alain Riendeau et Me Stéphanie Lapierre
Fasken, Martineau
Attorneys for the Petitioners

Me Denis St-Onge et Me Patrice Benoit
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Me Avram Fishman
Goldstein, Flanz, Fishman
Attorneys for Cadillac Fairview.

Me Guy-Paul Martel
Stikeman, Elliott
Attorneys for Ivanoe Cambridge Inc.

Date of hearing: December 17, 2003.

Tab 7

2002 ABQB 659, 37 C.B.R. (4th) 42, 318 A.R. 165

C
2002 CarswellAlta 875

Big Sky Living Inc., Re
IN THE MATTER OF THE INSOLVENCY OF BIG SKY LIVING INC.
Alberta Court of Queen's Bench
Slatter J.
Judgment: June 3, 2002
Docket: Edmonton 96892

Counsel: J.H. Hockin, for HSBC Bank of Canada

Subject: Insolvency; Corporate and Commercial

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

Bank provided $1,500,000 in financing to debtor -- Debtor had numerous other creditors -- Bank sought ex parte order appointing interim receiver -- Bank drafted order granting receiver extensive powers and protection -- Other creditors either consented to or did not oppose order -- Draft order went well beyond purpose and intent of appointing interim receiver -- Most terms beyond those granted by statute were not permitted -- Some relief was also denied due to lack of notice to affected parties -- Other avenues were open for obtaining such extensive relief.

Annotation

In this decision, Slatter J. analyses the scope of an ex parte order appointing an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act* (the "BIA") which permits an interim receiver to be appointed where the court is satisfied that a notice by a secured creditor is about to be sent or has been sent under s. 244(1) of the BIA. Slatter J. is to be commended for his thorough analysis of the scope and breadth of the order sought. Such an analysis is, unfortunately, not a common practice in the case of ex parte orders even though such orders may have very significant impact on the rights of third parties. It is also uncommon to see a similar analysis of the powers granted to a court-appointed receiver. Such an analysis is very long overdue.

As Slatter J. states, s. 47 of the BIA was enacted in 1992 for the purpose of protecting the rights of a secured creditor during the 10-day period that the secured creditor is prevented from enforcing its security. Prior to its amendment in 1992, the BIA provided for the appointment of an interim receiver to take possession of the property of the debtor during the period between the filing of a petition in bankruptcy and the making of a bankruptcy receiving order. Upon the bankruptcy adjudication, the appointment of an interim receiver is terminated and the trustee of the bankrupt estate assumes the powers over the property of the debtor granted by the BIA. Section 47(1) authorizes the appointment of an "interim" receiver. A logical interpretation of the section, taking into account the prior provisions of the BIA authorizing the appointment of an interim receiver when a petition in bankruptcy is filed, would be to have the appointment of an interim receiver under s. 47(1) terminate when the secured creditor has the right to enforce its security. Slatter J. recognized the

interim nature of the appointment but did not make any finding with regard to the period of its efficacy since the debtor had consented to the making of the order.

In this decision, Slatter J. clearly recognized the impact on third parties of many of the provisions of the draft order and considered the various draft sections from that perspective. The difficulty faced by Slatter J. was that there has been no significant debate as to whether or not a s. 47(1) interim receiver should be used for the purpose of assisting a secured creditor in enforcing its security as opposed to protecting the assets in the interval between the appointment of the interim receiver and the time the secured creditor is entitled to enforce its security. That section of the BIA was not enacted with the former purpose in mind and, as a result, no attempt was made in it to determine what rights should be available to a secured creditor and the effect of those rights on other parties.

Most of the provisions of the draft order in this case have been adapted from orders staying proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"). Justification for such provisions in a CCAA order has been that such provisions are necessary for an effective restructuring of the debtor company for the benefit of all stakeholders. In most instances such a justification does not exist when a s. 47(1) receiver is appointed.

In this annotation I will not discuss each of the sections of the decision of Slatter J. since this would involve a much more comprehensive article than an annotation. However, I clearly support the principle followed by him that an interim receiver appointed to assist a secured creditor in realizing on its security should not be granted rights and powers greater than those available to a secured creditor under statutory or common law until such an approach has received explicit statutory approval. Nevertheless, s. 244(1) of the BIA imposes a stay of proceedings on a secured creditor enforcing its contractual rights and it is clearly equitable that during the period that the rights of the secured creditor are stayed, the status quo should be maintained. A comprehensive stay is necessary for the protection of the estate of the debtor and the position of the secured creditor.

One of the reasons secured creditors support the appointment of a s. 47(1) interim receiver is that the BIA is a federal statute and orders made under its jurisdiction are enforceable across Canada. This permits a receivership to be administered in one jurisdiction and avoids the cost of auxiliary proceedings in other provinces where assets of the debtor may be located. This approach was upheld by Farley J. in the case of *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, 27 C.B.R. (3d) 148, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]). In that case, where a s. 47(1) interim receiver was appointed by the Ontario Court, Farley J. held that parties with possible lien claims against real property in the Yukon could have their rights to file liens barred by an order of an Ontario court. However, in that case, Farley J. referred the issue as to the validity of any lien claims that were filed in the Yukon to the Yukon courts. The extraprovincial powers of a s. 47(1) interim receiver were also recognized in the case of *Re Party City Ltd.* , 2002 CarswellOnt 1259, 34 C.B.R. (4th) 81 (Ont. S.C.J. [Commercial List]), where Cumming J. appointed a receiver already appointed under s. 101 of the *Courts of Justice Act* (Ontario) to be a receiver under s. 47(1) of the BIA in order to facilitate, at the least possible expense, the conveyance of assets in the Provinces of Manitoba, Alberta and British Columbia.

The most important impact of this decision of Slatter J. is that it should initiate a comprehensive discussion of the principles which should be applied and the appropriate relief to be granted when there is an application for a s. 47 interim receiving order. As in most bankruptcy issues, rights granted to one party usually derogate from rights available to another party and an equitable balancing of the positions of the affected parties is required.

David E. Baird, Q.C.

Cases considered by *Slatter J.*:

Bank of Montreal v. Lundrigans Ltd., 12 C.B.R. (3d) 170, 100 Nfld. & P.E.I.R. 36, 318 A.P.R. 36, 92 D.L.R. (4th) 554, 1992 CarswellNfld 17 (Nfld. T.D.) -- considered

Bre-X Minerals Ltd., Re, 2001 ABCA 255, 2001 CarswellAlta 1363, 29 C.B.R. (4th) 1, 206 D.L.R. (4th) 280, [2002] 2 W.W.R. 71, 12 C.P.C. (5th) 41, (sub nom. *Bre-X Minerals Ltd. (Bankrupt), Re)* 293 A.R. 73, (sub nom. *Bre-X Minerals Ltd. (Bankrupt), Re)* 257 W.A.C. 73, 97 Alta. L.R. (3d) 1 (Alta. C.A.) -- considered

Central Trust Co. v. Major Properties Inc., 70 C.B.R. (N.S.) 288, 1987 CarswellBC 527 (B.C. S.C.) -- con- sidered

Griffiths v. Secretary of State for Social Services, [1973] 3 All E.R. 1184, [1974] Q.B. 468 (Eng. Q.B.) -- con- sidered

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd., 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315 (Alta. C.A.) -- referred to

Parsons v. Sovereign Bank of Canada (1912), [1913] A.C. 160, 9 D.L.R. 476 (Ontario P.C.) -- considered

Powdrill v. Watson, [1995] 2 A.C. 394 (Eng. C.A.) -- considered

Rizzo & Rizzo Shoes Ltd. (Receiver of) v. Rizzo & Rizzo Shoes Ltd. (Trustee of) , 37 C.C.E.L. 74, 8 C.B.R. (3d) 291, (sub nom. *Peat Marwick v. Zittrer, Siblin & Associates Inc.)* 91 C.L.L.C. 14,038, 81 Alta. L.R. (2d) 242, [1991] 6 W.W.R. 62, (sub nom. *Rizzo & Rizzo Shoes Ltd., Re)* 119 A.R. 330, 1991 CarswellAlta 321 (Alta. Q.B.) -- considered

RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of), (sub nom. *Roynat Inc. v. Allan)* 69 C.B.R. (N.S.) 245, (sub nom. *Roynat Inc. v. Allan)* 61 Alta. L.R. (2d) 165, (sub nom. *Roynat Inc. v. Allan)* [1988] 6 W.W.R. 156, (sub nom. *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receivership))* 90 A.R. 173, 1988 CarswellAlta 299 (Alta. Q.B.) -- referred to

Standard Trust Co. v. Lindsay Holdings Ltd. (1994), 15 C.E.L.R. (N.S.) 165, 29 C.B.R. (3d) 297, [1995] 3 W.W.R. 181, 100 B.C.L.R. (2d) 378, 17 B.L.R. (2d) 127, 1994 CarswellBC 634 (B.C. S.C.) -- considered

Toronto Dominion Bank v. Leonard Industries Ltd. (1983), [1984] 1 W.W.R. 120, 49 C.B.R. (N.S.) 241, 31 Sask. R. 139, 1983 CarswellSask 60 (Sask. Q.B.) -- considered

Toronto Dominion Bank v. W-32 Corp., [1983] 5 W.W.R. 476, 47 A.R. 174, 27 Alta. L.R. (2d) 37, 50 C.B.R. (N.S.) 78, 1983 CarswellAlta 264 (Alta. Q.B.) -- considered

Statutes considered:

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

Generally -- considered

s. 13.3(2) [en. 1992, c. 27, s. 9(1)] -- considered

s. 14.06 [en. 1992, c. 27, s. 9(1)] -- referred to

s. 14.06(1) [en. 1992, c. 27, s. 9(1)] -- considered

s. 14.06(1.1) [en. 1997, c. 12, s. 15(1)] -- considered

s. 14.06(1.2) [en, 1997, c. 12, s. 15(1)] -- considered

s. 14.06(2) [en. 1992, c. 27, s. 9(1)] -- considered

s. 14.06(3) [en. 1992, c. 27, s. 9(1)] -- considered

s. 14.06(4) [en. 1997, c. 12, s. 15(1)] -- considered

s. 14.06(4)(c) [en. 1997, c. 12, s. 15(1)] -- considered

s. 14.06(6) [en. 1997, c. 12, s. 15(1)] -- considered

s. 47 -- considered

s. 47(2) -- considered

ss. 69-69.4 -- considered

s. 215 -- considered

s. 244 -- considered

s. 247 -- considered

Employment Standards Code, R.S.A. 2000, c. E-9

s. 5 -- considered

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Generally -- referred to

s. 1(tt) "person responsible" (iii) -- referred to

s. 134(b) "operator" (vi) -- referred to

Judicature Act, R.S.A. 2000, c. J-2

Generally -- referred to

Personal Property Security Act, R.S.A. 2000, c. P-7

Generally -- considered

s. 64(c) -- considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 386 -- considered

R. 387(2) – considered

R. 548 -- considered

RULING on scope of order appointing interim receiver.

***Slatter J.*:**

1 The issue on this application is the proper scope of an *ex parte* order appointing an interim receiver under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

Facts

2 The debtor Big Sky Living Inc. owns and is developing a piece of land in Parkland County, just west of Edmonton. HSBC Bank of Canada provided financing for the project, and took as security a general security agreement and a mortgage on the lands. HSBC has advanced approximately $1.5 million to Big Sky.

3 There are other creditors and interested parties. Country Squire 2000 Inc., the previous owner of the lands, has a second mortgage on the title. 416099 Alberta Ltd. claims an interest in the lands and has filed a caveat to protect it. Atco Gas and Pipelines Inc. has a right-of-way across the lands, and proposes to install a high pressure gas pipeline which may require an increased setback between the right-of-way and the development, and which may therefore affect the value of the property. Eng-Con Holdings Ltd. has been installing utility infrastructure on the lands. On May 23, 2002 Eng-Con filed a builder's lien on the property for $587,887.

4 The filing of the builder's lien caused concerns for HSBC. On May 30, 2002 HSBC gave Big Sky ten days' notice of its intention to enforce its security, as required by s. 244 of the *Bankruptcy and Insolvency Act*. On May 31, 2002 HSBC commenced these proceedings, and on June 3, 2002 it applied to Smith, J. for an interim receiver under s. 47 of the *Bankruptcy and Insolvency Act*. Smith, J. was apparently concerned by the short notice that had been received by some of the other interested parties, a problem that was compounded by the breadth and complexity of the proposed order, which is 15 pages long. For ease of reference a copy of the order that Smith, J. granted is attached to these reasons, with those portions that she added in handwriting shown in italics. As can be seen, Smith, J. granted the order effective until Friday, June 7, 2002 only, and directed that the order be renewed in Chambers on that date. On June 7th the matter came before me in Chambers for review. Upon reviewing the Order I became concerned about the breadth of some of the clauses, and I indicated to counsel that I was not prepared to grant the Order in the form tendered. I invited counsel to provide me with argument and authorities as to the proper scope of the Order, and to permit counsel to do so I extended the Order twice. Counsel appeared before me on June 21, 2002 and presented argument, at which point I extended the Order again, pending delivery of these Reasons for Decision.

5 Counsel advises that Big Sky, 416099, and Eng-Con are now consenting to the Order. Country Squire and Atco are not opposing it. This eliminates any concerns that the Court might have had about the impact of the Order on those parties. There remain, however, concerns about the scope and breadth of the Order.

The Statutory Framework

6 The jurisdiction to appoint an interim receiver is found in s. 47 of the *Bankruptcy and Insolvency Act*, which reads as follows:

> **47.(1)** - Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.
>
> **(2)** - The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.
>
> **(3)** - An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
>
> (a) the debtor's estate; or
>
> (b) the interests of the creditor who sent the notice under subsection 244(1).

7 It is precondition to the appointment of an interim receiver under this section that notice of intention to enforce security has or is about to be sent. That condition has been complied with in this case. The test is then whether it is "necessary for the protection of the estate or the creditors" to appoint an interim receiver. Smith, J. obviously felt that this condition had been satisfied, and I respectfully agree. The question is then what powers and directions should be given to the interim receiver. The wording of s. 47(2) is very wide, but in granting powers to the interim receiver the Court should have regard to what is truly "necessary for the protection" of the estate or the creditor.

8 Section 47 appears to contemplate that an interim receiver will be appointed for a brief period only, to protect the interest of the creditors while the 10-day notice period under s. 244 is running. The section does not appear to contemplate that the interim receiver will actually carry on the business of the debtor, although that is the intention of HSBC in this case. However, given the consent or lack of opposition by the key players described above, this issue need not be explored further. HSBC had the power to appoint a receiver under its general security agreement, and it could also have applied for a receiver under the *Judicature Act*, or it could have petitioned Big Sky into bankruptcy. HSBC obviously found the interim receivership route to be more convenient, and the other parties concur.

Statutory Protection for an Interim Receiver

9 There are a number of provisions in the *Bankruptcy and Insolvency Act* that provide some protection to an interim receiver. These provisions are primarily designed to allow the interim receiver to deal with the debtor's assets in an orderly way, without being bombarded by litigation or burdened by frequent court appearances. They protect the interim receiver from some risks and claims which Parliament has obviously felt should not, for reasons of fairness or convenience, be visited upon the receiver. By limiting the exposure of receivers, these provisions undoubtedly helped reduce the overall costs of receiverships.

10 The key provisions that provide protection for an interim receiver are as follows:

14.06(1) No trustee is bound to assume the duties of trustee in matters relating to assignments, receiving orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes an interim receiver or a receiver within the meaning of subsection 243(2).

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

. . .

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct.

(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

. . .

215. Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

In addition to s. 14.06(2), other sections of the *Act* deal with environmental risks in some detail. Section 14.06(4) limits the obligation of the interim receiver to comply with orders made to remedy any environmental condition. To obtain the protection of this section, the interim receiver must either comply with the order, abandon the property in question, contest the order, or apply for a stay of the order. The *Act* also provides a super priority for the costs of remedying certain environmental damage.

11 The Order applied for by HSBC is in many respects prospective, and it goes far beyond the provisions of the *Act*. It gives the interim receiver the power to deal with matters that have not yet arisen, and in all likelihood will never arise. The Order might be described as a "standard form order", and it attempts to anticipate problems or issues that might arise in a receivership. It obviously makes sense for the Order to be wide enough that the Interim Receiver does not have to be back in Court continuously seeking advice and direction on small points. There is nothing particularly objectionable in using precedents and standard form orders. However, an applicant tendering an order for signature by the court has a duty to edit it in each case to make sure that it is appropriate for the particular circumstances.

12 Of greater concern is the fact that the Order purports to affect the rights of parties that have not been served with the proceedings to date, and have probably not even been served with the Order. Those parties include employees, unsecured creditors, government agencies, landlords, and many others. While it is appropriate to anticipate *powers* that the Interim Receiver might require in the future, it is less appropriate to try and anticipate and cut off *rights* of third parties

that might exist. When an order purports to affect the rights of persons who have not been given notice of the proceedings, then it is an *ex parte* order as against those persons and the usual principles apply. The Applicant has a duty to make full disclosure to the Court. The relief sought is extraordinary, and should only be granted in a clear case. Generally speaking, the order should be no wider than the circumstances require. Relief which is not urgent should not be granted *ex parte*, but should await proper notice. Further, it is generally contemplated that *ex parte* orders will be served forthwith on all affected parties; it is clear that the Applicant does not propose to serve all affected parties (for example landlords, employees and contractors) until some particular need arises.

13 A further problem with the Order in question is that it is in some respects "legislative" in nature. Not only does it purport to give the Interim Receiver certain powers, and to cut off the rights of others, it then goes on to provide sweeping definitions and descriptions of what those rights and immunities encompass. In many cases the provisions of the Order go far beyond the statutes that are in place. It is generally inappropriate for the Court to define what Parliament has chosen not to define, and to expand at large on what particular statutory provisions mean. These parts of the Order are declaratory in nature. The Court has always been careful about issuing declaratory judgments, and will not issue them when the issues are moot, where the issues are overly abstract or academic, or where there is no necessity on the facts of the particular case to issue a declaration. There are good reasons for these rules, relating to the constitutional division of powers and relating to the role of a common law court in developing the law. Some clauses in the tendered Order are objectionable on this basis.

14 Counsel for the Applicant was unable to provide any authority supporting an order of the scope asked for. He was able to provide copies of two interim receivership orders granted by the Ontario Superior Court of Justice - Commercial List, but these were simply copies of the orders as granted and there were not written reasons provided to explain the or- ders.

15 With those general comments in mind, some of the specific clauses in the order require examination.

Solicitor-Client Notice Requirements

16 Clause 3 of the Order directs all persons to deliver all of the property of the debtor to the Interim Receiver. This is the essence of the receivership order. Included is a direction that all documents belonging to the debtor be delivered over, and in this respect the Order is directed at all "legal counsel". In *Bre-X Minerals Ltd., Re* (2001), 97 Alta. L.R. (3d) 1, 293 A.R. 73, 206 D.L.R. (4th) 280, [2002] 2 W.W.R. 71 (Alta. C.A.) the Court held that a trustee does not have a general power to waive solicitor-client privilege of the debtor. Accordingly, this provision in the Order is overly broad unless it specifically exempts privileged documents, as it is not clear that an interim receiver would have greater rights.

Exemption From Notice Requirements

17 Clause 5(f) of the order grants the Interim Receiver the power to sell assets, and ends with this clarification:

> . . . and in any case without compliance with the provisions of Part V of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 or any other notice, statutory or otherwise, which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, in respect of which notices the Receiver be and is hereby relieved.

In my view, the Court should not grant relief in this form. It is legislative in nature, in the sense that it purports to exempt the Interim Receiver from the provisions of the *P.P.S.A.*, and any other statute to the same effect. Parliament has not seen fit to grant interim receivers any such blanket statutory exemption, and it is inappropriate for the Court to purport to do

so. If the Interim Receiver can establish that it is in fact exempt from the provisions mentioned, whether for constitutional or other reasons, then it may proceed as it is advised. However, until there is an express legislative provision exempting interim receivers from the *P.P.S.A.*, or a binding decision of a court to the same effect, this provision should not appear in an *ex parte* receivership order.

18 While s. 64(c) of the *P.P.S.A.* gives the Court the jurisdiction to dispense with notice, I do not believe that it was ever contemplated that the Court would grant a blanket exemption in the form contemplated by this Order. There may be particular instances involving particular sales where the Interim Receiver does not wish to give notice to particular persons or groups of persons. In those cases the Interim Receiver should apply, setting out the full particulars of the circumstances that have arisen, and ask for an order dispensing with the service of notice as required.

Bankruptcy

19 Paragraph 5(u) of the Order authorizes the Interim Receiver to assign the debtor into bankruptcy, and "to act as Trustee in Bankruptcy of the estate". Section 13.3(2) of the *Act* recognizes that it is not always appropriate for a receiver to act as a trustee in bankruptcy. There is no urgency involved, and nothing on the record to justify this relief. The provision anticipates a future state of affairs that is unknown, and this provision is not justified.

Landlords

20 Clause 5(x) of the order allows the Interim Receiver to surrender any part of any leased premises, "in which case only the prorated portion of the occupation costs shall apply". It is not clear on the record whether Big Sky has any leased premises, but it is clear that any landlord has not been served with notice of this application. There is nothing on the record that would establish any urgency justifying the granting of this type of relief in an interim order on an *ex parte* basis. If the Interim Receiver believes that it has this type of power at law, and the order is merely intended to be declaratory of that power, then the Interim Receiver should simply proceed to exercise the rights it believes it has. However, if the Interim Receiver wishes to have that right declared and crystalized by the Court, and set out in an order that is enforceable by the usual methods, then the Interim Receiver is under an obligation to serve notice on the landlord whose rights are being affected. This is a good example of a provision in the Order which is designed to prospectively cut off the rights of a party who has not been served with any of the proceedings.

Variation of the Order

21 There are a number of provisions in the Order that provide that an affected party can apply for a variation. Variation of *ex parte* orders is provided for by Rule 387(2), but such a provision is almost invariably also included in the *ex parte* order. Variation clauses are also advisable in orders granting general relief, such as receivership orders, because one can never anticipate all of the ramifications of the order.

22 It is sometimes argued that the variation clause mitigates any concerns the Court might have about third parties whose rights are affected by the order. The argument is that any such party can simply come forward and have the order varied. While the variation clauses can provide some comfort to the Court, they are not a complete answer. First of all, an order with a variation clause in effect reverses the burden of proof, and there is no reason why the affected party should face that burden when the order was granted *ex parte*. Secondly, the affected party may be prejudiced because it cannot do the prohibited thing without first obtaining leave of the Court, and the passage of time might well prejudice that party. Thirdly, there is an expense in making the initial application. Here, of course, there is a balancing of interests involved, because the Interim Receiver must have some ability to carry on with the business of a debtor without undue interference by unilateral acts of third parties. However, as a general rule, variation clauses are not a complete answer to the type of

sweeping provisions included in this Order.

23 In paragraph 6 of the Order, the Interim Receiver is given the right to apply to vary the Order on two days' notice. All the other provisions of the Order providing for variation by third parties (such as paragraphs 8 and 30, and paragraph 33 as it originally read) provide for seven days' notice. It is customary for orders of this type to provide for variation on two days' notice, the time set out in Rule 386, and no reason was given why a general enlargement of time under Rule 548 is called for. If two days is insufficient notice in a particular case, the Interim Receiver can apply for an adjournment or other relief.

Contracting Parties

24 Paragraph 7 of the Order is directed at those who have contracts with the debtor, including "all persons, firms, corporations, governments, governmental agencies, municipalities, counties and other entities of any kind or nature", including all of the officers, directors and agents of Big Sky. Each of these persons are restrained from "varying, amending, terminating, cancelling or breaching any contracts or agreements with the debtor". In case someone should discover any way of circumventing the staggering breadth of this provision in the Order, the topic is picked up again in paragraphs 9(c), (d), (e) and (f). By paragraph 9(c) all persons are restrained from "accelerating, terminating, suspending, modifying or cancelling any agreements". Paragraph 9(c) ends up with a form of mandatory *ex parte* injunction requiring all persons to "continue to perform and observe" all agreements. It would appear to be wide enough to prevent any employee from resigning. Paragraph 9(f) of the Order restrains the exercise of certain options, remedies or rights, most of which would arise by contract. Paragraph 9(e) restrains even the "asserting or perfecting" of any right.

25 There are innumerable contracting parties who might be affected by these provisions, most of whom have no notice of the proceedings. Assuming that the contracting parties would have the right to act as contemplated under their contracts but for the provisions of this Order, then their rights are being interfered with without notice to them. If it is being suggested that this interference with contractual rights is the legal consequence of an interim receivership, then the provisions of the Order are merely declaratory and probably redundant. As such they would fall afoul of the rule against abstract and potentially moot declarations. These provisions of the order are also legislative in nature. There is nothing in the *Bankruptcy and Insolvency Act* which restrains contracting parties in the manner set out in this Order. Parliament not having seen fit to enact such a provision, it is inappropriate for the Court to attempt to do so under the guise of granting a receivership order.

26 In any event the rights of contracting parties should not be swept away or crystalized in a court order on an *ex parte* basis unless urgency can be shown. There is nothing on the record that would establish why such relief is necessary for the protection of the debtor's estate. There is also no evidence of any urgency justifying this relief being granted *ex parte*.

27 The only portion of these clauses which is justified is the provision in the middle of paragraph 9(c) which restrains the interference with any utilities or telecommunications being provided to the debtor. Because of the duty of public utilities to provide service on payment, and the severe effect that disruption to these services would have, those provisions may remain in the Order. The Applicant has leave to make further submissions justifying any other provision of clauses 7 and 9.

Restraint on Proceedings

28 Paragraph 9 of the Order opens with a general restraint on any proceedings against the Interim Receiver or the property of the debtor. The Order then goes on to provide two pages of single-spaced detail about the general restraint on proceedings, which is said to be "for greater clarity and without limitation". Paragraph 30 is on the same topic and to the

same effect. Some general observations are appropriate. First of all, it is well known that s. 69 through to s. 69.4 of the *Act* impose a general stay of proceedings during a bankruptcy. The provision of a stay is one of the central tenets of the bankruptcy system, as it allows the trustee to realize the assets of the debtor in an orderly way. However, it is significant that none of the sections providing a stay extend to an interim receivership. It has been suggested that absent a statutory authority the Court can control actions against a receiver, but not against the debtor: *Toronto Dominion Bank v. W-32 Corp.* (1983), 27 Alta. L.R. (2d) 37, 47 A.R. 174, 50 C.B.R. (N.S.) 78 (Alta. Q.B.).

29 The only restraint on proceedings relating to interim receiverships is to be found in s. 215, and it merely states that no action shall be brought against the interim receiver for any action taken pursuant to the *Act*, without the leave of the Court. It should be noted that this is a prohibition against actions against the interim receiver, as opposed to actions against the property of the debtor. It is accordingly of some concern that the Applicant is seeking an order from the Court which provides a stay of proceedings in circumstances where Parliament has not seen fit to impose one. Nevertheless, I am satisfied that in most circumstances the orderly management of the affairs of the debtor will require some protection for the interim receiver from inappropriate litigation: see F. Bennett, Bennett on Receiverships (2d ed., 1999) at pp. 221-24. Any general stay should however make it clear that leave of the Court to sue may be obtained *nunc pro tunc*, to avoid the issues that arose in *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 61 Alta. L.R. (2d) 165, 69 C.B.R. (N.S.) 245 (Alta. Q.B.).

30 The second observation I would make about the Order is that while the preamble of paragraph 9 talks about "proceedings", the detail of the paragraph then goes beyond matters that would normally be considered "proceedings". While it may be a legitimate drafting technique in a contract to provide expansive and artificial definitions, it is generally inappropriate to do so in a court order, and it is certainly inappropriate to do so unless the Applicant specifically draws the provisions in question to the attention of the Court.

31 I have already mentioned (supra, para. 24) paragraph 9(c), which deals with the rights of contracting parties, and not really with proceedings at all. In addition, paragraph 9(b) states that proceedings "shall specifically include any access to or development of any utility right-of-way affecting the property or any part thereof". Counsel quite properly drew this provision to my attention, and indicated that it was an attempt to deal with the possibility that Atco might enter upon its right-of-way and install its high pressure gas line, before the Interim Receiver would have an opportunity to properly assess that issue. Since Atco is not opposing this order, I am no longer concerned about the substance of the paragraph. However, any provision like this one designed to have specific effect against one person should have been drafted naming the particular party (Atco), and it should not have been worded so generally as to cover any and all utility rights-of-way. Further, this specific provision should have appeared in a separate paragraph, to emphasize that it was an application for specific relief against a specific party, and was not simply a request for general powers for the Interim Receiver. I understand that the Interim Receiver and Atco are discussing this issue, and they may address the proper wording of the clause in the Order as required.

32 Paragraph 9(b) includes a prohibition against the termination of any permits or licenses affecting the debtor. This provision is of some concern, because there is no indication of what these licenses or permits may consist, and accordingly there can be no assurance that the Court has any jurisdiction to interfere with them. However, licenses or permits may well be in the same category as utilities and telecommunications, in that their termination might well affect the viability of the enterprise. I am therefore prepared to grant an order that no license or permit affecting the debtor should be terminated or suspended except on seven days' notice to the Interim Receiver. That would give the Interim Receiver sufficient time to seek whatever remedies might be available to it in the circumstances.

33 Paragraph 9(g) of the order provides that no person may make demand upon, send notice to, or declare default with

respect to the debtor or its property. The record does not establish that such a provision is necessary for the preservation of the estate. The sending of such notices can at most fix the legal rights of the parties. It will not involve physical interference with the property of the debtor or its business. If persons have such rights, there is no obvious reason why the Court should intervene *ex parte* and take those rights away from them, especially in such a broad and general way. If it is a legal effect of an interim receivership that such rights may not be exercised, then this provision of the Order is redundant in any event, and any purported exercise of the rights will presumably be ineffective. The Applicant is at liberty to address this issue if it can establish that any of the rights mentioned should be restrained.

34 Paragraph 9(h) of the Order again has nothing to do with proceedings, but deals with deposits made by the Interim Receiver. There would appear to be no urgency in this regard, and no reason to deprive people on an *ex parte* basis of whatever rights they may have. If the Interim Receiver wants to make deposits on conditions, it is free to do so. If any other specific problems arise, the Interim Receiver can apply for advice and directions.

35 In summary, I am prepared to grant some general protection to the Interim Receiver against litigation. However, the provisions of the Order should provide that:

> a) proceedings outstanding on the date of the Order are stayed for 30 days, without affecting any steps taken before service of the Order;
>
> b) proceedings commenced after the date of, but before service of the Order are stayed for 30 days from service;
>
> c) after service of the Order a party may commence and serve new proceedings, but they may not be further prosecuted without leave of the Court.

Expansive definitions that are not found in the *Act* should not be provided in the Order, except that I am prepared to grant relief as set out in the first three lines of paragraph 9(b) as it may not be apparent to the untrained reader that realization remedies are "proceedings". I am prepared to grant an order restraining interference with utilities and telecommunications as previously indicated. I am also prepared to grant an order restraining interference with licenses as previously stated. The balance of paragraph 9 is unwarranted in the circumstances.

Employees

36 Paragraph 11 of the Order, which is more than one page in length, deals with the rights of employees. No employees have been served with these proceedings, and they accordingly have no notice of this application.

37 The status of employment contracts on the appointment of a receiver is somewhat unclear. Where the appointment is made privately under a security agreement, then contracts of employment are not necessarily terminated: *Griffiths v. Secretary of State for Social Services* (1973), [1974] Q.B. 468 (Eng. Q.B.), at 485; *Powdrill v. Watson*, [1995] 2 A.C. 394 (Eng. C.A.), at 440. There is authority that a court directed receivership results in the automatic termination of employment contracts: *Toronto-Dominion Bank v. Leonard Industries Ltd.* (1983), 49 C.B.R. (N.S.) 241 (Sask. Q.B.); *Central Trust Co. v. Major Properties Inc.* (1987), 70 C.B.R. (N.S.) 288 (B.C. S.C.). But the leading case of *Parsons v. Sovereign Bank of Canada* (1912), [1913] A.C. 160 (Ontario P.C.), at 171 suggests that termination is neither automatic nor universal:

> ... The inference is that as between the company and the appellants the contracts continued to subsist. The receivers and managers were exercising the powers of continuing the business given to them under the orders of the Court by taking no actual steps to determine the relations between the company and the appellants. The state

> of matters was one totally different from that in *Reid v. Explosives Co., Ld.* (1887), 19 Q.B.D. 264, where the appointment by the Court of receivers and managers was held, having regard to the character of the contract in that case, which was one of personal service, to have put an end to it. As Fry L.J.,however, points out in his judgment at p. 269, even in the case of contracts of service it by no means follows as matter of principle that all such contracts are determined when a mortgagee takes possession. It is, for example, far from clear that in the absence of a bankruptcy the mere appointment, although compulsory, of a manager to continue in the name of the mortgagor the existing management of an agricultural estate would effect such a disturbance of the owner's possession as to determine the agreements with the farm labourers employed on the property. In the case of contracts to deliver paper, such as existed in the present case, there appears to be no reason for saying that the possession of the undertaking and assets, given by the order of the Court for the express purpose of carrying on the business, put an end to these contracts. The company remained in legal existence, and so did its contracts, until put an end to otherwise.

The suggestion that employment contracts are terminated on a receivership is based on the common law rule that the personal nature of such agreements prevents their assignment, a concept that appears somewhat artificial in the modern economy, and the context of the continuation of a business by a receiver.

38 There is authority that a bankruptcy has the effect of terminating employment: *Rizzo & Rizzo Shoes Ltd. (Receiver of) v. Rizzo & Rizzo Shoes Ltd. (Trustee of)*, [1991] 6 W.W.R. 62, 81 Alta. L.R. (2d) 242, 119 A.R. 330, 8 C.B.R. (3d) 291 (Alta. Q.B.). There does not appear to be authority to the same effect respecting an interim receivership under s. 47. In any event, if a party wishes to have legal rights declared and crystalized by court order, the rules of procedure require that the affected parties be given notice. This requirement of service cannot be avoided by an argument that the rights in question are "obvious".

39 Paragraph 11 starts out by providing that all employment is "hereby" terminated. I am prepared to assume that the Interim Receiver may unilaterally terminate the employment of the employees. If the Interim Receiver did so, or if that is the legal effect of a receivership, it might well be appropriate on notice to seek a declaration of the Court to confirm that fact. However, that is a far different thing from asking the Court, by court order, to terminate employees, or to declare that result, if only because there is no evidence on the record whatsoever to justify such action. A further problem arises in that an employee might be terminated by this Order, but not find out about the termination until sometime later when he or she is actually served with the Order. Accordingly, the provision for termination should not be included. The Interim Receiver may terminate employees if it wishes, and may apply for further relief on notice to affected employees.

40 Paragraph 11 goes on to provide that if the Interim Receiver employs any person formerly employed by the debtor, the employment shall be deemed not to be continuous. The paragraph then goes on for many lines detailing the rights that such employees will not have. It goes on to provide that the Interim Receiver is not liable to the employees for any unpaid wages "whether pursuant to statute or common law". The Interim Receiver is essentially asking the Court to grant it a blanket exemption from the laws relating to employment, including any statutes. If the Interim Receiver is entitled to such immunity by operation of the *Bankruptcy and Insolvency Act*, so be it. In that event the provision is merely declaratory and redundant. It is objectionably wide, abstract and theoretical, and I decline to exercise my discretion to grant declaratory relief on this basis, *ex parte*, even if the Applicant is right about the law. If the Applicant is not right about the law, then there is no basis on which the Court could sweep away the rights of all these unknown employees. I say no more about the substantive law except to note s. 5 of the *Employment Standards Code*, R.S.A. 2000 c. E-9:

> **5.** For the purpose of this Act, the employment of an employee is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged *or if it continues*

to operate under a receiver or receiver manager. (emphasis added)

Also relevant is s. 14.06(1.2) of the *Bankruptcy and Insolvency Act,* which deals with the continuation of employment by the Interim Receiver. The exact interplay of these two sections is complex, and while the Receiver might argue that the provincial provision is inapplicable for constitutional reasons, the very presence of these sections makes it inappropriate to include in the Order the sweeping words of paragraph 11. Section 14.06(1.2) does not exempt the debtor's estate or the Interim Receiver from all of the common and statutory law of employment. Nor does that section state that employment is "not continuous"; it merely states that the Interim Receiver is not liable for certain claims *ex officio.*

41 Paragraph 11 goes on to provide that if the Interim Receiver chooses to pay an employee, the employee is deemed to have assigned his or her rights to the Interim Receiver. Again, if the Interim Receiver wishes to obtain an assignment of rights from an employee, that assignment should be obtained in writing from the employee, and not indirectly by a court order.

42 In summary, the whole of paragraph 11 is overly broad, theoretical and abstract, and does not belong in an *ex parte* receivership order of this type.

Environmental Risks

43 The increased societal sensitivity to environmental damage and contamination created new issues for receivers and trustees in bankruptcy. Particularly problematic were provisions in environmental legislation that imposed liability not only on those who contaminated property, but on those who thereafter came to own or control that property. In 1992 Parliament addressed those problems by the new provisions found in s. 14.06 of the *Bankruptcy and Insolvency Act*, which provisions were modified and extended to interim receivers in 1997: see Marin and Ilchenko, "Environmental Liabilities of Trustees and Receivers" (1997), 14 Nat. Ins. Rev. 19. In addition to limiting the liability of trustees and interim receivers for environmental damage, the *Act* now provides a super priority for the costs of environmental clean-ups.

44 The case law on the environmental liability of receivers is sparse and inconsistent. In *Bank of Montreal v. Lundrigans Ltd.* (1992), 92 D.L.R. (4th) 554, 12 C.B.R. (3d) 170 (Nfld. T.D.) the Bank applied for an order appointing a receiver, but with a limit on the environmental liability of the receiver to the net value of any contaminated property. It was submitted that no receiver would take the appointment without this protection, or an indemnity for these risks that the Bank was not prepared to give. The issue was argued on notice to the federal and provincial governments, who opposed the order. The key finding of the Court was that the various pieces of environmental legislation in question did not purport to impose liability for past environmental damage on receivers, as the definitions of those responsible for such damage did not expressly include receivers. On this interpretation of the legislation the order sought was merely declaratory of the law, namely that the environmental liability of the receiver was limited to the net value of the assets.

45 The *Lundrigans* case was not followed in *Standard Trust Co. v. Lindsay Holdings Ltd.* (1994), [1995] 3 W.W.R. 181, 29 C.B.R. (3d) 297 (B.C. S.C.) [hereinafter *Lindsay*]. *Lindsay* was decided after the 1992 amendments to the *Bankruptcy and Insolvency Act* provided some protection to trustees, but before the 1997 amendments extended that protection to receivers. The applicant in *Lindsay* wanted an order exempting the receiver from all past, present and future environmental liability, except for failure to comply with written directions from environmental regulators. Both levels of government were given notice, and opposed this blanket exemption from the law, and the effective delegation to the regulators of the environmental management of the assets in the estate. The Court in *Lindsay* held that environmental legislation did apply to receivers, even if they were not specifically named in the legislation. The Court held at paras 14 - 15:

Rather than suggest that the legislation must specifically *include* entities not intended to be made liable, the

> more logical approach would be to expect legislation to *exclude* those not liable. This is precisely the approach taken by Parliament with respect to trustees in bankruptcy. Under a recent amendment to the *Bankruptcy and Insolvency Act*, R.S.C. 1992, c. 27, s. 9, the potential environmental liability of a trustee has been expressly limited. No similar limitation is given to receivers in any legislation and accordingly I conclude that the legislators intended them to fall within the ambit of environmental legislation.
>
> To make the order requested the court would have to find jurisdiction within its own Rules, the *Law and Equity Act* or its inherent jurisdiction. Rule 47 provides that the court may appoint a receiver "either unconditionally or on terms ..." The *Law and Equity Act* empowers the court to appoint a receiver and the order may be made "on terms and conditions that the court thinks just." Neither of these, in my opinion, empowers the court to impose conditions that conflict with statutory duties, rights or liabilities.

The order was refused.

46 In Alberta, it is clear that receivers are bound by environmental legislation. They are expressly included among the "persons responsible" mentioned in sections 1(tt)(iii) and 134 (b)(vi) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, ch. E-12 (*"E.P.E. Act"*). The scope of the liability of a receiver was discussed by the Court of Appeal in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280, 80 C.B.R. (N.S.) 84 (Alta. C.A.). There is no basis for holding that a receiver in Alberta has any immunity for environmental damage beyond what is found in s. 14.06, or the *E.P.E. Act* itself. As was held in ***Lindsay***, the Court has no general jurisdiction to grant exemptions from statutes.

47 The provisions of s. 14.06(2) are fairly short and have been reproduced *supra*, paragraph 10. Essentially they provide that a receiver is only liable for environmental damage arising after the receiver's appointment and because of its gross negligence or wilful misconduct. The Court is given no power to extend or limit the protection given. The Applicant has turned those brief provisions into over one page of text in the Order, encompassing clauses 22 through 28.

48 The initial problem with the proposed environmental provisions in the Order is that they contradict other provisions of the Order. Paragraph 2 of the Order places all of the assets of the debtor under the power of the Interim Receiver. Paragraph 28 then provides that the Order does not vest in the Interim Receiver care or control of any property which "may be" environmentally polluted. This latter clause is unacceptable, because at best it creates great uncertainty as to which properties are under the control of the Interim Receiver, and at worst it gives the Interim Receiver some sort of *ex post facto* right to elect whether it has been in control of property or not. Sections 14.06(4)(c) and 14.06(6) contemplate the abandonment of contaminated property by the receiver, which is the process that should be followed if this later becomes necessary.

49 There would be nothing objectionable to a provision in the Order which essentially parallels s. 14.06(2) of the *Bankruptcy and Insolvency Act*. While such a provision might be redundant in legal terms, it is helpful to note those provisions in the Order. However, the Order as drafted goes considerably beyond this. First of all, it deems the Interim Receiver not to be an occupier for the purposes of "environmental legislation". The *Bankruptcy and Insolvency Act* does no such thing. There is no indication what environmental legislation is being referred to, or whether the Court has any jurisdiction to make this type of declaration. No notice has been given to any Department of Environment or other regulator who might have an interest in the matter. These provisions are legislative in nature, in the sense that the Court is being asked to extend general and unlimited immunity to the Interim Receiver.

50 Paragraph 23 of the Order does roughly parallel section 14.06(2) of the *Bankruptcy and Insolvency Act*. However, it goes further in that it states that the Interim Receiver's immunity comes into effect on the later of the appointment of the

Interim Receiver, or the date the Interim Receiver goes into possession. Section 14.06(2) contains no such provision. Presumably if Parliament had intended to extend that type of immunity, it would have done so.

51 Paragraphs 26 and 27 of the Order purport to define "Environmental Legislation" and "Adverse Environmental Condition". Parliament did not see fit to define either of these terms, and did not see fit to exempt trustees from all of the requirements of environmental legislation as implied by paragraph 23 of the Order. For example, I note that clause 14.06(3) of the *Act* requires the Interim Receiver to make any reports or disclosures called for by such legislation. Counsel for the Applicant indicated that these definitions were to "provide comfort" to the Interim Receiver, and to clarify what the *Act* "really means". He indicated that receivers have more faith in court orders than in the *ex post facto* interpretation of statutory provisions. Whether that be so, Parliament did not see fit to define these terms, and I cannot see why the Court should do so prospectively and in a factual vacuum.

52 Paragraph 25 of the Order limits the Interim Receiver's liability for environmental damage to the "Net Realizable Value of the Property" in the estate. Again, the *Bankruptcy and Insolvency Act* contains no such provision. If Parliament had intended a cap on the liability of receivers, it presumably would have provided for one. Furthermore, I note that the Net Realized Value of the property is defined in paragraph 29 as being net of the remuneration of the Interim Receiver and a number of other items including "distributions of proceeds". Accordingly, if the estate was only large enough to pay the secured creditors and the Interim Receiver's compensation, there would be nothing left and the Interim Receiver would be absolved of any liability whatsoever. After distribution of the assets, the Interim Receiver's liability is limited under the Order to the amount of its fees. I am unable to see on what basis the Court could grant this sort of relief *ex parte* and before the Interim Receiver has even gone into possession.

53 In summary, the environmental clauses provided in this order are inappropriate. The Applicant is at liberty to insert a clause which essentially parallels the provisions of s. 14.06(2) of the *Act*.

General Protection of the Receiver

54 Paragraph 29 purports to limit the liability of the Interim Receiver to the Net Realizable Value of the estate. I have already commented on the breadth and effect of the definition of Net Realizable Value of the assets.

55 Paragraph 29 purports to protect the Interim Receiver from all kinds of liability "whatsoever", including negligence and wilful misconduct. Paragraph 29 is so broad it even appears to protect the Interim Receiver if one of its employees negligently injured someone in a motor vehicle accident while acting in the scope of the employee's duties. It contradicts s. 247 of the *Act* which requires the receiver to act honestly and in a commercially reasonable manner. It purports to cap the liability of the Interim Receiver in connection with any environmental legislation, or labour or employment laws, something that s. 14.06(1.2) does not do. There is no obvious jurisdiction in the Court to exempt anybody from the general operation of statutes, or excuse liability for their own negligence, or to limit their liability. Apart from the environmental damage cases mentioned, there does not appear to be a decision where it has been attempted. Even the *Lundrigans* case is based on the premise that it was merely declaratory of the law. There is no provision in the *Bankruptcy and Insolvency Act* which provides any limit on the liability of receivers, whether tied to the net value of the estate or otherwise. There may situations, such as the one that arose in *Lundrigans*, where the public interest requires a receiver to wind up a high risk enterprise but no one will accept the assignment without some protection. Whether the Court can grant that protection will have to be decided when the point arises. But these protective clauses should not be included in all receivership orders as a matter of routine, and they should only be granted on notice to all governments and interested parties. In my view, the provisions of Clause 29 are unjustified on this record. The Applicant may include in the Order a provision that paraphrases s. 215. A provision paraphrasing s. 247 should also be included.

56 The indemnity in paragraph 16 is acceptable, but the reference to "gross negligence" should be a reference to "commercial reasonableness", the standard found is s. 247.

Conclusion

57 In conclusion, the Applicant has established that it is entitled to an interim receivership order in accordance with s. 47 of the *Bankruptcy and Insolvency Act*. However, the order tendered for signature is overly broad, and overly declaratory and legislative in nature. It purports to affect in general terms the rights of broad and undefined classes of parties who have not received notice of this application. It goes far beyond what is necessary for the protection of the estate of the debtor. It attempts to provide the Interim Receiver with immunities and protections that are not authorized by statute. The Order as presently granted will be extended for a further five days from the date of these Reasons, during which time the Applicant can draft and submit a further order for signature.

Order accordingly.

APPENDIX
Order of Smith, J. dated June 3, 2002

DISTRICT OF ALBERTA COURT NO. 96892
DIVISION NO. 1 ESTATE NO. _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL DISTRICT OF EDMONTON
IN THE MATTER OF
THE INSOLVENCY OF
BIG SKY LIVING INC.

BEFORE THE HONOURABLE MADAM JUSTICE L.P.L.J.)))) ON MONDAY, THE 3{RD}
SMITHIN CHAMBERS, LAW COURTS, EDMONTON, ALBERTA DAY OF JUNE, 2002.

ORDER APPOINTING INTERIM RECEIVER

UPON the application of the **HSBC BANK CANADA** (the "Bank"); AND UPON having read the Affidavit of DAVID BELL, filed; AND UPON hearing counsel for the Bank;

AND UPON IT APPEARING that the Bank has a security interest in all present and after-acquired personal property of **BIG SKY LIVING INC.** (the "Debtor"), and has a first mortgage registered against title to certain real property loc-

ated in the Province of Alberta;

AND UPON IT APPEARING that the Bank has sent to the Corporation the notice prescribed by Subsection 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (as amended) (the "BIA");

AND UPON IT APPEARING to this Honourable Court that there is sufficient urgency and reason for abridging notice of this application;

AND UPON IT APPEARING that it is necessary for the protection of the interests of the Bank and of the Debtor's estate that this Order be granted;

And upon Big Sky not appearing, though served, Atco and Country Squire not appearing, though served, Engcon Holdings appearing on a watching brief;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The time for service of the Notice of Motion and the Affidavit(s) is hereby abridged so that this Motion is properly returnable today and that further notice is hereby dispensed with.

2. Effective as of 12:01 a.m. Mountain Standard Time on the date hereof, KMPG Inc. is hereby appointed interim receiver pursuant to section 47(1) of the BIA (the "Receiver") without security of all of the property, assets and undertaking of the Debtor (collectively, the "Property"), with power to act at once to administer, manage, take control of, receive, preserve, protect, dispose of, deal with and sell the Property or any part thereof as it sees fit subject to further Order of this Court to the extent required herein, and the Receiver is hereby empowered and authorized to take possession and control of the Property, and any and all proceeds, receipts and disbursements arising out of or from the Property, and to act at once in respect thereof, until further Order of this Court.

3. The Debtor, its present and former officers, directors, solicitors, agents, custodians, managers, employees, servants, limited partners, shareholders, members, contractors, any persons acting on their instructions or behalf including, without limitation, any accountants thereof or legal counsel thereto, and all other persons having notice of this Order (collectively, the "Affected Persons"), shall forthwith grant access to and deliver possession of the Property of every nature and kind whatsoever, wheresoever situate to the Receiver including, without limitation: (a) all monies, cash on hand, cheques, post-dated cheques and remittances of any kind relating to the Property; (b) all books, securities, documents, contracts, tenancy agreements, deeds, engineering drawings, papers, records, computer records (including computer facilities and access codes) and accounts of every kind relating thereto; and (c) any other records and information of every kind and nature relating to the Property or the business carried on by the Debtor and to provide or permit the Receiver to make, retain and take away copies thereof, and to allow the Receiver immediate, continued and unrestricted access to the Property; and all of the aforesaid persons are hereby restrained and enjoined from disturbing or interfering with the Property or the Receiver and with the exercise by the Receiver of its powers and the performance by the Receiver of its duties hereunder and, to the extent required to effect the provisions hereof, all Affected Persons are hereby relieved of the powers conferred on all Affected Persons by virtue of any office or position they may hold relating to the Debtor.

4. If the Debtor's records relating to the Property are stored in a computer (which term shall include any electronic data processing system, whether in the possession of the Debtor or a third party including, without limita-

tion, internet service providers ("ISP") accessible to any of the persons referred to in paragraph 3 of this Order, such persons shall, at the request of the Receiver, give the Receiver access to and assistance in retrieving such information in such manner as the Receiver, in its discretion, considers reasonable and expedient.

5. Without limiting the generality of paragraphs 2 and 3 above, the Receiver shall be at liberty and is hereby authorized and empowered, but is not obligated, to take such steps on behalf of or in the name of the Debtor as it deems appropriate in respect of the Property, including, without limitation, any or all of the following, without the necessity for any further Order of the Court except in respect of transactions referred to in paragraph (f) hereof:

(a) take possession of all or any part or parts of the Property;

(b) make arrangements with such agents, consultants, assistants and employees as the Receiver may consider necessary or desirable to secure their assistance in the exercise of the Receiver's powers and the performance of the Receiver's duties hereunder;

(c) carry on the business pertaining to the Property, including, without limiting the foregoing, the power to sell, lease, mortgage, manage, develop and operate the Property or any part or parts thereof in the ordinary course of business;

(d) obtain such appraisals of the Property or any part or parts thereof as the Receiver may, in its discretion, deem appropriate;

(e) solicit offers to purchase the Property or any part or parts thereof, whether directly or indirectly through agents, auctioneers or liquidators, whether for cash or on credit, privately or otherwise;

(f) sell, transfer or assign, whether on credit, by private tender, public auction or otherwise, or to lease or mortgage the whole of the Property or any part or parts thereof in the ordinary course of business without Court approval, and out of the ordinary course of business with the approval of this Honourable Court first having been obtained in respect of any sale in which the gross sale price exceeds $1 million and in any case without compliance with the provisions of Part V of the *Personal Property Security Act*, R.S.A. 2000, c.P-7 or any other notice, statutory or otherwise, which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, in respect of which notices the Receiver be and is hereby relieved;

(g) take steps for the preservation and protection of the Property, including, without restricting the generality of the foregoing, to pay any debts, claims, obligations or liabilities, of the Debtor which have priority over the claims of the Bank and to pay such other debts, claims, obligations or liabilities, of the Debtor as the Receiver deems necessary or advisable to protect or properly realize on the Property, provided that all of the aforementioned payments are to be allowed to the Receiver in passing its accounts and shall form a part of the Receiver's First Charge (as defined below) on the Property;

(h) complete or partially complete such repairs and improvements on the Property as the Receiver may, in its discretion, deem appropriate;

(i) employ and retain such agents, assistants, experts, auditors, advisors, consultants, employees, solicitors and counsel, including legal counsel, as the Receiver may consider necessary or desirable and, in particular, but without limiting the generality of the foregoing, to retain a manager to, among other things carry out the

management of some or all of the Property and to the extent that the Receiver employs any of the former employees of the Debtor, paragraph 11 shall apply;

(j) receive, attorn and collect all monies and deposits now or hereafter owing to the Debtor pertaining to the Property;

(k) extend the time for payment of any monies now or hereafter due or owing to the Debtor pertaining to the Property, with or without security, and to settle or compromise any such indebtedness;

(l) apply for any permits, licenses, approvals or permissions as may be required by any governmental authority with respect to the Property;

(m) assume any contracts, licenses, or permits to which the Debtor is a party or refrain from assuming same;

(n) execute, sign, issue, endorse or negotiate in the name of and on behalf of the Debtor, or any of them, all necessary cheques, leases, bills of sale, transfers of land, conveyances, bills of lading, deeds and documents of whatever nature necessary or incidental to the exercise of the powers granted herein;

(o) purchase or lease such machinery, equipment, premises or other assets or supplies as may be necessary or desirable in the opinion of the Receiver to receive, manage, preserve, protect or realize upon the Property or any part or parts thereof;

(p) take such steps as in the opinion of the Receiver are necessary or appropriate to establish and maintain control over the Property or any part or parts thereof, including, but not limited to, the changing of locks and security codes, (including but not limited to computer access and security codes) the engaging of independent security personnel, the taking of physical inventories and the placement of adequate insurance coverage as required;

(q) pay ongoing costs or expenses incurred prior to, on or after the date of this Order which arise out of or in connection with the day to day use of the Property;

(r) take any steps, enter into any agreements or incur any obligations necessary or incidental to the exercise of the aforesaid powers and to disclaim, terminate or otherwise refuse to carry out any agreement of the Debtor in connection therewith;

(s) register notice of this Order against title to the Property in the appropriate registry offices;

(t) vote any shares and exercise any rights which the Debtor may have as a shareholder;

(u) make an assignment of all of the property of the Debtor for the general benefit of its creditors pursuant to the BIA, or to consent to a Receiving Order against the Debtor and to act as Trustee in Bankruptcy of the estate of the Debtor;

(v) file a Notice of Intention to Make a Proposal or a Proposal pursuant to the BIA or initiate reorganization or arrangement proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36. as amended, the Alberta *Business Corporations Act*, R.S.A. 2000, c.B-9, as amended, or any other provincial or federal statute, and to participate fully in any such proceedings, which may include but is not limited to applying for an extension of any period of time within which the Debtor is required to file a Proposal or

plan in any existing reorganization or arrangement initiated by the Debtor whether pursuant to the BIA or otherwise;

(w) to complete any sale which is pending as at the date of this Order, (i) on the basis that any representations and warranties to be given under any agreement of purchase and sale remain representations and warranties of the vendors named therein and shall not be or be deemed to be representations and warranties of the Receiver and (ii) if necessary, with such changes or amendments as are deemed appropriate by the Receiver, without prior approval or further order of the Court, and to do or perform all acts or things necessary for the completion of such transactions; and

(x) abandon or surrender all or any part of the Property, including leased premises, in which case only the pro-rated portion of the occupation costs shall apply;

6. The Receiver may apply, from time to time, upon two (2) days notice to the persons affected for directions and guidance in the exercise of the Receiver's powers and the performance of its duties hereunder.

7. All persons, firms, or corporations, governments, governmental agencies, municipalities, counties and other entities of any kind or nature including without limitation all Affected Persons (collectively, the "Persons" and each a "Person") are each hereby restrained and enjoined until further Order of this Honourable Court from varying, amending, terminating, cancelling or breaching any contracts or agreements with the Debtor in existence as of the date of this Order.

8. Without limiting the generality of the provisions hereof, no Person claiming an interest in the Property or any part or parts thereof shall be at liberty to exercise any rights in respect of such interest, including without limitation a right to possession of such Property or any part or parts thereof, except with the prior written consent of the Receiver or with leave of this Honourable Court being first obtained on at least seven (7) days notice to the Receiver.

9. Absent the consent of the Receiver, until further Order of this Honourable Court, no Proceedings (as hereinafter defined) shall be commenced, taken or proceeded with against the Receiver or the Property. For greater clarity and without limitation:

(a) any and all Proceedings (as hereinafter defined) commenced, taken or proceeded with or that may be commenced, taken or proceeded with by any Person, including, without limitation any of the Debtor's creditors, shareholders, employees, directors, officers, partners, joint ventures, beneficiaries, trustees, customers, clients, purchasers, suppliers, consultants, agents, principals, lessors and lessees (including without limitation, lessors and lessees of real property and equipment), governments of any nation, province, state or municipality or any other entity, exercising the executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, whether federal, provincial, state or municipal, in Canada or elsewhere and any corporation or other entity owned or controlled by or which is the agent of any of the foregoing or any other person, firm, corporation or entity wherever situate or domiciled, against or in respect of the Debtor or any Person who is from and after the date of this Order a director, officer or employee of the Debtor, or in respect of any present or future Property shall be stayed and suspended;

(b) for the purposes of this Order, Proceedings shall mean and include, without limitation, any act or process of or connected to realization, seizure, repossession and/or any suits, actions, extra-judicial proceedings or remedies, enforcement processes or the termination, revocation, suspension or cancellation of any permits

or licenses affecting the Debtor, its business, operations, Property or other remedies, and shall specifically include any access to or development of any utility right-of-way affecting the Property or any part thereof;

(c) all Persons having Agreements (as hereinafter defined) with the Debtor, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such Agreements or the supply of goods and services and are also hereby restrained from exercising any right of distress, recission, set-off or consolidation of accounts in relation to any indebtedness or obligation in favour of the Debtor or from retaining goods, without the prior written consent of the Receiver or leave of this Honourable Court on proper notice to the Receiver. Without limiting the generality of the foregoing, all Persons are restrained until further Order of this Honourable Court from discontinuing or interfering with any utility or required services to or utilized by the Debtor (including telephone, facsimile or other communication services at the present numbers used by the Debtor in respect of any Property), the furnishing of oil, gas water, heat or electricity, the supply of equipment, computer software, hardware support and electronic, internet access, electronic mail and other data services, so long as the Receiver pays (subject to the other provisions of this Order) the normal prices or charges (other than security or other deposits whether by way of cash, letter of credit or guarantee or otherwise, stand-by fees or similar items, which the Receiver shall have no obligation to pay or grant) for such goods and services received after the date of this Order as same become due and payable in accordance with present payment practices, or as may be hereafter agreed by the Receiver from time to time, or as otherwise may be provided for in this Order. Provided that nothing herein shall prohibit any Person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the date hereof, and all Persons shall continue to perform and observe the terms and conditions contained in any Agreements (as hereinafter defined) entered into with the Debtor whether in connection with any of the Property or otherwise;

(d) for the purposes of this Order, Agreement(s), shall mean and include any arrangement or agreement, written or oral, with the Debtor, including, without limitation, agreements or arrangements for the sale, supply, purchase or lease of goods and/or services (inclusive of labour) and/or real property from, by or to the Debtor or with respect to any of the Property, or any service agreement, warranty agreement, transportation agreement, rental agreement, collective bargaining agreement, delivery agreement, consulting agreement, management agreement, insurance contract or agreement and/or any similar contract or agreement;

(e) the right of any Person to commence or continue Proceedings in respect of any encumbrance, security interest, tax, lien, charge, mortgage, hypothec, prior claim or other security held in relation to Property, or to any trust attaching to the Property, including the right of any Person to take any step in asserting or perfecting any right or interest is hereby restrained. Notwithstanding the foregoing or any other term of this Order, the Bank is at liberty to commence and continue any action for the enforcement of its security;

(f) the right of any Person to assert, enforce or exercise any option, remedy or right, including, without limitation, any right of dilution, buy-out, divestiture, repudiation, recission, forced sale, forced purchase, acceleration, termination, suspension, modification, cancellation, or right to revoke any qualifications or registration, howsoever such remedy, option or right arises and whether such remedy, option or right arises under or in respect of any Agreement or by reason of any default under any Agreement, is hereby restrained;

(g) the right of all Persons to make demand upon, send notice to or declare default with respect to the Debtor or the Property is hereby restrained;

(h) any deposit made by the Receiver with any Person from and after the making of this Order, whether in an operating account or otherwise and whether for its own account or for the account of any other entity, shall not be applied by such Person in reduction of or repayment of any amount owing as of the date of this Order or which may become due on or before the date of this Order or in satisfaction of any interest, fees, charges or other amounts accruing in respect thereof, and such Person shall have no right of lien, set-off, counterclaim, consolidation or other right in respect of such deposits, and such deposits shall be remitted to the Receiver.

10. The Receiver is hereby fully authorized and empowered, but not obligated, to initiate, prosecute and continue the prosecution of any and all actions, applications, administrative hearings, arbitrations or proceedings as may in its judgment be necessary or desirable to properly receive, manage, operate, preserve, protect or realize upon the Property and to secure payment of rent and accounts from the Property, to defend all applications, proceedings, actions, administrative hearings or arbitrations now pending or hereafter instituted against the Debtor or the Receiver the prosecution or defence of which will in the judgment of the Receiver, be necessary to properly receive, manage, operate, protect, preserve or realize on the Property or to protect the administration by the Receiver of the Property, and to settle or compromise any such actions, applications, proceedings, administrative hearings or arbitrations which in the judgment of the Receiver should be settled or compromised. The authority hereby bestowed shall extend to such appeals or applications for judicial review as the Receiver shall deem proper and advisable in respect of any order or judgment pronounced in any such application, proceeding or action, administrative hearing or arbitration.

11. The employment of all of the employees of the Debtor, including without limitation, all employees on maternity leave, disability leave, layoff, temporary leave or any other of approved absence is hereby terminated effective 11:59 p.m. on the day before the making of this Order. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the employment by the Receiver of any person formerly employed by the Debtor shall be deemed not to be a continuation of that person's employment and the calculation of any benefits or entitlements arising from that person's employment shall not be computed as though that person's employment continued after 11:59 p.m. on the day before the making of this Order and the Receiver is not and shall not be deemed or considered to be the same employer, a successor employer, related employer, common employer, representative or successor of the employer, deemed employer, sponsor or payer with respect to any of the employees of the Debtor or any of its subsidiaries or any former employees thereof within the meaning of any provincial, federal or municipal legislation or common law governing employment or labour standards, the treatment of persons in their capacities as employees, or labour or employment standards or workplace safety, or any other statute, regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between the Debtor and any of its present or former employees. The Receiver shall not be liable to any of the employees of the Debtor for any unpaid pension or benefit contributions or for any wages (as "wages" are defined in the *Employment Standards Code*, R.S.A. 2000, c.E-9, or any other provincial statute governing labour or employment standards), severance pay, termination pay, vacation pay, holiday pay, or any other employee benefit or accrued incentive or entitlement, or any amount whatsoever arising from any of the employees' employment on the cessation or termination thereof, whether pursuant to statute or common law except for such amounts as the Receiver may specifically agree to pay. If the Receiver deems it necessary or advisable to make payment to the employees of the Debtor of any amounts on account of unpaid wages, severance pay, termination pay, vacation pay or any other employee benefit or accrued incentive and entitlement owing by the Debtor as at the date of this Order, the

claims of the employees in respect of such amounts shall be deemed to have been assigned to the Receiver for the purpose only of the Receiver asserting a claim against the estate of the Debtor and, in the event of the bankruptcy of the Debtor, the Receiver shall be entitled to file one or more proofs of claim in respect of such amounts which shall be accepted by the Trustee as valid claims pursuant to subsection 136(1)(d) of the BIA. For greater certainty, such assignment shall not have the effect of granting to the Receiver any claims or rights against the present and former directors and officers of the Debtor. Further, by the granting of this Order, the business of the Debtor has not been and shall not be deemed to have been, nor treated as having been sold, but rather, such business or businesses will continue to be the business(es) of the Debtor until sold, in whole or in part, to a purchaser other than the Receiver and nothing in this order shall or shall be deemed to determine whether such a purchaser is or is not a successor employer of the Debtor's employees and former employees.

12. The Receiver shall pass its accounts from time to time and shall pay the balances in its hands as this Honourable Court may direct.

13. The Receiver's remuneration and any expenses which may be properly made or incurred by the Receiver in connection with the exercise of its powers and the performance of its duties hereunder (including without limitation fees and disbursements of its counsel on a solicitor and its own client basis) shall be allowed to the Receiver in the passing of its accounts and shall form a first and specific, fixed ranking charge on the Property ranking in priority to any and all other charges or claims of the Bank or any other Person and all encumbrances subsequent thereto (the "Receiver's First Charge").

14. The costs of the Bank in the preparation of this motion, and up to and inclusive of the hearing of this motion and the entry of this Order be assessed as between a solicitor and his own client and the Receiver shall pay such costs, which shall be treated as an expense of the Receiver and be satisfied as contemplated herein.

15. The Receiver shall be at liberty, from time to time, to pay, from monies in its hands, costs and other expenses relating to the Property, including its own remuneration and disbursements and that of its legal counsel, whether incurred prior to or subsequent to the date of this Order. Any amounts so applied against the Receiver's remuneration and expenses shall constitute advances against the amounts allowed on the passing of the Receiver's accounts.

16. The Receiver is hereby indemnified out of the Property from and against all liabilities arising out of the performance of its duties as Receiver pursuant to the terms of this Order, save and except for any gross negligence or willful misconduct on part of the Receiver with respect to such duties, and the Receiver shall have a charge on the Property for such indemnity in priority to all security, charges and encumbrances affecting the Property excepting only the Receiver's First Charge.

17. The Receiver shall be at liberty and is hereby empowered to borrow monies without personal liability from time to time as it may consider necessary, not to exceed $2 million in principal amount in the aggregate, with such fees and at such rate or rates of interest as it deems advisable and for such period or periods as it may be able to arrange, for the purpose of exercising its powers and performing its duties. The monies authorized to be borrowed and interest thereon shall form a first specific, fixed charge on the Property and/or its proceeds ranking in priority to the charge of the Bank or any other Person and all encumbrances subsequent thereto, on the Property and/or its proceeds, but subject to the Receiver's First Charge and the rights of the Receiver to be indemnified out of the Property with respect to its liability, expenses and its own remuneration properly incurred, as contemplated herein.

18. The monies authorized to be borrowed by this Order shall be evidenced by certificates substantially in the form of the draft certificate attached as Schedule "A" to this Order and may be in the nature of a revolving credit or term facility which the Receiver may pay off or re-borrow within the limits of the authority hereby conferred.

19. All monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Honourable Court, and all Receiver's Certificates representing the same or any part thereof, shall rank pari passu.

20. Any security granted by the Receiver in connection with its borrowings shall not be enforced without leave of this Honourable Court first being obtained upon seven (7) days notice to the Receiver.

21. Notwithstanding any other provision contained in this Order, the Receiver shall be protected by the terms and provisions of the BIA including without limitation, section 14.06 of the BIA, as amended.

22. The Receiver is not and shall not be deemed to be an owner, occupier or other person responsible in respect of any of the Property for any purpose including, without limitation, for purposes of Environmental Legislation.

23. The Receiver shall not be liable under Environmental Legislation in respect of any Adverse Environmental Condition (as defined below) with respect to the Property or any part thereof that arose or occurred before the latter of the date of appointment of the Receiver or the date the Receiver goes into possession of the Property, if applicable.

24. The Receiver shall not be liable under Environmental Legislation, in relation to its position as Receiver, in respect of any Adverse Environmental Condition at the Property or any part thereof that arose, occurred or continued after the time of appointment of the Receiver unless such Adverse Environmental Condition has been caused by gross negligence or willful misconduct of the Receiver.

25. Notwithstanding paragraph 24, the Receiver shall not be liable beyond the Net Realized Value of the Property (as defined in Paragraph 29 below) under any Environmental Legislation in respect of any Adverse Environmental Condition with respect to the Property or any part thereof except that which has been caused by the gross negligence or willful misconduct of the Receiver.

26. For purposes of this Order, the term "Environmental Legislation" shall mean any federal, provincial or other jurisdictional legislation, statute, regulation, guideline, standard, or rule of law or equity respecting the protection, conservation, enhancement, remediation or restoration, rehabilitation or assessment of the environment or relating to the disposal of waste or other contamination, which may have application in any province or state in which the Debtor carries on business and any orders or directions made pursuant to any of the foregoing.

27. For purposes of this Order, the term "Adverse Environmental Condition" shall include, without limitation, any injury, harm, damage, impairment or adverse effect to the environmental condition of the Property and the unlawful storage, spillage, discharge, release, deposit or disposal of any substance which may cause an adverse effect including, without limitation, hazardous substances, waste or other contamination on or from the Property.

28. Nothing herein contained shall vest in the Receiver the care, ownership, control, charge, occupation, possession, responsibility or management, nor require the Receiver to take care, ownership, control, charge, occupation, possession, responsibility or management, of any of the Property which may be environmentally polluted or contaminated or where a pollutant or contaminant, is or may become present or from which any spill, dis-

charge, release or deposit of a substance emanates, contrary to any Environmental Legislation or which is the subject of any Adverse Environmental Condition.

29. Any liability of the Receiver whatsoever, including in respect of any form of negligence and willful misconduct, and whether in its personal capacity or in its capacity as Receiver and whether arising out of or from its appointment or the exercise of its powers hereunder, including without limitation, arising in connection with Environmental Legislation, or labour or employment laws, shall be limited in the aggregate to the Net Realized Value of the Assets in the possession of the Receiver and, after distribution thereof, in respect of claims in respect of gross negligence and willful misconduct, only to the total assessed fees of the Receiver. "Net Realized Value of the Assets" shall be the cash proceeds actually received by the Receiver from the operation and disposition of the Assets, after deducting all costs and expenses properly incurred in connection therewith, including the remuneration and expenses of the Receiver and the fees and disbursements of its counsel, on a solicitor and its client basis, and any monies borrowed by or other indebtedness incurred by the Receiver pursuant to this Order and all interest thereon paid out of such proceeds, and any distributions of such proceeds.

30. No person shall commence any proceedings concerning the affairs of the Debtor or the Receiver's performance or alleged failure to perform its duties under this Order without first obtaining leave of this Honourable Court by motion made on not less than seven (7) days notice to the Debtor and the Receiver.

31. The Registrar of Land Titles for the North Alberta Land Registration District is hereby directed, notwithstanding Section 191 of the *Land Titles Act*, R.S.A. 2000, c.L-4, to effect registration of this Order, or any conveyance or Transfer of Land or instrument executed by the Receiver pertaining to land owned by the Debtor.

32. The Receiver is at liberty, and is hereby authorized and empowered to apply, upon such notice as it may consider necessary or desirable, to any other courts or tribunals in any other jurisdictions, both foreign and domestic, including any Province in Canada, the Federal Court and any foreign court, tribunal or administrative body, for orders aiding, assisting or recognizing the appointment of the Receiver and confirming the powers of the Receiver in any other jurisdiction or jurisdictions, and all courts of all such jurisdictions, both foreign and domestic, are hereby respectfully requested to make such orders and provide such other aid, assistance and recognition to the Receiver, as an officer of this Honourable Court, as they may deem necessary or appropriate in furtherance of this Order or any subsequent Order in this proceeding. For the purposes of s.304 of the U.S. Bankruptcy Code, the Receiver is the foreign representative of the Debtor.

33. *This order expires on Friday, June 7, 2002 at noon unless it is renewed in chambers, and it is now put over to Friday, June 7/02, at 10:00 am chambers.*

[Smith, J. deleted the draft paragraph 33, which read: Any person affected by this Order may move on seven (7) days notice to the Receiver and the parties affected to amend any provision of this Order provided that the moving party brings such motion forthwith after the matter at issue becomes known to that moving party.]

34. The Bank is hereby given leave to file the Motion and Affidavit in connection with the application which has resulted in the granting of this Order, and proof of service thereof, after the time prescribed by Rule 13 of the General Rules of the BIA.

"L.P.L. J. Smith"

JUSTICE OF THE COURT OF QUEEN'S BENCH

2002 ABQB 659, 37 C.B.R. (4th) 42, 318 A.R. 165

OF ALBERTA IN BANKRUPTCY AND INSOLVENCY

ENTERED this 3rd day of

June , 2002.

"W. Breitkreuz"

REGISTRAR IN BANKRUPTCY

SCHEDULE "A"

AMOUNT $ RECEIVER CERTIFICATE NO.

1. THIS IS TO CERTIFY that KPMG Inc., the Interim Receiver (the "Receiver") over the assets, property and undertaking of _____ (the "Property"), appointed by an Order of the Court of Queen's Bench of Alberta dated the _____ day of _____, 20____ made in an action having court file number _____ (the "Order"), acknowledges that as Receiver it is indebted to _____ (the "Lender") on account of this certificate in the maximum principal sum of $_____, which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum which may from time to time be outstanding on account of this certificate is payable on demand with interest thereon calculated and payable monthly on the _____ day of each and every month at the rate of _____ per annum (both after as well as before demand) to the date of payment. The first payment of interest shall be calculated for the period commencing _____ and shall be payable on the _____ of _____.

3. The principal sum with interest thereon is by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, together with all other assets and property which are now or may hereafter be in the custody and control of the Receiver (the "Charge"), in priority to the security interests of HSBC BANK CANADA and all subsequent encumbrances thereto, but subject to the right of the Receiver to indemnity out of the Property in respect of its remuneration and its expenses and legal costs properly incurred.

4. Until the Lender delivers or issues a written notice to the Receiver pursuant to paragraph 2 above, the Receiver may borrow, repay and reborrow, and the Lender may advance on account of this certificate such principal sums as the Receiver may require; provided that the principal outstanding shall at no time exceed $ MACROBUTTON NoMacro 1.

5. From time to time and at any time, the Receiver may make such payments on account of principal sum outstanding as it considers appropriate or desirable without any penalty.

6. All sums payable in respect of principal and interest under this certificate are payable at _____.

7. Until all liability in respect of this certificate shall have been terminated, no certificates creating charges rank-

ing or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the Lender, without the prior written consent of the Lender.

8. All liability in respect of the whole or any part of the principal sum for which this certificate is issued and interest thereon shall at any time or from time to time be terminated on tender to the Lender of the outstanding balance of the principal sum together with interest accrued thereon to the date of tender.

9. The Charge shall operate so as to permit the Receiver to deal with the Property and all other assets and property coming under the control of the Receiver as authorized by the Order and as authorized by any further or other order of the Court.

10. Notwithstanding any other provisions hereof, the Charge created hereby shall not cease to operate or be or be deemed to be void by reason of the principal sum outstanding hereunder becoming or being zero at any time or from time to time.

11. The Receiver does not undertake and it is not under any personal liability to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____.

KPMG Inc., as Receiver of the assets, property

and undertaking of

By:_____

Name:

Title:

END OF DOCUMENT

Tab 8

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

C

2009 CarswellOnt 1998

Indalex Ltd., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended
And In the Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canadian Inc. and Novar Inc. (Applicants)
Ontario Superior Court of Justice [Commercial List]
Morawetz J.
Heard: April 8, 2009
Judgment: April 8, 2009
Docket: CV-09-8122-00CL

Counsel: Linc Rogers, Katherine McEachern for Applicants

Wael Rostom for JPMorgan Chase Bank (N.A.) as Pre-petition Agent, DIP Agent for Proposed DIP Lenders

Ashley Taylor for FTI Consulting Canada ULC, Monitor

Subject: Insolvency

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- Miscellaneous issues

I Ltd. was involved in Companies' Creditors Arrangement Act proceedings -- I Ltd. brought motion for approval of Debtor-In-Possession ("DIP") financing, pursuant to credit agreement with its US parent and its affiliates, and for post-filing guarantee -- Motion granted -- DIP financing was required -- Structure of DIP credit agreement was reasonable -- Modifications proposed were appropriate.

Cases considered by Morawetz J.:

> A & M Cookie Co. Canada, Re (2008), 49 C.B.R. (5th) 188, 2008 CarswellOnt 7136 (Ont. S.C.J. [Commercial List]) -- followed
>
> InterTAN Canada Ltd., Re (2008), 49 C.B.R. (5th) 248, 2008 CarswellOnt 8040 (Ont. S.C.J. [Commercial List]) -- followed
>
> Intertan Canada Ltd., Re (2009), 49 C.B.R. (5th) 232, 2009 CarswellOnt 324 (Ont. S.C.J. [Commercial List]) – referred to
>
> Pliant Corp. of Canada Ltd., Re (March 24, 2009), Doc. 09-CL-8007 (Ont. S.C.J.) -- followed

Smurfit-Stone Container Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) -- followed

Statutes considered:

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

Generally -- referred to

MOTION by company involved in Companies' Creditors Arrangement Act proceedings for approval of debtor-in-possession financing and for post-filing guarantee.

***Morawetz J.* (Orally):**

1 On April 8, 2009, the record was endorsed as follows: "Order granted in the form presented, as amended. Brief reasons will follow." These are those reasons.

2 The Applicants brought this motion for:

> (i) the approval of debtor-in-possession financing ("DIP Financing") pursuant to a Credit Agreement (the "DIP Credit Agreement") among the Applicants, their U.S. parent and its affiliates (collectively, ("Indalex U.S.") and together with the Applicants, (collectively, the "Indalex Group")) and JPMorgan Chase Bank (N.A.) ("JPMorgan"), in its capacity as Administrative Agent for the Lenders (collectively, the "DIP Lenders") and
>
> (ii) the approval of a secured guarantee granted by the Applicants in favour of the DIP Lenders, guaranteeing the obligations of Indalex U.S. under the DIP Credit Agreement (the "Post-Filing Guarantee").

3 Counsel to the Applicants submits that the purpose of these CCAA proceedings is to preserve value for a broad cross-section of stakeholders of the Applicants including their employees, customers, business partners, suppliers and secured and other creditors and that in order to accomplish this goal, the Applicants need stable and reliable access to DIP Financing. Counsel further submits that one of the pre-conditions to obtaining such financing is that the Applicants provide a guarantee (the "Post-Filing Guarantee") of the obligations of Indalex U.S. Indalex U.S. is currently subject to Chapter 11 proceedings.

4 Counsel to the Applicants further submits that the authorization of DIP Financing and the Post-Filing Guarantee is reasonable, appropriate and justified in the circumstances and that DIP Financing is necessary to preserve the opportunity to seek a viable growing concern solution and that sufficient safeguards are in place to protect the pre-filing collateral position of the Applicants' unsecured creditors and any potential prejudice in connection with the granting of the Post-Filing Guarantee is substantially outweighed by the potential benefit to stakeholders, derived from the DIP Financing.

5 The relevant facts, in support of the requested relief, are set out at paragraph 4 of the factum submitted by counsel to the Applicants.

6 The record has established, in my view, that DIP financing is required. However, prior to approving the DIP Financing pursuant to the DIP Credit Agreement, it is necessary to consider a number of factors which include

the benefit the Applicants will receive from the DIP Facility and the collateral that is charged to secure the DIP Facility. See *Intertan Canada Ltd., Re* (2009), 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]). In this case, the proposed collateral being provided to the DIP Lenders includes a secured guarantee of the Applicants in favour of the DIP Lenders, guaranteeing the obligations of Indalex U.S. under the DIP Credit Agreement.

7 The situation in which proposed DIP financing has been conditional on a guarantee by the Canadian debtor of the U.S. debtors' obligations has recently been considered by this court in *A & M Cookie Co. Canada, Re* (2008), 49 C.B.R. (5th) 188 (Ont. S.C.J. [Commercial List]), *InterTAN Canada Ltd., Re* (2008), 49 C.B.R. (5th) 248 (Ont. S.C.J. [Commercial List]), *Smurfit-Stone Container Inc., Re*, (January 27, 2009, CV-09-7966-00CL), [2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List])] and *Pliant Corp. of Canada Ltd., Re* (March 24, 2009), Doc. 09-CL-8007 (Ont. S.C.J.).

8 These cases have established that the following factors are relevant in determining the appropriateness of authorizing a guarantee in connection with a DIP facility:

> (a) the need for additional financing by the Canadian debtor to support a going concern restructur- ing;
>
> (b) the benefit of the breathing space afforded by CCAA protection;
>
> (c) the availability (or lack thereof) of any financing alternatives, including the availability of alternative terms to those proposed by the DIP lender;
>
> (d) the practicality of establishing a stand-alone solution for the Canadian debtors;
>
> (e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on;
>
> (f) any potential prejudice to the creditors of the entity if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than as existed prior to the filing, apart from the impact of the super-priority status of new advances to the debtor under the DIP financing;
>
> (g) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and
>
> (h) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.

9 In this case, I am satisfied that the Applicants have established the following:

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
>
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
>
> (c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order (see [10] and [11] below); and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing.

10 The Monitor also filed a report in respect of the motion. The Monitor indicated that it was concerned that any DIP structure securing the Canadian Pre-Filing Guarantee via court-ordered charge could potentially prejudice Canadian stakeholders by pre-determining the issue of the validity and enforceability of the Canadian Pre-Filing Guarantee. As a result of the concerns raised by the Monitor, the Applicants and the Senior Secured Creditors addressed the situation, the details of which are set out at paragraph 25 of the Monitor's First Report.

11 As stated at paragraph 26 of the Monitor's Report, the intent of the structure is for the Senior Secured Lenders to obtain the benefit of Court-ordered charges securing the DIP Financing and the cross-guarantees of the U.S. Additional Advances and the Canadian Additional Advances while maintaining the *status quo* vis-à-vis the Canadian Pre-Filing Guarantee.

12 The Monitor's Report also summarizes the DIP Credit Agreement. The DIP Credit Agreement provides a maximum facility of up to $84.6 million and the Applicants may draw up to $24.36 million, and the U.S. Debtors are able to borrow the balance, in each case subject to margin availability under borrowing-based calculations for the Applicants and the U.S. Debtors.

13 Counsel to the Monitor has reviewed the security of the Senior Secured Lenders, other than the Canadian Pre-Filing Guarantee and has provided an opinion to the Monitor which states that, subject to the assumptions and qualifications contained therein, the Senior Secured Lenders' security is valid and enforceable and ranks in priority to other claims with respect to accounts and inventory.

14 The Monitor has also referenced that maintaining business operations is in the interests of all stakeholders as it will afford the Applicants the opportunity to develop a viable restructuring plan designed to maximize recoveries for all stakeholders and furthermore, maintaining operations continues the employment of approximately 750 people as well as providing ongoing business for suppliers and customers. The Monitor has also reported that if the Applicants' request for approval of the DIP Agreement was to be denied, the Applicants would be unable to continue operations, both likely resulting in the forced liquidation of the assets to the detriment of

creditors, employees, suppliers and customers.

15 The Monitor also considered the potential prejudice to creditors and reports that the likelihood of a call on the Applicants' guarantee of the U.S. Additional Advances is unlikely and that the approval of the DIP Agreement and the proposed structuring of the DIP Charge provide appropriate protection for the DIP Lenders and appropriately balances the benefits to stakeholders that will accrue from such approval with the need to protect the interests of the Canadian creditors against any potential prejudice.

16 The Monitor concludes its Report by noting that it is of the view that approval of the DIP Agreement is in the best interests of the Applicants and their stakeholders and recommends approval of the DIP Agreement and the granting of the DIP Charge.

17 I am satisfied that the Applicants have established that the granting of DIP Financing is necessary and that the structure of the DIP Credit Agreement is reasonable in the circumstances. DIP Financing pursuant to DIP Credit Agreement is accordingly approved.

18 The proposed Amended and Restated Order also provides for certain restructuring powers and an agreed upon priority as between the Directors' Charge, the Administrative Charge and the DIP Lenders' Charge. In my view, these modifications are appropriate and are approved.

19 An order shall issue in the form presented, as amended, which order I have signed.

Motion granted.

END OF DOCUMENT

Tab 9

49 C.B.R. (5th) 248

H

2008 CarswellOnt 8040

InterTAN Canada Ltd., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36,
As Amended
In the Matter of a Plan of Compromise and Arrangement of InterTAN Canada Ltd.
and Tourmalet Corporation
Ontario Superior Court of Justice [Commercial List]
Morawetz J.
Heard: November 26, 2008
Oral reasons: November 26, 2008[FN*]
Docket: Toronto CV-0800007841-00 CL

Proceedings: additional reasons at *InterTan Canada Ltd., Re* (2009), 2009 CarswellOnt 687 (Ont. S.C.J. [Commercial List])

Counsel: E. Sellers, J. Dacks, J. MacDonald for Applicants

M. Forte for Bank of America, N.A.

J. Carfagnini, L.J. Latham for Alvarez and Marsal Canada Inc.

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- Miscellaneous issues

I was speciality retailer of consumer electronics and was operating Canadian subsidiary of major United States based electronics retailer -- T was affiliated non-operating holding company whose sole asset was preferred stock of I -- I's sole credit facility stemmed from US parent company -- US parent company filed for bankruptcy protection under Chapter 11 of United States Bankruptcy Code -- Secured credit facility was terminated and parties entered in debtor-in-possession loan facility ("DIP facility") -- Monitor was of view that liquidation and wind down of I would eliminate over 3,000 jobs and would detrimentally affect dealers, joint-venture partners and other stakeholders -- Monitor was supportive of I's efforts to obtain interim financing so as to avoid liquidation and to facilitate restructuring or going concern sale under Companies' Creditors Arrangement Act ("CCAA") -- I and T brought application for protection under CCAA -- Application granted -- I was qualifying debtor corporation and T was qualifying affiliated debtor company within meaning of CCAA -- Both I and T had obligations in excess of $5 million qualifying limit and as result of default in secured credit facility, both were insolvent -- Jurisdiction of court to receive application was established.

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

Approval of DIP facility -- I was speciality retailer of consumer electronics and was operating Canadian subsidiary of major United States based electronics retailer -- T was affiliated non-operating holding company whose sole asset was preferred stock of I -- I's sole credit facility stemmed from US parent company -- US parent company filed for bankruptcy protection under Chapter 11 of United States Bankruptcy Code -- Secured credit facility was terminated and parties entered in debtor-in-possession loan facility ("DIP facility") -- DIP facility would only extend credit to I if it was borrower under DIP facility and order was obtained that provided for super priority charge on all assets and property of I as security for DIP facility -- DIP facility provided that credit would only be advanced to US parent company on condition that I became joint and several borrower for all advances and became guarantor for entire facility and that I's assets were pledged as security for obligations -- I and T brought application for protection under CCAA -- Application granted -- Issue arose as to requirement for approval of DIP facility -- DIP facility was approved -- Approval of DIP facility was considered in light of alternatives -- Onus was on applicant to establish that extraordinary relief should be granted -- Potential upside of going concern operation was preferable to liquidation notwithstanding provisions of DIP facility which effectively transferred assets from I to another member of enterprise group -- It was appropriate to approve DIP facility given prospects of going concern operation, continued employment of over 3,000 individuals and benefits of continued operation for third party stakeholders -- Fact that certain creditor groups would be largely unaffected by CCAA proceeding and creation of unsecured creditors charge provided degree of protection to those creditors was also taken into account.

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally -- referred to

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

Generally -- referred to

s. 11 -- referred to

s. 11(2) -- referred to

APPLICATION by debtor company and affiliated holding company for protection under *Companies' Creditor Arrangement Act*.

***Morawetz J.*:**

1 The applicants, InterTAN Canada Ltd., ("InterTAN"), and Tourmalet Corporation, ("Tourmalet"), brought this application on November 10, 2008. At the conclusion of argument, an order was granted providing the applicants with protection under the Companies' Creditors Arrangement Act, ("CCAA"), with reasons to follow. The following are those reasons.

2 InterTAN is incorporated under the laws of the Province of Ontario. It is a leading speciality retailer of consumer electronics in Canada and is the operating Canadian subsidiary of the major United States based electronics retailer, Circuit City Stores, Inc., ("Circuit City").

3 InterTAN is a privately held Ontario corporation and sole direct subsidiary of InterTAN Inc., which is

owned by the Delaware corporation Ventoux International Inc., and Tourmalet, a Nova Scotia unlimited liability company. Tourmalet is in turn wholly owned by Ventoux, which is wholly owned by Circuit City. As such, InterTAN is an indirect wholly-owned subsidiary of Circuit City. Tourmalet is an affiliated non-operating, holding company whose sole asset is the preferred stock of InterTAN, Inc. which has sought insolvency protection.

4 InterTAN operates retail stores and licences dealer-operated stores selling brand name and private label consumer electronics throughout Canada under the trade name, "The Source by Circuit City", ("The Source").

5 InterTAN currently has 772 retail stores in Canada and employs approximately 3,130 people.

6 InterTAN's sole credit facility is through an agreement between Circuit City, certain U.S. affiliates, InterTAN and Bank of America N.A. as agent, together with other loan parties, (the "Secured Credit Facility"). InterTAN has historically relied on the Secured Credit Facility to maintain a consistent cash flow for its operations.

7 Circuit City and certain of its affiliates filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia on November 10, 2008.

8 As a result of the Chapter 11 proceedings, the Secured Credit Facility was terminated and the parties to that loan agreement entered into a Debtor-in-Possession loan facility, (the "DIP Facility"), that replaced the Secured Credit Facility.

9 Counsel to InterTAN advised that the lenders providing the DIP Facility would only extend credit to InterTAN if it was a borrower under the DIP Facility and an initial order was obtained from this court, in the CCAA proceedings, providing for a super priority charge on all of the assets and property of InterTAN (subject only to certain court ordered charges) as security for the DIP Facility.

10 Counsel for InterTAN also advised that witout the DIP Facility, InterTAN was insolvent as it was not able to:

> (a) access operating credit;
>
> (b) operate as a going concern; or
>
> (c) satisfy all of its ongoing obligations to its employees, dealers, landlords, suppliers and other stakeholders.

11 Counsel submitted that the applicants required a stay of proceedings and other relief sought in order to permit InterTAN to continue operating as it pursues restructuring options, which include the potential sale of the business, in order to maximize enterprise value. The applicants took the position that it was necessary and in the best interests of the applicants and their stakeholders, and in light of the Chapter 11 proceedings, that the applicants be afforded the protection provided by the CCAA as they attempt to restructure their affairs.

12 Counsel also submitted given the current economic situation, it was not practical for InterTAN to find a replacement to the Secured Credit Facility.

13 The applicants proposed Alvarez & Marsal Canada ULC, ("A & M"), as the Monitor in these proceedings and a consent to act was filed by A & M.

14 The application was supported by the affidavit of Mark J. Wong, Vice President, General Counsel and Secretary of InterTAN as well as a report filed by A & M in its capacity as proposed Monitor, (the "Report").

15 The purpose of the Report was to provide the court with information concerning:

(a) background on InterTAN's business;

(b) the financial position of InterTAN;

(c) the current Secured Credit Facility in place for InterTAN;

(d) recent action by InterTAN's trade creditors that have impacted its cash flow;

(e) the proposed restructuring of InterTAN and the proposed restructuring alternatives;

(f) the terms of the proposed DIP Facility;

(g) the implications of the DIP Facility for InterTAN's Canadian creditors; and

(h) A & M's summary comments.

16 A & M was retained by InterTAN on October 31, 2008, as the proposed Monitor. In the ten days prior to the bringing of this application, A & M has been reviewing InterTAN's available financial information in an attempt to gain knowledge of the business and financial affairs of InterTAN and has been preparing for this anticipated CCAA application.

17 A & M commented on the Secured Credit Facility which consists of a U.S. $1.25 billion commitment to Circuit City and certain of its affiliates, (the "U.S. Debtors"), and a U.S. $50 million commitment to InterTAN.

18 InterTAN has not guaranteed and is not liable for the borrowings of the U.S. Debtor under the Secured Credit Facility. Tourmalet is not a party to the Secured Credit Facility but it has guaranteed InterTAN's obligations thereunder. A & M is of the understanding that this guarantee is unsecured.

19 As a result of the commencement of the Chapter 11 proceedings, the Secured Credit Facility was terminated and the parties to that loan agreement entered into the DIP Facility. A & M is of the understanding that, unlike the Secured Credit Facility, the DIP Facility provides that credit would only be advanced to Circuit City on the condition that InterTAN agreed to become a joint and several borrower for all advances and a guarantor for the entire facility, including existing advances to the U.S. Debtors and to have all of InterTAN's assets pledged as security for those obligations. Further, A & M was of the understanding that the lenders providing the DIP Facility would only extend credit to InterTAN if the Dip Facility was approved by an order of this court with a charge over all of the assets and property of InterTAN.

20 As of September 30, 2008, InterTAN had total assets of approximately $370 million. According to its internal, unaudited financial statements as at September 30, 2008, InterTAN's current assets represented in excess of $218 million of it total assets, including $148 million of inventory, nearly $50 million of current accounts and notes receivable and $5.8 million in cash. Non-current assets were comprised primarily of property, plant and equipment of $45 million, notes receivable of $91 million (representing promissory notes from InterTAN, Inc, and Tourmalet) and goodwill of $8.7 million.

21 As at September 30, 2008, InterTAN's total liabilities were approximately $110 million which consisted of current liabilities of approximately $90 million, miscellaneous long-term liabilities of approximately $20 million and a small inter-company payable of $250,000. Current liabilities as at September 30, 2008 included nearly $50 million of trade accounts payable, accrued expenses of $22.2 million, deferred service contract revenue of $9.8 million and short-term bank borrowings of $7.5 million.

22 In preparation for this application, a 17-week Cash Flow Forecast, (the "Cash Flow Forecast"), was prepared by InterTAN, with the assistance of its financial advisor, FTI Consulting. A & M reviewed the Cash Flow Forecast and noted that InterTAN's borrowings under the Secured Credit Facility were projected to be approximately $43.3 million through November 9, 2008. The Cash Flow Forecast projects that InterTAN will require further incremental funding during the cash flow period of up to $19.8 million, such that cumulative credit requirements to fund its operations are projected to peak at approximately $63 million during the week ending November 30, 2008, $43.3 million of borrowings under the Secured Credit Facility plus approximately $19.8 million of incremental borrowings under the DIP Facility.

23 As a result of the seasonal nature of InterTAN's business, cash requirements decrease as a result of Christmas sales such that the expected borrowings under the DIP Facility are projected to be reduced to approximately $1 million by January 4, 2009. From that time forward, the Cash Flow Forecast indicates that borrowings under the DIP Facility will range from approximately $600,000 to $8.6 million through the week ending March 1, 2009.

24 A & M is of the understanding that the portion of the DIP Facility available to InterTAN will remain fully drawn, with the funds not needed to fund InterTAN's operations being advanced by InterTAN to the U.S. Debtors. A & M notes that there is presently no mechanism to ensure repayment of the amounts advanced by InterTAN to the U.S. Debtors and no mechanism to ensure that sufficient funds would be repaid to service InterTAN's liquidity needs.

25 The Secured Credit Facility is in default as a result of the Chapter 11 proceedings. The result of this default is the termination of the Secured Credit Facility, which causes all obligations under the Canadian Facility to become automatically due and payable. As of November 9, 2008, InterTAN had outstanding borrowings under the Secured Credit Facility of approximately $43.3 million.

26 A & M specifally points out that InterTAN's obligations under the credit agreement are limited to the amounts borrowed by InterTAN. As security for the obligations, InterTAN executed both a general security agreement and a deed of hypothec on moveable property in favour of the secured lenders.

27 A & M has received a preliminary opinion from its independent counsel that Bank of America holds valid and perfected security in Ontario over the inventory, receivables and intangible assets of InterTAN described in the security documents.

28 Over the past few months, as a result of public reports concerning potential liquidity concerns at Circuit City, several of InterTAN's significant suppliers have shortened their credit terms, requiring cash in advance or on delivery, which has had the effect of increasing the exposure of the secured lenders and decreasing trade payable. A & M is of the view that it is essential that InterTAN's suppliers continue to supply InterTAN throughout the crucial holiday sales period and while InterTAN has access to sufficient credit to obtain holiday season levels of inventory.

29 In order to ensure the continuity of InterTAN's supply chain from outside North America where the stay of proceedings will not apply, InterTAN is proposing to continue to pay foreign trade creditors and suppliers in the ordinary course both before and after the date of filing.

30 With respect to North American suppliers, InterTAN proposes to freeze all pre-filing trade claims until further order of the court, subject to the Monitor having discretion

> (i) to authorize critical supplier payments for pre-filing amounts not to exceed $2 million (subject to further order of the court); and
>
> (ii) to authorize the payment of any other costs and expenses that are deemed necessary for the preservation of InterTAN's property and business.

31 InterTAN has also advised A & M that it has agreed to enter into a Key Employee Retention Plan, the ("KERP"), with certain of its key management employees. A & M is of the understanding that the maximum amount payable under the KERP will not exceed $838,000.

32 It is clear that the financing of InterTAN's Canadian operations are intertwined with the financing of Circuit City's U.S. operations as the Canadian and U.S. entities are parties to the same credit agreement. The result of the commencement of the Chapter 11 proceedings is that InterTAN no longer has access to financing under the Secured Credit Facility and would be unable to purchase inventory and discharge its obligations in the ordinary course.

33 A & M has acknowledged that it has not been a party to the negotiations between InterTAN and the secured lenders. A & M is of the understanding that the secured lenders have advised InterTAN that they are only willing to continue to extend credit to InterTAN under the DIP Facility as part of the CCAA filing co-ordinated with the Chapter 11 proceedings. The total amount of the DIP Facility will be U.S. $1.1 billion including a maximum Canadian commitment of U.S. $50 million for InterTAN, which could, in certain circumstances, escalate to U.S. $60 million.

34 The borrowers, including InterTAN, will be jointly and severally liable for the amounts outstanding under the DIP Facility, meaning that the obligations under the DIP Facility will be cross-guaranteed and cross-collateralized and that InterTAN and Tourmalet will be liable for the amounts drawn under the DIP Facility by the U.S. Debtors and will pledge their assets as security for the U.S. Debtor's obligations.

35 The applicants will grant the DIP lenders security, evidenced by a court ordered charge on the applicants' assets and property, (the "DIP Charge"), such that the security over the applicants' property and assets will rank as follows:

> (i) the administrative charge in the amount of $2 million;
>
> (ii) the directors' charge in the amount of $19.3 million;
>
> (iii) the KERP charge in the amount of $838,000.
>
> (iv) the DIP Charge to the maximum amount borrowed by InterTAN under the DIP Facility;
>
> (v) a $25 milllion charge, (the "Unsecured Creditors Charge"), to secure payment of the claims of

Canadian pre-filing unsecured creditors;

(vi) the remainder of the DIP Charge pertaining to the guaranteed liabilities of the applicants to the DIP lenders over and above the amount borrowed by InterTAN under the DIP Facility.

36 InterTAN has advised A & M that the proposed DIP Facility, while not perfect, represents the only alternative available to the company, emphasizing that the Dip Facility will ensure the continuation of operations and employment for all of the current employees. In addition, because the approval of the DIP Facility is a condition precedent to all lending, the entire enterprise and all business and jobs in the North America operations would be at risk if the DIP Facility was not approved.

37 Pursuant to the proposed initial order, InterTAN is entitled, but not required to pay certain expenses payable on or after the date of the initial order, as well as amounts owing for certain goods and services supplied prior to the date of the initial order. These expenses and obligations include employee claims, amounts due to logistics or supply-chain providers and certain customs brokers, trade vendors and suppliers outside of North America and amounts related to servicing warranties and honouring gift cards and reward and loyalty programmes. As such, a significant portion of InterTAN's liabilities will not be affected by the CCAA stay of proceedings.

38 It is estimated that liabilities of approximately $26.8 million, made up of $22.5 million of trade accounts payable, net of estimated potential set-offs, and $4.3 million of joint venture partner deposits and other smaller accrued liabilities, would be stayed by the initial order. In addition, management estimates that there will be $5 million of outstanding cheques that may also be stayed. Therefore, the estimated total trade creditors that may be stayed by the initial order are in the magnitude of between $26.8 and $31.8 million net of estimated potential set-offs.

39 A & M has also been provided with an extract of a report prepared on behalf of the secured lenders to estimate the net orderly liquidation value of InterTAN's inventory. This extract has been filed with the court but due to the sensitive information contained therein, it is the subject of a sealing order.

40 In addition to inventory assets addressed in the report extract, InterTAN also has accounts receivable, and property, plant and equipment. These assets have a combined net book value of approximately $80 million.

41 A & M has not conducted a detailed review of the realizable value of the assets but, the view of A & M, when considered together with the net orderly liquidation value of the inventory, the value of InterTAN's combined assets in an orderly wind down of the business far exceeds the current borrowing under the Secured Credit Facility.

42 Prior to the cross-collateralization in enhanced security provided for under the DIP Facility, A & M is of the view that it is likely that the trade creditor claims of $26.8 million to $31.8 million discussed above, would receive a meaningful recovery in an orderly wind down of the business.

43 InterTAN had reported EBITDA of $33.1 million for the fiscal year ended February 28, 2008 and, depending on the outcome of the critical holiday sales period, it is expecting EBITDA for fiscal 2009 to be approximately $26 million. Although A & M has not conducted any type of enterprise valuation of InterTAN and has not had the opportunity to engage in any discussions with the investment banking advisors, InterTAN's projected EBITDA results would ordinarily auger well for a potential going concern solution.

44 In summary, A & M is of the view that:

(i) the liquidation and wind down of InterTAN would eliminate over 3,000 jobs; and

(ii) would detrimentally affect dealers, joint-venture partners and other stakeholders.

45 In these circumstances, A & M is supportive of InterTAN's efforts to obtain interim financing, so as to avoid a liquidation, and to facilitate a restructuring or a going concern sale under the CCAA.

46 A & M also points out that the DIP lenders have agreed to the creation of the $25 million Unsecured Creditors Charge for the payment of pre-filing unsecured creditors. This charge provides some measure of protection for the unsecured creditors during a going concern restructuring of InterTAN. It is acknowledged that, if InterTAN achieves a going concern sale and provided that InterTAN or a buyer pays or honours certain other pre-filing claims as contemplated by the initial order, the result of the Unsecured Creditors Charge would appear to be positive. However, if no going concern outcome is achieved and there is a wind down after the initial order, those unsecured creditors may well receive a less meaningful recovery than they might receive in an immediate liquidation of InterTAN.

47 Having reviewed the record and having heard submissions, I am satisfied that InterTAN is a qualifying debtor corporation and Tourmalet is a qualifying affiliated debtor company within the meaning of the CCAA.

48 Both have obligations in excess of the $5 million qualifying limit and as a result of default in the Secured Credit Facility, the applicants are insolvent.

49 The jurisdiction of this court to receive the CCAA application has been established.

50 The applicants sought an initial order under s.11 of the CCAA. The required statement of projected cash flow and other financial documents required under ss. 11(2) have been filed. The application was not opposed by any party appearing.

51 The only real significant issue on the initial application was the requirement for approval of the DIP Facil- ity.

52 It is clear that the DIP Facility results in a substantial change to the status quo. The use of the assets of InterTAN as a basis for obtaining finance for Circuit City raises a number of questions, especially when the approval of the DIP Facility could very well affect InterTAN's ability to honor its current obligations.

53 The parties come to court, having negotiated the DIP Facility. They insist that this court make an immediate order, which approves the DIP Facility. If the DIP facility did not receive such approval, InterTAN indicated that there would be no credit facilities available and the enterprise would collapse.

54 It is recognized that in order to maintain its business activities InterTAN must have access to funds to enable it to continue to pay for inventory as well as all other costs associated with the running of the business. If there are no credit facilities, there is very little prospect of reorganizing or restructuring InterTAN.

55 The issue is whether it is appropriate in the circumstances for InterTAN to provide support for its indirect parent, Circuit City.

56 On a motion such as this, it is necessary for the court to consider the approval of the DIP Facility in light of the alternatives. In this case, InterTAN says there are no alternatives and no further time to consider alternatives. However, the parties who could be detrimentally affected by the implementation of the DIP Facility, namely North American trade creditors, are not before the court, and it is open to speculate as to what this group would have to say on the issue. On the one hand, they could view the proposal favourably, as it could result in the continuation of InterTAN's business and thereby provide an outlet for ongoing sales. On the other hand, they could very well take the position that in a liquidation, they would get paid, and that this would be the preferred economic alternative, as opposed to the risk associated with the impaired ability of InterTAN to pay its obligations if the DIP Facility is approved.

57 This application was essentially brought on an ex-parte basis. The only other parties attending in court were the secured lenders and the proposed monitor. Timing was dictated to a degree by the applicant and the secured lenders. They had negotiated their financing and had applied for Chapter 11 protection. The relief being sought on this initial application was unusual, and I have no doubt that this was recognized by all parties.

58 In my view, the court has the jurisdiction to grant the requested relief. However, in situations such as this, it is up to the applicant to convince the court that it should exercise its discretion to grant this extraordinary relief. In this case, and as a general principle, it is up to the applicants to present sufficient evidence that would enable the court to conclude that such an order is appropriate, not only on factual grounds but also on the basis of the broad remedial purpose of and the flexibility inherent in the CCAA and the broad power of the court to stay proceedings under section 11 of the CCAA.

59 It must be recognized that if debtors and secured lenders are going to continue with the practice of requesting such extreme relief on an initial application, with little or no notice, the quid pro quo is that the applicant must establish the evidentiary basis for the requested relief. In the absence of such evidence, parties should have no expectation that the court will grant such extraordinary relief. The alternatives open to the court are clear. In certain circumstances, the motion could be adjourned until such time as the matter could be considered on a full record, or, alternatively, motions could be dismissed. Evidence can be provided by a representative of the applicants, as well as other sources such as the secured lenders or the proposed monitor or in some cases, representatives of key creditor groups.

60 This is not the first time that an issue like this has come before the court in recent weeks. No doubt the situation has been exacerbated by the current economic situation and the accompanying liquidity crisis. The record in this case indicates that there is a liquidity crisis.

61 By way of example, the CCAA proceedings of A & M Cookie Company Canada, came before this court on Friday, October 10, 2008 with a request to approve a ratification agreement under which it was conceivable that U.S. $5 million of assets of the debtor would not be available to the current creditors of the debtor. I deferred consideration of that matter until the following Tuesday so that the parties could provide additional evidence to support the request. The debtor did file additional material and an order was made approving the ratification agreement.

62 In my reasons, I noted the following: "Counsel to the proposed monitor advise that the monitor had not been in a position to comment on the liquidation analysis and was not in a position to provide any meaningful report on the potential impact of the ratification agreement. It would have been helpful if the monitor had been involved in the process at an earlier stage. The court certainly would have benefitted from an analysis of this

situation."

63 In this case, the proposed monitor did become involved some 10 days before the application. A & M was in a position to provide a report which I found to be of great assistance. In fact, in the absence of such a report, it is questionable as to whether the court would have been in a position to consider whether it was appropriate to approve the DIP Facility.

64 However, it seems to me that the A & M report could have been more comprehensive. I do not intend this statement to be in any way critical of A & M. On the contreary, under the circumstances, I commend them for their outstanding effort. A & M was retained 10 days before the application, and they did not have the time nor the mandate to review the affairs of InterTAN in great detail. A & M was not party to the negotiations between InterTAN and the secured lenders. The effectiveness of A & M was to some degree compromised by a lack of information. For example, A & M did not see documentation relating to the DIP Facility until the day before the application.

65 Had Circuit City and InterTAN provided the proposed monitor with relevant and verifiable information pertaining to the initial application on a timely basis, I have no doubt that a more comprehensive report could have been issued.

66 A party, who is being nominated as a court officer can, in the circumstances, play a pivotal role on an initial application. Generally speaking, the process can be enhanced if the debtor applicants take timely steps to involve the proposed monitor in the events leading up to an initial application.

67 It is recognized that debtor companies in distress face certain practical realities. They may be required to keep their status and intentions confidential, but if such debtors and their secured lenders have expectations and/or requirements of wide sweeping relief on initial applications, it is incumbent upon the applicants to present the evidentiary case for such relief. In doing so, such applicants have to take into consideration the benefits of having supporting evidence filed by a proposed court officer, who can be looked to by the court to provide a degree of objectivity to the proceedings.

68 The benefits of having such evidence coming from the proposed monitor cannot be underestimated, especially in circumstances where the volume of documentation that is being relied upon by the parties at the initial application is such that it creates additional practical difficulties for the judge to read and digest the information in an extremely short period of time.

69 In this case, however, I concluded, having considered and balanced the alternatives, that the DIP Facility should be approved. In my view, the potential upside of a going concern operation was preferable to a liquidation, notwithstanding the provisions of the DIP Facility which effectively transfers assets from InterTAN to another member of the enterprise group. It was in my view, appropriate to approve the DIP Facility, taking into account the prospects of a continued going concern operation, the continued employment of over 3000 individuals and the benefits of a continued operation for other third party stakeholders. I also took into account that certain creditor groups would be largely unaffected by the CCAA proceeding and that the creation of the Unsecured Creditors Charge provides in theory, a degree of protection to this group of creditors, who could otherwise be detrimentally affected by the DIP Facility.

70 My endorsement of November 10, 2008 provided that an order was to issue in the form submitted, as amended, which order granted initial protection under the CCAA to the applicants, and it also approved the DIP

Facility. I understand that this order has been issued and entered.

Application granted.

FN*. Additional reasons at *InterTan Canada Ltd., Re* (2009), 2009 CarswellOnt 687, 49 C.B.R. (5th) XXX (Ont. S.C.J. [Commercial List]).

END OF DOCUMENT

Tab 10

50 C.B.R. (5th) 71

C
2009 CarswellOnt 391

Smurfit-Stone Container Inc., Re
In the Matter of a Plan of Compromise or Arrangement of Smurfit-Stone Container Canada Inc. and others
Ontario Superior Court of Justice [Commercial List]
Pepall J.
Judgment: January 27, 2009
Docket: CV-09-7966-00CL

Counsel: Sean F. Dunphy, Alexander D. Rose for Applicants

Robert J. Chadwick, Christopher G. Armstrong for Proposed Monitor

Susan Grundy for DIP Lenders

Subject: Insolvency

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

American parent entities of debtor companies commenced Chapter 11 proceedings -- Debtor companies were principal Canadian operating entities of American parent companies – Debtor companies brought application for relief under CCAA and requested that terms of initial CCAA order apply to two Canadian partnerships ("CCAA entities") affiliated with applicants -- Application granted -- Applicants were insolvent, had indebtedness in excess of $5 million and qualified pursuant to CCAA -- Proposed outline for plan included continuing process of selling and realizing value in respect of closed and discontinued operations and coordinating with US entities to achieve balance sheet restructuring -- Due to Chapter 11 filing, pre-filing secured credit facility was not available and as such, absent some additional facility CCAA entities would be required to repay amounts owing under pre-filing credit agreement -- CCAA entities would also no longer have access to operating credits, would not longer be able to benefit from accounts receivable securitization program, would be unable to operate in ordinary course or satisfy ongoing obligations -- Extensive process was undertaken to obtain new debt financing -- Proposed monitor was of view that restructuring and continuation of debtor companies and CCAA entities as going concern was best option available -- Successful restructuring of CCAA entities appeared to be intertwined with successful restructuring of American entities in Chapter 11 proceeding -- In order to continue day-to-day operations and facilitate restructuring, debtor companies required access to significant funding.

Cases considered by Pepall J.:

> Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 -- referred to

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

Generally -- referred to

APPLICATION by debtor companies for relief under Companies' Creditor Arrangement Act and order for extension of terms of initial CCAA order to two affiliated partnerships.

Pepall J.:

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

2 On January 26, 2009, Smurfit-Stone Container Corporation ("Smurfit-Stone") and certain of its affiliates including SSC Canada commenced Chapter 11 proceedings in the U.S. Smurfit-Stone is based in St. Louis, Missouri and in Chicago, Illinois. It is a leading North American producer of paperboard products, market pulp, corrugated containers and other specialty packaging products. It is also one of the world's biggest recyclers of paper. It currently holds approximately 18% of the North American container board market. Its operations have been negatively affected by the global economic downturn, the decrease in consumer spending, the manufacturing exodus from North America, a rise in costs, and a general market shift away from paper-based packaging. It has numerous direct and indirect subsidiaries.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 As mentioned, the requested order extends the benefits of the protections provided by the order to Smurfit-MBI and SLP Finance General Partnership, both of which are partnerships but not Applicants. The operations of the partnerships are integral and closely interrelated with that of the Applicants and in my view the request is appropriate in the circumstances outlined. See also *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

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

CDN $414,000 in cash.

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

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

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

24 There are obviously numerous other provisions in the order that I have not addressed specifically as I believe they are all self-evident. In all of the circumstances I am prepared to grant the order requested. Counsel will re-attend on Wednesday at 10:00 a.m. to address a further recognition order.

Application granted.

END OF DOCUMENT

Tab 11

Court File No. 09-CL-8007

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

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

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

Applicants

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

March 24/09

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

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

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

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

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

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

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

Wilton-Siegel J.

Tab 12

COURT FILE NO.: CV-09-8241-00CL
DATE: 20090622

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WITH RESPECT TO FRASER PAPERS INC. FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED, FRASER N.H. LLC

Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Michael Barrack, Robert Thornton and D. J. Miller for the Applicants**

David Chernos, for the Brookfield Asset Management Inc.

Susan Grundy, for CIT Business Canada Inc.

Peter Griffin, for Board of Directors of the Applicants

Robert J. Chadwick and Cathy Costa for PricewaterhouseCoopers Inc., Proposed Monitor

HEARD: **JUNE 18, 2009**

ENDORSEMENT

[1] On June 18, 2009, I granted an Initial Order in the proceedings with reasons to follow. These are those reasons.

[2] Fraser Papers Inc. ("FPI"), FPS Canada Inc. ("FPSC"), Fraser Papers Holdings Inc. ("Fraser Holdings"), Fraser Timber Ltd., Fraser Papers Limited and Fraser N.H. LLC (collectively, the "Fraser Group" or the "Applicants") make this application under the *Companies' Creditors Arrangement Act.*

[3] FPI is a CBCA company with a registered head office in Toronto, Ontario. It is a publicly-traded company listed on the Toronto Stock Exchange. As of June 1, 2009, the issued and outstanding capital of FPI consisted of 50,166,789 common shares. There are no other classes of shares outstanding at this time. As at December 31, 2008, Brookfield Asset Management Inc. ("Brookfield") owned, directly or indirectly, approximately 70.5% of the outstanding common shares of FPI.

[4] The other Applicants are either a direct or indirect wholly-owned subsidiaries of FPI. A simplified corporate chart is attached to the affidavit of J. Peter Gordon (the "Gordon Affidavit") which was filed in support of the application.

[5] FPI owns all of the issued and outstanding shares of FPSC and Fraser Holdings. Fraser Holdings owns all of the issued and outstanding shares of Fraser Timber Ltd. and Fraser Papers Limited. Fraser Papers Limited is the sole member and manager of Fraser N.H. LLC.

[6] Detailed information concerning the background of the Applicants, their creditors and their financial status forms part of the Gordon Affidavit and is also summarized in the First Report submitted by PricewaterhouseCoopers Inc. ("PwC") in its capacity as proposed Monitor (the "PwC Report").

[7] The PwC Report notes that a key to the Fraser Group's ability to carry on its business operations as usual, is the ongoing multi-dimensional support provided by Brookfield Asset Management Inc. ("BAM").

[8] The Fraser Group is a speciality paper company with integrated paper, pulp and lumber operations. The operations of the Applicants comprise two paper mills, one market pulp mill, two internal pulp mills, a biomass cogeneration power plant, and four lumber mills in New Brunswick, Quebec, Maine and New Hampshire.

[9] The Fraser Group operates largely as an integrated business. PwC reports that while the Applicants' operations include the above-noted locations in both Canada and the United States, each location provides to or receives product from another location creating an integrated nature to the business.

[10] For fiscal 2008, the Applicants had consolidated net sales of approximately $688.6 million (unless otherwise stated, all monetary amounts are expressed in United States dollars, the Applicants' reporting currency) and suffered a net loss of $71.9 million. For the four months ended May 2, 2009, the Applicants reported a net loss of $22.1 million on consolidated net sales of $202.8 million.

[11] PwC further reports that the Fraser Group's debt structure and approximate current amounts outstanding is as follows (excluding any amounts in respect of pensions, post-employment benefits, guarantees, potential exposure under foreign exchange hedging contracts and potential environmental liabilities):

Lender/Type of debt	Outstanding Amount US$ millions
CIT – secured	56
NB Loan – secured	29
CIBC – unsecured	25
3rd party trade creditors – Canadian entities*	43
3rd party trade creditors – US entities*	30
Intercompany payable to FPI – US entities*	32

* Balances as at May 2, 2009

[12] FPI is the borrower under the CIT Business Canada Inc. ("CIT") Facility (the "CIT Facility"). The CIT Facility is guaranteed by all of the other Applicants. CIT has a first charge over inventory and accounts receivable of each of the Applicants. BAM has also guaranteed $25 million of the outstanding amount under the CIT Facility.

[13] The Province of New Brunswick has a first charge over the fixed assets in New Brunswick and a second charge on inventory and accounts receivable in New Brunswick in connection with FPI's indebtedness to it (the "NB Loan"). Counsel to the Applicants advised that the Province of New Brunswick is aware of these CCAA proceedings.

[14] FPI is the borrower under the unsecured CIBC Facility. BAM has guaranteed $25 million of the outstanding amount under this facility.

[15] The two BAM guarantees noted above are secured by guarantees of each of the Applicants and a general security agreement over all of the Applicants' assets, which security is subordinate to the CIT and NB Loan security.

[16] The Applicants seeks protection under the CCAA to facilitate the re-organization of their affairs.

[17] PwC reports that based on discussions with management, the principal causes of the need for the CCAA filing include:

(i) the poor economic conditions of the past few years, resulting in significant operating losses and a severe working capital shortfall;

(ii) the impact of the U.S. "Black Liquor Tax Credit", which the Applicants are not entitled to receive, which has further lowered the price of pulp;

(iii) the uncertainty associated with negotiating new collective bargaining agreements and obtaining concessions under the existing collective bargaining agreements with certain of its unions;

(iv) the recent stock market crash which has resulted in material funding deficiencies in the Applicants' defined pension benefit plans; and

(v) the continued poor outlook for the housing, lumber and pulp markets.

[18] In addition, PwC has been advised by the Applicants that it does not have the liquidity required to meet the following near term obligations;

(i) the ongoing losses associated with the pulp and lumber operations;

(ii) the repayment of the $25 million CIBC term loan which matures in September 2009;

(iii) $7.8 million of severance payments related to the temporary shutdown of the Thurso pulp mill, due for payment in two equal amounts in November 2009 and December 2009.

(iv) the approximate amount of $10 million required to bring their overdue supplier balances back to normal credit terms; and

(v) the approximate amount of $7.7 million owing to various municipalities for property taxes.

[19] The Applicants contemplate a comprehensive operational and balance sheet restructuring, and PwC reports that the Applicants have already commenced dealing with the numerous issues that are currently negatively impacting the profitability of its various business units.

[20] The Applicants have indicated that significant additional time is required in order to be able to meet with all of the relevant parties, to attempt to negotiate revisions to contract terms, to determine which parts of the business are viable based on these contract revisions, to update business plans, to arrange exit financing and to develop a plan of arrangement and compromise for consideration by the Applicants' creditors.

[21] PwC understands that negotiations will take place with these various parties throughout the summer of 2009.

[22] Copies of FPI's audited consolidated financial statements as at December 31, 2008 as well as consolidating statements as at May 2, 2009 are filed in the record.

[23] The Applicants have acknowledged that they are insolvent.

[24] PwC has consented to act as the Monitor (the "Monitor") of the Applicants in the CCAA proceedings.

[25] The record filed in support of the application also contains the required cash flow forecast which forecast estimates that the Applicants have an urgent need for DIP Financing. The Applicants have received two term sheets in respect of DIP Financing – one from BAM and one from CIT, the Applicants existing revolving credit lender.

[26] The PwC Report comments at length with respect to the DIP Financing proposals. The PwC Report indicates that the two proposals have super priority charges and would be in priority to existing charges granted to the Province of New Brunswick in respect of its advances to fund capital expenditures in New Brunswick.

[27] Counsel to the Applicants advised that the Province of New Brunswick is aware of the priming provisions, subject to a maximum of $20 million. The Applicants have acknowledged that this $20 million cap is acceptable at this time.

[28] PwC also reports that it has inquired into the marketing process for the DIP Financing arrangements and has been advised by management that the financing requirement was not marketed externally to other potential lenders given the nature of the industry and the willingness of the existing lenders to fund ongoing operations. Management has advised PwC that the two DIP term sheets represent the only alternative available to the Applicants to ensure the continuation of the Applicants' operations at this time.

[29] PwC reports that it has compared the principal financial terms of the two DIP Financing arrangements to a number of other recent debtor-in-possession financing packages in the forestry, pulp and paper sector with respect to pricing, loan availability and certain security considerations and based on this comparison, PWC is of the view that the financial terms of the DIP Facilities term sheets appear to be commercially reasonable and consistent with current market transactions.

[30] I accept that DIP Financing is urgently required and that financing on the basis of the term sheets should be approved.

[31] The proposed form of Order provides for a number of charges which are described in both the Gordon Affidavit and the PwC Report. These charges include an administrative charge, a CIT DIP charge, a DIP Lenders' charge, a directors' charge and an intercompany charge.

[32] Counsel to the Applicants advised that the directors' charge is in the amount of $30 million; however, counsel also advised that there is a directors' and officers' insurance policy in place which should have the practical impact of reducing any exposure under the directors' charge.

[33] In its Report, PWC has recommended that the Applicants be granted the benefit of protection under the CCAA and, as well, PwC is supportive of the charges and financial thresholds proposed in the Draft Order. The priority of the various charges is specified in the Draft Order.

[34] Having reviewed the record and have heard submissions, I am satisfied that the Applicants qualify as debtor corporations within the meaning of the CCAA. The Applicants clearly have obligations in excess of the qualifying limit and have acknowledged that they are insolvent. The jurisdiction of this court to receive the CCAA application has been established.

[35] The Applicants seeks an Initial Order under Section 11 of the CCAA. The required Statement of Projected Cash Flow and the other financial documents required under Section 11(2) have been filed. The application was not opposed by any party appearing.

[36] I am satisfied that it is appropriate that the Applicants be granted protection under the CCAA and an order shall issue to that effect. The Draft Order is based on the Model Order and the modifications as proposed are acceptable.

[37] As previously noted, the Fraser Group is fully integrated including between the Canadian and the United States operations. The integration of the Applicants' business is described in detail in the Gordon Affidavit. The Applicants are of the view that the restructuring to be undertaken under the CCAA will require a review of the operations of the Fraser Group as a whole and may involve a restructuring of certain business and the sale of the remaining businesses and related assets. The Applicants anticipate that this process will require a judicial proceeding and approval in the United States in view of the assets and operations located in the United States.

[38] The Applicants are of the view that the restructuring of the Fraser Group will be administered most efficiently through a single, centralized restructuring process. Such a process would likely minimize the cost of the restructuring, minimize the time necessary to effect the restructuring and thereby maximize the overall value of the assets and operations for all stakeholders.

[39] The Applicants contemplate that the CCAA proceeding in Canada will be the primary court-supervised process for the restructuring of the Fraser Group. The Applicants have also indicated that they will be seeking an Order pursuant to Chapter 15 of the United States Bankruptcy Code to have the CCAA proceedings recognized as "foreign main proceedings". The effect of the Chapter 15 proceedings would be to give effect to this Initial Order in the United States.

[40] The Applicants are of the view that FPI's centre of main interest ("COMI") is Ontario. Its registered head office is in Ontario and all corporate, management, banking and strategic functions are undertaken from its head office in Ontario.

[41] In considering whether these CCAA proceedings should be recognized as "foreign main proceedings", paragraphs 24 – 28 of the Gordon Affidavit provides comprehensive reasons for the basis for his conclusion that the Applicants' COMI is also Ontario.

[42] PwC has also commented on this issue in the PwC Report at paragraphs 26 – 29. PwC has indicated that based on their understanding of the integrated nature of the Applicants' management, operations and financing as between the Canadian and U.S. Applicants, the poor liquidity situation of the U.S. Applicants which have no separate borrowing facilities, and PWC's view that the Applicants' COMI is Ontario, they concur with the Applicants commencing proceedings under Chapter 15.

[43] I do note that it is more usual in Chapter 15 proceedings to have the Monitor make the application as foreign representative. In this case, the Applicants have indicated that, in their view, it would be both more time effective and cost effective for the Applicants to make the application. The Applicants have indicated that the Monitor will be taking a very active role in the proceedings both in the CCAA and in any proceedings under the U.S. Bankruptcy Code. I am satisfied that the involvement of the Monitor will ensure that a satisfactory process is in place in order to keep the stakeholders informed of developments both in this proceeding and in the proceedings under the U.S. Code.

[44] An order shall issue to give effect to the foregoing.

[45] I would like to express my appreciation to the parties involved in this process. The detail contained in the Gordon Affidavit as well as the PwC Report was of great assistance to the court.

MORAWETZ J.

DATE: June 22, 2009

Tab 13

6 C.B.R. (4th) 314, [1999] O.J. No. 709, 96 O.T.C. 272

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Royal Oak Mines Inc., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
In the Matter of the Courts of Justice Act, R.S.O., 1990, C. C-43, as amended
In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines Inc., and others
Ontario Court of Justice, General Division [Commercial List]
Blair J.
Judgment: March 10, 1999
Docket: 99-CL-003278

Counsel: David E. Baird, Q.C., and Mario J. Forte, for Applicants.

Peter H. Griffin, for Trilon Financial Corporation and Northgate Exploration Limited.

Ronald N. Robertson, Q.C., for Unofficial Senior Subordinated Noteholders' Committee.

Sean Dunphy, for Bankers Trust and Macquarrie Limited.

Hilary Clarke, for Bank of Nova Scotia.

Subject: Insolvency; Corporate and Commercial

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangements Act -- Arrangements -- Approval by court -- Miscellaneous issues

Debtor company applied for initial order pursuant to Companies' Creditors Arrangement Act -- Relief sought included debtor-in-possession financing super-priority, stay of proceedings, and permission to conduct certain operations and take certain restructuring steps – Relief sought also included power to borrow and charge property, to impose charge as liability protection in favour of directors, to not pay creditors, permission to file plan of arrangement, appointment of monitor and inclusion of general terms, including come back clauses -- Debtor was supported by two senior secured lenders and by unofficial creditors' committee of senior secured subordinated noteholders -- Group of hedge lenders opposed scope and extent of relief as being broad and overreaching -- Other creditors received short notice or no notice of application -- Application granted -- Initial order approved but in more limited scope than requested -- Relief sought extended beyond bounds of procedural fairness -- Language of order not to read like trust indenture but to be clear, simple and readily understandable -- Initial order to contain declaration that applicant had standing to apply, authorization to file plan of compromise, appointment of monitor and its duties and to contain comeback clause -- Initial order to put in place stay provisions and operating, financing and restructuring terms reasonably necessary for continued operation of debtor during brief

but realistic sorting-out period on urgent basis -- Proliferation of advisory committees and extension of broad protection to directors are better left for orders other than initial order -- Comeback clauses not to be used to provide answer to overreaching initial orders -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), (4).

Cases considered by Blair J.:

> Bank of America Canada v. Willann Investments Ltd. (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.) -- referred to
>
> Canadian Asbestos Services Ltd. v. Bank of Montreal, 16 C.B.R. (3d) 114, [1992] G.S.T.C. 15, 11 O.R. (3d) 353, 93 D.T.C. 5001, 5 C.L.R. (2d) 54, [1993] 1 C.T.C. 48, 5 T.C.T. 4328 (Ont. Gen. Div.) -- referred to
>
> Canadian Asbestos Services Ltd. v. Bank of Montreal, 13 O.R. (3d) 291, 10 C.L.R. (2d) 204, [1993] G.S.T.C. 23, 1 G.T.C. 6169 (Ont. Gen. Div.) -- referred to
>
> Dylex Ltd., Re (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.) -- referred to
>
> Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) -- referred to
>
> Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. Elan Corp. v. Comiskey) 1 O.R. (3d) 289, (sub nom. Elan Corp. v. Comiskey) 41 O.A.C. 282 (Ont. C.A.) -- referred to
>
> Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (B.C. S.C.) -- referred to

Statutes considered:

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

> Generally -- considered
>
> s. 3(1) -- referred to
>
> s. 11 [rep. & sub. 1997, c. 12, s. 124] -- considered
>
> s. 11(3) [rep. & sub. 1997, c. 12, s. 124] -- considered
>
> s. 11(3)(a)-11(3)(c) [en. 1997, c. 12, s. 124] -- considered
>
> s. 11(4) [en. 1997, c. 12, s. 124] -- considered

APPLICATION by debtor company for initial order pursuant to s. 11 of Companies' Creditors Arrangement Act.

Blair J.:

1 These reasons are an expanded version of an endorsement made at the time of the granting of an Initial Order in favour of the Applicants under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as

amended, on February 15, 1999. At the time, I indicated that I would release additional reasons with respect to certain of the issues raised on the Initial Application at a later date. In doing so, I propose to incorporate significant portions of the earlier handwritten endorsement.

2 Royal Oak Mines Inc. ("Royal Oak"), and a series of related corporations, applied for the protection of the Court afforded by the Companies' Creditors Arrangement Act (the "CCAA") while they endeavour to negotiate a restructuring of their debt with their creditors. Royal Oak is a publicly traded mining company of considerable import in the mining industry. It currently operates four gold and copper mines (two in the Timmins area of Ontario, one in Yellowknife in the North West Territories, and one (the Kemess mine) in the interior of British Columbia). The Company employs approximately 960 people (about 300 in Ontario, 280 in the North West Territories, 348 in British Columbia, 27 at its corporate headquarters in Seattle, and 5 in the Province of Newfoundland).

3 Royal Oak is supported in this CCAA Application by Trilon Financial Corporation and Northgate Exploration Limited, the senior secured lenders who are owed approximately $180 million, and by the unofficial creditors' committee of the Senior Secured Subordinated Noteholders who are owed about $264 million. A group of three other lenders, known in the jargon of the industry as the "Hedge Lenders", and who have advanced approximately $50 million to Royal Oak, stands between the former two groups, in terms of priority. The three Hedge Lenders -- Bankers Trust, Macquarrie Limited of Australia, and Bank of Nova Scotia -- did not strenuously oppose the granting of an Initial CCAA Order in principle; however, they questioned the scope and extent of some of the relief sought, arguing that it was unnecessarily broad and "overreaching", particularly where they had only been given short notice of the Application and where some creditors had been given none.

4 There are construction lien claimants in the Province of British Columbia, they point out, who have lien claims against the Kemess Mine totalling about $18 million, and whose claims are admittedly prior to those of *any* other secured creditor in relation to that asset. Yet the lien claimants were not given notice of these proceedings. In addition, Export Development Corporation has a claim for about $19.5 million and had not been given notice.

5 Falling world prices for gold and copper, environmental concerns with their attendant costs, and construction and start-up costs relating to the Kemess Mine in particular, have led to Royal Oak's current financial crunch. It is insolvent. I was quite satisfied on the evidence in Ms. Witte's affidavit, and on the other materials filed, that the Applicants met the statutory requirements for the granting of an Initial Order under section 11 of the CCAA, and that it was appropriate and just in the circumstances for the Court to grant the protection sought on an Initial Order basis, while the Applicants attempt to restructure their affairs and to elicit the approval and support of their creditors to such a restructuring. Accordingly, an Initial Order was granted on February 15, 1999. There have been certain adjustments and variations made to that Order since then.

6 In view of some of the important concerns raised by Mr. Dunphy and Ms. Clarke on behalf of the Hedge Lenders about the details and reach of the Order sought, however, I indicated that the Court was not prepared to approve it in its entirely at this stage. The Initial Order as granted was therefore somewhat more limited in scope than that requested. Somewhat more expanded reasons than those set out in the handwritten endorsement made at the time were to follow. These are those reasons.

Initial CCAA Orders

7 Section 11 of the CCAA is the provision of the Act embodying the broad and flexible statutory power inves-

ted in the court to "grant its protection" to an applicant by imposing a stay of proceedings against the applicant company, subject to terms, while the company attempts to negotiate a restructuring of its debt with its creditors. It is well established that the provisions of the Act are remedial in nature, and that they should be given a broad and liberal interpretation in order to facilitate compromises and arrangements between companies and their creditors, and to keep companies in business where that end can reasonably be achieved: see, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.), per Doherty J.A.; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31; "*Reorganizations Under the Companies' Creditors Arrangement Act*", Stanley E. Edwards, (1947) 25 Can. Bar Rev. 587 at p. 593 referred to with approval by Thackray J. in *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) at p. 173.

8 In the utilization of the CCAA for this broad purpose a practice has developed whereby the application is "pre-packaged" to a significant extent before relief is sought from the Court. That is, the debtor company seeks to obtain the consent and support of its major creditors to a CCAA process, and to its major terms and conditions, before the application is launched. This has been my experience in the course of supervising more than a few such proceedings. The practice is a healthy and effective one in my view, and is to be commended and encouraged. Nonetheless, it has led in some ways to the problem which is the subject of these reasons.

9 The problem centers around the growing complexity of the Initial Orders sought under s. 11(3) of the Act, and the increasing tendency to attempt to incorporate into such orders provisions to meet every eventuality that might conceivably arise during the course of the CCAA process. Included in this latter category is the matter of debtor-in-possession ("DIP") financing, calling -- as it frequently does -- for a "super priority" position over all other secured lending then in place.

10 Initial Orders under the CCAA are almost invariably sought on short notice to many of the creditors and, not infrequently, without any notice to others. I note as well that the Court is also asked in most cases to respond on short notice and with little advance opportunity to examine the materials filed in support of the application. This is because the materials, for very practical reasons, are not usually ready for filing until just before the filing is made. I make these observations not to be critical in any way, but simply to point out the realities of the context in which the application for the Initial Order is usually determined.

11 This case falls into both the "short notice" and "no notice" categories. The Hedge Lenders, at least, received only very short notice of the Application on February 15th. Neither the Kemess Lien Claimants in British Columbia nor Export Development Corporation were given any notice. Yet the Court was asked to grant super priority funding, which would rank ahead of even the Lien Claimants (who have admitted priority over everyone), without their knowledge or consent, and which would rank ahead of the Hedge Lenders who had not yet had a reasonable opportunity to consider their position or (given an American holiday) for their counsel to obtain meaningful instructions. The Initial Order which was originally sought in the proceeding consisted of 58 paragraphs of highly complex and sophisticated language. It was 28 pages in length. In addition, it had an 11 page Term Sheet annexed as a Schedule to it. It dealt with,

(a) the stay of proceedings (7 paragraphs, 4 $^1/_2$; pages);

(b) permitted operations by the Applicants during the CCAA period (4 paragraphs, 3 $^1/_2$; pages);

(c) restructuring steps permitted (8 paragraphs, 3 pages);

(d) the power to borrow and the charging of property (15 paragraphs, 5 pages);

(e) a charge to be imposed as a liability protection in favour of directors (2 elaborate paragraphs, spanning 4 pages);

(f) non-payment of creditors (one paragraph, 1/3 page);

(g) permission to file a plan of arrangement (2 paragraphs, 1/3 pages);

(h) appointment and duties of the Monitor (9 paragraphs, 5 pages); and,

(i) general terms, including the "come back" clauses (6 paragraphs, 1 1/2; pages).

12 What is at issue here is not the principle of the Court granting relief of the foregoing nature in CCAA proceedings. That principle is well enough imbedded in the broad jurisdiction referred to earlier in these reasons. In particular, it is not the tenet of DIP financing itself, or super priority financing, which were being questioned. There is sufficient authority for present purposes to justify the granting of such relief in principle: see, *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 11 O.R. (3d) 353 (Ont. Gen. Div.), (Chadwick J.) at pp. 359-361, supplemental reasons and leave to appeal granted (1993), 13 O.R. (3d) 291 (Ont. Gen. Div.); *Bank of America Canada v. Willann Investments Ltd.* (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.), (Austin J); *Dylex Ltd., Re* (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.), (Houlden J.A.). It was the granting of such relief on the broad terms sought here, and the wisdom of that growing practice -- without the benefit of interested persons having the opportunity to review such terms and, if so advised, to comment favourably or neutrally or unfavourably, on them -- which was called into question.

13 There is justification in the call for caution, in my view. The scope and the parameters of the relief to be granted at the Initial Order stage -- in conjunction with the dynamics of no notice, short notice, and the initial statutory stay period provided for in subsection 11(3) of the Act -- require some consideration.

14 I have alluded to the highly complex and sophisticated nature of the Initial Order which was originally sought in this proceeding. The statutory source from which this emanation grew, however, is relatively simple and straightforward. Subsection 11(3) of the CCAA -- which is the foundation of the Court's "protective" jurisdiction -- states:

> 11(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

15 Conceptually, then, the applicant is provided with the protections of a stay, a restraining order and a prohibition order for a period "not exceeding 30 days" in order to give it time to muster support for and justify the relief granted in the Initial Order, all interested persons by then having received reasonable notice and having had a reasonable opportunity to consider their respective positions. The difficulties created by *ex parte* and short

notice proceedings are thereby attenuated.

16 Subsection 11(4) of the Act provides for the making of additional orders in the CCAA process. The Court is granted identical powers to those set out in paragraphs (a) through (c) of subsection 11(3), except that there is no limit on the time period during which a subsection 11(4) order may remain in effect. The only other difference between the two subsections is that in respect of an Initial order under subsection 11(3) the onus on the applicant is to show that it is appropriate in the circumstances for the order to issue, whereas in respect of an order under subsection 11(4) there is an additional requirement to show that the applicant "has acted, and is acting, in good faith and with due diligence" in the CCAA process.

17 The Initial Order sought in this case was not unlike those sought -- and, indeed, those which have been granted -- in numerous other CCAA applications. While the relief granted is always a matter for the exercise of judicial discretion, based upon the statutory and inherent jurisdiction of the Court, it seems to me that considerable relief now sought at the Initial Order stage extends beyond what can appropriately be accommodated within the bounds of procedural fairness. It was at least partially for that reason that I declined to grant the Initial Order relief sought at the outset of this proceeding.

18 Upon reflection, it seems to me that the following considerations might usefully be kept in mind by those preparing for an Initial Order application, and by the Court in granting such an order.

19 First, recognition must be given to the reality that CCAA applications for the most part involve substantial corporations with large indebtedness and often complex debtor-creditor structures. Indeed, the threshold for applying for relief under the CCAA is a debt burden of at least $5 million[FN1]. Thus, I do not mean to suggest by anything said in these reasons that either the process itself or the corporate/commercial/financial issues which must be addressed and resolved, are simple or easily articulated. Therein lies a challenge, however.

20 CCAA orders will of necessity involve a certain complexity. Nevertheless, at least a nod in the direction of plainer language would be helpful to those having to review the draft on short notice, or to react to the order in quick fashion after it has been made on no notice. It would also be helpful to the Court, which -- as I have noted -- is not infrequently asked to give its approval and grant the order with very little advance opportunity for review or consideration. The language of orders should be clear and as simple and readily understandable to creditors and others affected by them as possible in the circumstances. They should not read like trust indentures. These comments are relevant to all orders, but to Initial CCAA Orders in particular.

21 The Initial Order will, of course, contain the necessary declaration that the applicant is a company to which the CCAA applies, the authorization to file a plan of compromise and arrangement, the appointment of the monitor and its duties, and such things as the "comeback" clause. In other respects, however, what the Initial Order should seek to accomplish, in my view, is to put in place the necessary stay provisions and such further operating, financing and restructuring terms as are reasonably necessary for the continued operation of the debtor company during a brief but realistic period of time, on an urgency basis. During such a period, the ongoing operations of the company will be assured, while at the same time the major affected stakeholders are able to consider their respective positions and prepare to respond.

22 Having sought only the reasonably essential minimum relief required for purposes of the Initial Order, the applicant then has the discretion as to when to ask for more extensive relief. It may well be helpful, though, if the nature of the more extensive relief to be sought is signalled in the Initial application, so that interested and affected persons will know what is in the offing in that regard.

23 Subsection 11(3) of the Act does not stipulate that the Initial Order shall be granted for a period of 30 days. It provides that the Court in its discretion may grant an order for a period *not exceeding* 30 days. Each case must be approached on the basis of its own circumstances, and an agreement in advance on the part of all affected secured creditors, at least, may create an entirely different situation. In the absence of such agreement, though, the preferable practice on applications under subsection 11(3) is to keep the Initial Order as simple and straightforward as possible, and the relief sought confined to what is essential for the continued operations of the company during a brief "sorting-out" period of the type referred to above. Further issues can then be addressed, and subsequent orders made, if appropriate, under the rubric of the subsection 11(4) jurisdiction.

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

25 For similar reasons, things like the proliferation of advisory committees and the attendant professional costs accompanying them, and the extension of broad protection to directors, are better left for orders other than the Initial order.

26 I conclude these observations with a word about the "comeback clause". The Initial Order as granted in this case contained the usual provision which is known by that description. It states:

> THIS COURT ORDERS that, notwithstanding any other provision of this Order, the Applicants may apply at any time to this Court to seek any further relief, *and any interested Person may apply to this Court to vary or rescind this Order or seek other relief* on seven days' notice to the Applicants, the Monitor, the CCAA Lender and to any other Person likely to be affected by the Order sought or on such other notice, if any, as this Court may order. (emphasis added)

27 The Initial Order also contained the usual clause permitting the Applicants or the Monitor to apply for directions in relation to the discharge of the Monitor's powers and duties or in relation to the proper execution of the Initial Order. This right is not afforded to others.

28 The comeback provisions are available to sort out issues as they arise during the course of the restructuring. However, they do not provide an answer to overreaching Initial Orders, in my view. There is an inherent disadvantage to a person having to rely on those provisions. By the time such a motion is brought the CCAA process has often taken on a momentum of its own, and even if no formal "onus" is placed on the affected person in such a position, there may well be a practical one if the relief sought goes against the established momentum. On major security issues, in particular, which arise at the Initial Order stage, the occasions where a creditor is required to rely upon the comeback clause should be minimized.

29 These reasons are intended to compliment and to elaborate upon those set out in the brief endorsement made at the time the Initial Order was granted on February 15, 1999, in favour of the Royal Oak Applicants, but in a form more limited than that sought.

Application granted.

FN1. CCAA, subsection 3(1).

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Tab 14

Court of Queen's Bench of Alberta

Citation: 1252206 Alberta Ltd. v. Bank of Montreal, 2009 ABQB 355

Date: 20090610
Docket: BE03 1203160
Registry: Edmonton

In the Matter of a Notice of Intention to Make a Proposal filed by 1252206 Alberta Ltd. under Section 50.4 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3

Between:

1252206 Alberta Ltd.

Applicant

- and -

Bank of Montreal

Respondent

And Between:

Bank of Montreal

Applicant

- and -

1252206 Alberta Ltd.

Respondent

Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby

Decision:

[1] The 30-day period following the filing of a Notice of Intention to make a proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, ("the BIA") was terminated early pursuant to the provisions of s. 50.4(11) of that legislation. The Court concluded that the insolvent debtor would not likely be able to make a viable proposal before the expiry of that period and that it would not be likely, before the expiry of that period, to make a proposal that would be accepted by its creditors. The debtor's companion application

for approval for $1.1 million in Debtor-in-Possession (DIP) financing to rank ahead of the sole secured creditor and for an extension of time to file a proposal was dismissed.

[2] The Respondent Bank is the sole secured creditor, owed approximately $2.9 million. It also holds 97% of the unsecured debt. The debtor was incorporated to build a single residential real estate project. In support of its applications it outlined a planned proposal which would permit it to use the DIP financing to complete the real estate project. If sold, the sale proceeds might allow it to repay the Bank prior to the expiry of the period within which the debtor was required to produce a proposal.

[3] The Bank maintained it would vote against this proposal if produced and that it would not approve any other proposal advanced by the debtor because it had lost confidence in its management. That management made misrepresentations to it in the past, including misrepresenting that it had received deposits from purchasers.

[4] The debtor's plan would see its proposal, in effect, be completed before the creditors were given an opportunity to vote upon it. Support for such initiatives is not within the legislative intent of the proposal provisions of the BIA which is to permit the restructuring of businesses to permit them to remain in operation for the benefit of both themselves and their creditors, rather than to pass a further financing risk onto unwilling creditors to the ultimate benefit of only the debtor and its shareholders.

Facts:

[5] These are the reasons for a decision made by me in open court on May 4, 2009.

[6] The Applicant company is indebted to the Respondent Bank in the approximate amount of $2.9 million borrowed pursuant to a demand loan made July 16, 2007 ("the loan agreement"). That debt is secured by a general security agreement, a demand collateral mortgage registered on lands which were purchased with a portion of the borrowed money and various personal guarantees. The lands in question comprise 38 serviced lots in Edmonton, Alberta upon which the Applicant originally planned to build a 38-unit wood-framed duplex project.

[7] It was incorporated solely for the purpose of constructing and selling this project. Therefore, the ultimate acceptance and implementation of any proposal would not serve to ensure it was able to continue to do business in the long term as it had no such intention.

[8] The Applicant commenced construction on only 12 of the planned units. Those are said to be 40% to 45% completed to date. Construction stopped sometime last autumn due to a shortfall of funds in the hands of the Applicant. The loan agreement required the loan from the Bank to be repaid in full by December 1, 2008. It was not.

[9] On April 20, 2009 the Bank demanded the Applicant repay the loan within 10 days. It responded on May 7, 2009 by filing a Notice of Intention under s. 50.4 of the BIA. Meyers

Norris Penny Limited agreed to act as its trustee. The Applicant now applies for an order allowing it to borrow up to $1.1 million in DIP financing from a third party lender, Echo Merchant Fund Ltd., on the basis that funding will assume priority ahead of that held by the Bank.

[10] The Applicant has obtained an evaluation from Glen Cowan & Associates as of April 16, 2009 which, although not directly in evidence, indicates:

a. the 26 serviced lots have a fair market value of approximately $2.54 million;

b. the 12 partially constructed units have a fair market "as is" value of approximately $1.79 million;

c. should the construction on these 12 units be completed they will then have an aggregate market value of $3.695 million;

d. should that construction be completed the aggregate value of the 26 serviced lots and 12 completed units will be approximately $6.235 million.

[11] The Applicant outlined the contents of the proposal it hoped to eventually be in a position to make if the DIP financing were granted and it was allowed the extension it sought. That proposal would involve using the $1.1 million in DIP financing, or part of it, to complete the 12 units. It would hope to sell at least two of those units per month for the next six months at prices of at least $300,000 a unit. Its own shareholders would inject equity of $175,000 in December 2009 and of $400,000 in January 2010. In December 2009 the DIP financing would be repaid in full. In January 2010 a land loan would be obtained from an as yet unidentified lender in the amount of $1 million to be secured against the 26 bare land lots. The Bank would be paid in full at that time. Thus all creditors would be repaid in full by, or shortly after, the 6-month period established in s. 50.4(9) of the BIA, the maximum period to which the current stay could be extended. The shareholders of the Applicant would also be repaid their shareholders' equity in full and would earn a $2.2 million profit generated if the Cowan & Associates valuations proved correct.

[12] The Applicant owes minimal unsecured debt to 10 trade creditors in the aggregate amount of $28,670.19. Two potential purchasers have provided it with deposits totaling $59,625. The Bank holds 100% of its secured debt and 97% of its unsecured debt.

[13] The Bank opposed this application. It brought a counter-application asking for the immediate termination of the 30-day period for making a proposal with the result that the assets of the Applicant would be liquidated forthwith.

[14] It did so because it believed the Applicant had breached its obligations under the loan agreement. In particular that agreement provided that the funding would be initially advanced by the Bank on condition that the Applicant provide confirmed presales of the 12 units to arm's

length purchasers in the total amount of $3.888 million with the provision of non-refundable purchasers' deposits of a minimum of 5% of the purchase price for most units. The Applicant also agreed to seek and obtain the Bank's approval to all changes or cancellations to those presale agreements.

[15] The Bank was not provided with the actual presale agreements until September 24, 2008; it now challenges some of them as colorable. Further, each of the presale agreements purported to provide for the payment of deposits by the purchasers but the Applicant did not receive most of those deposits. When examined on his affidavit tendered in support of the Applicant's application, Terry Regenwetter admitted that deposits were in fact received by the Applicant on only three of the 12 presales. Those deposits were used to pay for certain construction costs without the knowledge or permission of the Bank. He also testified that nine of the presale contracts were cancelled by the Applicant due to construction delays without his having approached the Bank for its consent to those cancellations.

[16] Mr. Regenwetter testified that the Applicant has approached five other lenders in order to obtain financing to finish the townhouse units but no lender has been willing to provide financing which would be subordinate to that of the Bank, even at a high interest rate.

[17] Assuming for the moment that I have inherent jurisdiction to order that creditors advancing DIP financing take priority over the debtor's secured lenders in this BIA proceeding, such an order should be granted only after concluding that, on balance, the prejudice to secured creditors created by removing their priority claim to the debtor's assets is outweighed by the value of the opportunity to bring greater value to the enterprise as a whole than would be afforded by liquidation at the hands of the secured creditor. In conducting that balancing exercise I must consider the following:

a. will the benefit afforded by the DIP financing clearly outweigh the prejudice to the creditors whose security is being subordinated to the financing; see *Re Bearcat Explorations Ltd.* [2004] 3 C.B.R. (5th) 167 (Alta. QB);

b. will the benefit afforded by the DIP financing bring greater value to the enterprise as a whole than bankrupting the Applicant and liquidating its assets through that bankruptcy; further considerations here include whether the major secured creditor tendered evidence demonstrating that its security would realistically be at risk during the period of financing, whether there was a demonstrated significant net value in the assets after the security registered against it was taken into account, whether the sale of the assets as would be provided for in the ultimate proposal would likely pay out all secured creditors and the DIP lender and whether the unsecured creditors would benefit only if the DIP financing allows the business to be continued so that it can be sold as a going concern; see *Re Manderley Corp.* (2005) 10 C.B.R. (5th) 48 (Ont. S.C.J.); *Re Farmpure Seeds Inc.* 2008 CarswellSask 639;

c. can limitations be placed upon the advancement of DIP financing to minimize its impact on the secured creditors, such as limiting the amount of drawdowns on that financing rather than allowing it to be advanced in one tranche; see *Re Manderley*;

d. is the DIP financing required to permit the Applicant's business to survive the proposal period; see *Re Farmpure*.

[18] The Bank argued that if circumstances exist which justify the granting of an order terminating the stay created by the Applicant filing its Notice of Intention on May 7th then DIP financing must not be approved, the stay must be terminated and the Applicant therefore placed into bankruptcy notwithstanding the results of any balancing exercise. I accepted that if circumstances exist which justify terminating the stay forthwith then no proposal could be created which would allow the Applicant to continue to operate, with the result that any balancing of interests undertaken could not ultimately justify the granting of priority to any DIP financing, nor to extending the time for the filing of a proposal.

[19] Section 50.4(11) of the BIA governs the circumstances under which early termination can be ordered. It provides:

> (11) The court may, on an application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected ...

[20] The Applicant admitted to being insolvent. I was satisfied that it would not likely be able to make a viable proposal nor one which would be accepted by its creditors. The Bank thus made out the criteria under s. 50.4(11) (b) and (c). The order for early termination was granted.

[21] Section 62(2) of the BIA sets criteria for the approval of a proposal which the Applicant cannot meet without the approval of the Bank. It provides:

> (2) A proposal accepted by the creditors and approved by the court is binding on creditors in respect of ...
>
> > (b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in the value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal ...

[22] The Bank is the only secured creditor and thus holds 100% of the majority in number and value of the secured debt. It stated that is because it had lost faith in the management of the Applicant and gave good reasons for that loss of faith, i.e. the misrepresentations in relation to the taking of deposits from the presale purchasers. Therefore, even if a proposal was made it will not be viable in that it would not be binding on the Bank which would vote against it. The Bank could then proceed to liquidate on the Applicant's only asset, the developed and undeveloped land which is the subject of its mortgage; see s. 69.1(b) of the BIA. The Applicant could not then carry on in business.

[23] Precedent can be found for early termination of a stay in the decision of Farley J. of the Ontario General Division in *Re Cumberland Trading Inc.* [1994] O.J. No. 132 where the Court was similarly presented with a termination application by a secured creditor that represented 95% of the value of the secured claims and 67% of all creditors claims. The secured creditor asserted that there was no proposal which the debtor could make which it would approve.

[24] Justice Farley noted that a proposal need not be in progress nor proposed before an application under s. 50.4(11) could be brought. A creditor need not wait to see what a proposal contains before it can take the position to vote against it. In allowing the termination application he stated at para. 9:

> ... I do not see anything in the BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming.

[25] Similarly in *Re Com/Mit Hitech Services Inc.* [1997] O.J. No. 3360 Justice Farley allowed the creditor's application recognizing it was the overwhelming creditor and thus in a veto position with respect to any proposal. He stated at para. 9:

> As for [s. 50.4(11)] (b) and (c) the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Debtor has done in the past and what it is proposing to do with respect to New Clean. It is justifiably not impressed; to the contrary it has in all fairness lost all confidence in the Debtor....

[26] Similarly here the Bank is the overwhelming creditor, is in a veto position and advises it has lost all confidence in the Applicant.

[27] I am not troubled by the effect of refusing the Applicant's applications for DIP financing and a stay extension because its plans are not reflective of the legislative purpose for enactment of the proposal provisions of the BIA. Rather than aiming at restructuring a viable enterprise so that jobs can be maintained and a business preserved, the effect of allowing its application for DIP financing would have been to remove control from a secured lender of the means of recovery upon its loan. It would allow the insolvent debtor another opportunity to complete this building project without the party bearing the greatest risk, the secured creditor, having any control over the decisions made in relation to same. It would impose, in effect, a lending regime on the Bank which no other lender has been prepared to entertain.

[28] While in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 BCCA 327 the British Columbia Court of Appeal was considering the legislative purpose behind the proposal provisions of the BIA's companion legislation, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, rather than the BIA, the description of legislative purpose given there applies to the BIA as well. The Court held, at para. 28:

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[29] There, as here, the creditors had lost confidence in a debtor which was seeking to reorganize to allow it control over completing a real estate development. The Court went on to say:

> 37. The failure of the chambers judge to consider the fundamental purpose of the CCAA and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the CCAA should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.
>
> 38. ...What the Debtor Company was endeavoring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[30] That is essentially what the Applicant hoped for here. With the DIP financing in place it hoped to finish construction of the 12 units, sell them and use the proceeds to pay off the Bank during the period of the stay without any proposal being developed or at least voted upon.

[31] Applicant's counsel sought to distinguish the *Cliffs Over Maple Bay* decision by arguing that he has already presented a plan for a proposal and that that proposal would go to a vote, albeit at a point where it would be able to repay the Bank in full. He thus considered the requirement for a vote on a proposal as a technicality.

[32] The Court in *Cliffs Over Maple Bay* was not concerned with the absence of a technical requirement, however. It was concerned with a scenario which would see a proposal implemented through the use of DIP financing before any creditor would be able to cast a negative vote against it. That, in substance, is exactly what the Applicant proposed here.

[33] If DIP financing were given priority over the Bank's debt here there would be no guarantee that the Applicant will be able to complete the project and sell the units at the projected profit. It was unable to do so in 2008. Five lenders have refused its applications for refinancing which suggests that they were not convinced of the profitability of this venture.

[34] Any social benefits which might ensue from putting the Applicant in funds to finish this project itself are more than set off by the negatives. The Applicant argued that the completion of the project would increase taxes paid to the City of Edmonton, would offer tradesmen employment and would remove an unsightly partially finished development from the view of its neighbors. Allowing the Applicants to proceed, however, does not guarantee this plan would have been successful. It would not only be the Bank which would be impacted by failure. These residences would have been marketed at prices designed to attract often young, first time buyers who would put down deposits on a presale basis and terminate their leases on rental accommodation in anticipation of moving in by the stated completion date. If that did not happen those purchasers will be seriously impacted. Even if given possession they would face the risk of builders' liens being filed by unpaid trades. Had it been necessary to consider the question of whether permitting the Applicant to complete and sell the 12 partially completed units would likely bring greater value to the enterprise as a whole than would be the case if the proposal were made and accepted I might well have not concluded that it did. Rather, the Applicant's valuation shows that the Bank and other creditors will most likely be fully repaid and a surplus produced in an orderly liquidation of the real estate in question. DIP financing with priority over the Bank can only cause uncertainty and prejudice to those creditors with no corresponding benefit.

[35] The purpose for requesting DIP financing here was not simply to provide operating funds to allow the Applicant to prepare a proposal and keep its business in operation in the meantime. That business has not been in operation since late 2008. It has not been able to find any other lender, at any cost, who would assume the risk after replacing the Bank's financing or as a subordinate lender to the Bank. Its application was an attempt to do indirectly what it had not been able to achieve directly.

Conclusion:

[36] The application for approval of DIP financing in priority to the security held by the Bank was therefore refused. The application to extend the time for the making of a proposal was similarly refused. The time granted to the Applicant to make a proposal was terminated as of the date the applications were argued, May 4, 2009.

Heard on the 4th day of June 2009.
Dated at the City of Edmonton, Alberta this 10th day of June 2009.

M.B. Bielby
J.C.Q.B.A.

Appearances:

Jeffrey Lee
for 1252206 Alberta Ltd.

Kenneth Lenz
for Echo Merchant Fund Ltd.

Ray Rutman & Roberto de Guzman
for Bank of Montreal

Darren R. Bieganek
for the Trustee, Meyers Norris Penny Limited

Tab 15

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

C
2007 CarswellAlta 1806

Temple City Housing Inc., Re
In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended
And In the Matter of Temple City Housing Inc. (Applicant)
Alberta Court of Queen's Bench
Romaine J.
Judgment: December 21, 2007[FN*]
Docket: Calgary 0701-12190

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

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

Jill Medhurst-Tivadar for Canada Revenue Agency

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

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

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

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

Corporate taxpayer owed CRA approximately $870,000 in unremitted source deductions, with an expected GST net tax refund of $150,000 -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA"), including debtor-in-possession ("DIP") charge -- Petition granted -- DIP charge was allowed in amount of $300,000 -- Granting of DIP charge to take taxpayer through first weeks of CCAA process was necessary and in best interests of company's shareholders -- CRA's submission, that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order, was rejected -- CCAA proceeding is

able to grant super-priority over existing security interests for DIP financing -- If it were otherwise, protection of CCAA effectively would be denied to debtor company in many cases -- Supreme Court of Canada decision on point held that deemed trust created by s. 227(4.1) had priority, but did not attach specifically to particular as- sets.

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

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

Cases considered by Romaine J.:

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

Statutes considered:

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

> Generally -- considered

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

> Generally -- referred to
>
> s. 227(4) -- considered
>
> s. 227(4.1) [en. 1998, c. 19, s. 226(1)] -- considered

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

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

***Romaine J.*:**

Introduction

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

Facts

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

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

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

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

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

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

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

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

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

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

11 He noted that the deemed trust takes priority in situations where the CRA and secured creditors of a tax debtor both claim an interest in the tax debtor's property. On the issue of whether the deemed trust attached to after-acquired property, Iacobucci, J. found that the language of the relevant section implied that "Parliament has contemplated a fluidity with respect to the assets of the debtor to which the trust attacks": para. 32. He commented that, since the deemed trust is a statutory creation, it is not subject to the "restraints imposed by ordinary principles of trust law"; para. 34. Thus, while conceptually it could be considered that the source deductions themselves are the corpus of the trust, according to the language of the section, "property of the person . . . equal in value to the amount so deemed to be held in trust is deemed" to be held in trust. As the Court noted, this saves

the CRA from having to trace specific assets to the funds originally deducted for source deductions. Iacobucci, J. referenced the comments of Gonthier, J. in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) at para. 31 that the "trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust. . ."

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

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

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

Petition granted.

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

END OF DOCUMENT

Tab 16

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

1999 CarswellBC 2673

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

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

Douglas I. Knowles, for Ernst & Young LLP.

Martin L. Palleson, for Canadian Western Bank.

Shelley C. Fitzpatrick, for Century Services Inc.

E. Jane Milton, for Royal Bank of Canada.

John I. McLean, for Aziz Group.

Bonita Lewis-Hand, for Clarica Life Insurance Company.

R.G. Hildebrand, for City of Surrey.

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

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

Subject: Corporate and Commercial; Insolvency

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

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

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

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

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

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

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

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

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

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

Cases considered by Tysoe J.:

> Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada) [1991] 2 W.W.R. 136 (B.C. C.A.) -- applied
>
> Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (B.C. C.A.) -- referred to
>
> Mooney v. Orr (1994), 33 C.P.C. (3d) 31, [1995] 3 W.W.R. 116, 100 B.C.L.R. (2d) 335 (B.C. S.C.) -- considered
>
> Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352, 57 O.A.C. 241 (Ont. C.A.) -- referred to
>
> Royal Oak Mines Inc., Re (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) -- applied
>
> Royal Oak Mines Inc., Re (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) -- considered
>
> Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) -- applied

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

Statutes considered:

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

Generally -- referred to

s. 8 -- referred to

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

***Tysoe J.*:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Order accordingly.

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2000 BCCA 146, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, [2000] B.C.W.L.D. 559, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96, [2000] B.C.J. No. 409

2000 CarswellBC 414

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

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

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

S.C. Fitzpatrick, for Respondent Century Services.

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

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

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

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

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

Subject: Corporate and Commercial; Insolvency

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

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

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

Cases considered by *Mackenzie J.A.*:

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

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

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

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

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

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

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) -- applied

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

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

2000 BCCA 146, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, [2000] B.C.W.L.D. 559, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96, [2000] B.C.J. No. 409

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

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

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

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

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

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

Statutes considered:

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

Generally -- referred to

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

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

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

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

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

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

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

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

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

2000 BCCA 146, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, [2000] B.C.W.L.D. 559, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96, [2000] B.C.J. No. 409

Background

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

The facts

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

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

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

7 The aggregate debt is $24 million.

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

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

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

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

The *Companies' Creditor Arrangement Act*

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

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

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

> The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *C.C.A.A.*, the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.
>
> There is nothing in the *C.C.A.A.* which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument.

Gibbs J.A. concluded (at 320):

> In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as *Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.); *Re Feifer and Frame Manufacturing Corp.*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.); *Wynden Canada Inc. v. Gaz Métropolitain Inc.*

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

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

The Monitor

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

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

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

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

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

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

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

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

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

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

Monitor not liable

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

Assistance to be provided

(5) The debtor company shall

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

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

1997, c. 12, s. 124.

Non-liability in respect of certain matters

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

Status of claim ranking

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

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

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

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

Cases

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

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

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

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

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

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

The receivers' jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

32 I would dismiss the appeal for these reasons.

Appeal dismissed.

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Tab 17

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-025430-055

DATE: MAY 6, 2005

IN THE PRESENCE OF: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON

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

MEI COMPUTER TECHNOLOGY GROUP INC.
Petitioner
and
ERNST & YOUNG INC.
Monitor

JUDGMENT ON A REQUEST FOR THE CREATION OF AN EMPLOYEE RETENTION CHARGE

---

[1] In the context of an Amended Motion for the First Extension of the Initial Order issued under the *CCAA*[1], MEI Computer Technology Group Inc. (MEI) requests the creation of a new priority charge on its assets, namely what it calls an Employee Retention Charge.

[2] In the Initial Order, the Court already authorized the creation of a Directors and Officers Indemnification Charge, for an aggregate amount of $300,000, as well as the

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

creation of an Administration Charge for the Monitor, its legal counsel, MEI's legal counsel and other advisers, for a further amount of $200,000.

[3] The Administration Charge ranks prior to all security on MEI's assets, while the D&O charge ranks prior to all such security with the exception of the Administration Charge and the security held by the National Bank of Canada.

[4] The Employee Retention Charge that MEI now wants this Court to order pertains to an Employee Retention Programme being presently contemplated by the company[2].

[5] The Programme is aimed at ensuring the retention of all current employees until the end of the *CCAA* process, and thus sets targets for each of them in furtherance of a successful restructuring. The total value of the Programme is as much as $455,000 based on performance. Fifty-three (53) employees divided in four (4) groups (General, Project managers and key analysts, Management, and Chief restructuring officer) are covered by the Programme.

[6] A first portion of the Programme relates to specific targets to be reached for a potential total amount of $265,000. These target amounts are only payable in the event that a Plan is approved by the creditors and sanctioned by the Court at the end of the *CCAA* process. In such instance, it is expected that the Plan will provide for the payment of these target amounts in full prior to the mass of unsecured claims. However, these target amounts are not in themselves secured.

[7] A second portion of the Programme represents base amounts totalling $190,000 that will be paid to all employees covered by the Programme who are still with MEI at the conclusion of the *CCAA* proceedings. The Programme provides for the payment of that second portion regardless of the outcome of the restructuring.

[8] The charge that MEI requests concerns solely the base amounts of the Programme. MEI wants the Court to create a charge to guarantee the payment of these amounts totalling $190,000 in order not to compromise the company's cash flow. It asks that the charge ranks immediately after all existing security on MEI's assets, but prior to all subsequent security, and obviously prior to all the unsecured creditors.

[9] As appears from the Initial Order, the secured creditors' claims aggregate $1,490,000, while the two priority charges created at that time amount to another $500,000. Therefore, the existing security on MEI's assets stand at $1,990,000.

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[2] Exhibit P-4.

[10] In comparison, the unsecured claims aggregate approximately $3,677,000. They include the claims of trade creditors for $710,000, employees' claims in accrued vacation pay, unpaid severance or unpaid commissions for $1,467,000, and two contingent claims against which MEI acknowledged an indebtedness totalling $1,500,000.

[11] MEI argues that the creation of the Employee Retention Charge is needed for the restructuring process. Since the beginning of the *CCAA* application, it says that twenty-seven (27) employees have been laid off and that four (4) have also resigned. Without the Programme and the related charge, other employees are expected to leave and the restructuring may be put in jeopardy. According to MEI, the remaining employees are in a position of uncertainty in light of the many lay-offs. They need to be reassured.

[12] MEI further indicates that it has the support of the National Bank of Canada for the creation of this charge. It adds that no objections have been raised by any of the creditors, even though it is not clear as to which ones were notified specifically of this pending request.

[13] Neither MEI's counsel, nor the Court, found any precedent in the Quebec or Canadian case law on this issue. Apparently, no decision rendered in the context of a *CCAA* restructuring has specifically authorized the creation of a charge similar to the Employee Retention Charge sought here. Short of pure speculation, it is not possible to explain this absence of precedent. It is however sufficient for the Court to act with caution before granting MEI's request.

[14] Notwithstanding its designation, MEI's counsel first submits that in reality, this charge is exactly the same as, and is finally no different than, a Debtor in Possession (DIP) financing and its related priority charge.

[15] For the purposes of this Judgment, the Court accepts this proposition. The Employee Retention Charge is indeed comparable to a DIP financing to allow the debtor corporation to continue operating. The justification behind it is in fact similar.

[16] MEI's counsel then pleads that this is a situation where the Court should give a large and liberal interpretation to the *CCAA* and exercise its inherent jurisdiction to grant the priority charge requested.

[17] With all due respect, the Court disagrees with this other submission in the context of MEI's restructuring. Obviously, some explanations are necessary in support of this finding. They are as follows.

[18] It is now settled in canadian jurisprudence that the *CCAA* is a remedial legislation which is to be given a large interpretation to facilitate its objectives[3]. The courts recognize that *CCAA*'s effectiveness in achieving its objectives is indeed dependent on a broad and flexible exercise of jurisdiction so as to facilitate a restructuring and continue the debtor as a going concern in the interim[4].

[19] The Quebec courts share the same vision as to the liberal interpretation of the *CCAA* and as to the necessity to achieve its objectives[5].

[20] In giving to the *CCAA* such large and liberal interpretation and in facilitating the achievement of its objectives, courts in this country have relied on their inherent jurisdiction, or alternatively on the broad jurisdiction under Section 11, as the source of judicial power to "fill in the gaps" or "put flesh on the bones" of the Act[6].

[21] In a noteworthy opinion issued recently in the context of a *CCAA* restructuring, Blair J. of the Ontario Court of Appeal summarized what is to be understood by this concept of inherent jurisdiction:

> [34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:
>
> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[22] Under the *CCAA*, a well-known demonstration of the use of this inherent jurisdiction as a source of judicial power has been the courts' interpretation that it includes the ability to order DIP financing or create priority charges. As a matter of fact,

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3 *Stelco Inc. (Bankruptcy) (Re)* [**Stelco**], [2005] O.J. No. 1171 (QL) (Ont. C.A), at ¶ 32.
4 *United Used Auto & Truck Parts Ltd. (Re)*, [2000] B.C.J. No. 409 (QL) (B.C. C.A.), at ¶ 12.
5 *PCI Chemicals Canada Inc. (Plan d'arrangement de transaction ou d'arrangement relatif à)*, [2002] R.J.Q. 1093 (S.C.), at ¶ 58; cited with approval in *Syndicat national de l'amiante d'Asbestos inc.* v. *Mine Jeffrey inc.*, [2003] R.J.Q. 420 (C.A.), at ¶ 32.
6 *Stelco*, *supra*, note 3.

one can safely venture to say that canadian courts have regularly affirmed their ability to create and order priority charges or priming liens in *CCAA* proceedings, be it to allow DIP financing or to cover D&O charges or administration charges[7].

[23] Professor Janis Sarra, a well-respected author on the subject, provides a very good summary of the canadian courts' jurisdiction to grant such DIP financing and other priority charges or priming liens:

> The courts have interpreted their jurisdiction as including the ability to order DIP financing to allow corporations to continue operating during the stay period under the *CCAA*. Similarly, the courts have consistently affirmed their ability to order priming liens or priority charges in favour of insolvency officers during a *CCAA* proceeding. This allows the debtor corporation access to the professional services of the monitor, chief restructuring officer, other workout experts and lawyers that can assist with a successful workout. Such financing orders have been approved by the courts to cover administrative charges in a *CCAA* proceeding; to protect directors and officers from liability exposure; for specific environmental maintenance programs; to cover expenses and fees of a representative creditor and its legal counsel; insurance premium payments for director liability policies or for property and casualty coverage; and for general operating purposes, including post-petition trade creditor charges. DIP financing was approved in *Consumers' Packaging Inc.*, including cross-border approval with the initial *CCAA* order recognized by the U.S. Court pursuant to s. 304 of Chapter 11 of the U.S. *Bankruptcy Code*. The court has allowed the charge to cover the cost of insolvency professionals in preparation for the filing, but not work prior to contemplation of *CCAA* proceedings.
>
> The courts have found authority for granting super-priority charges or DIP financing under both the *CCAA* and their inherent jurisdiction. (...)[8]
>
> (Footnotes omitted)

[24] While according to some[9], the question is still open as to whether or not the Quebec Superior Court can create such priority charges in Civil Law under the authority

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7 See, for example, *United Used Auto & Truck Parts Ltd. (Re)*, *supra*, note 4; *Air Canada (Re)*, [2003] O.J. No. 1157 (QL) (Ont. S.C.J.); *Sulphur Corp. of Canada Ltd. (Re)*, (2002) 35 C.B.R. (4th) 304 (Alta. Q.B.); *Hunters Trailer & Marine Ltd. (Re)*, (2001) 27 C.B.R. 4th 236 (Alta. Q.B.); *Royal Oak Mines Inc. (Re)*, (1999) 7 C.B.R. (4th) 293 (Ont. Gen. Div.); *Dylex Ltd (Re)*, (1995) 31 C.B.R. (3rd) 106 (Ont. Gen. Div.); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1816 (QL) (B.C. S.C.).

8 Janis SARRA, "Exploring the Boundaries, Jurisdiction under the Companies' Creditors Arrangement Act", Vancouver, May 2004, at p. 18 and 19. See also Pamela L.J. HUFF and Linc A. ROGERS, "Fortune Favours the Bold: Lending in a CCAA Proceeding and Priority Charges to Facilitate Restructurings", (2004) 16 *Comm. Insol.* R. 57, and Janis SARRA, "Debtor in Possession Financing: The Jurisdiction of Canadian Courts to Grant Superpriority Financing in CCAA Applications", (2000) 23 *Dalhousie L.J.* 337.

9 See in this respect the article of Me Antoine LEDUC, "Les limites de la «juridiction inhérente» du Tribunal et le cas du financement débiteur-exploitant («DIP Financing») en droit québécois", in the *Insight Annual Conference on Insolvabilité et restructuration commerciale*, Montreal, April 18 and 19, 2005.

of its inherent jurisdiction, the case law in this Province[10] indicates that it has been done often in the context of *CCAA* proceedings, similarly to what has been seen in the rest of Canada.

[25] That said, the review of the jurisprudence and doctrine on this issue of the exercise of the Courts' inherent jurisdiction to allow a DIP financing or create priority charges point out to the following factors, while not necessarily exhaustive, as applicable guidelines:

1) Allowing a DIP financing or creating a priority charge is an extraordinary measure that should be used sparingly and only in clear cases;

2) Before allowing a DIP financing or creating a priority charge, a court should be satisfied with proper evidence that the benefits to all creditors, shareholders and employees clearly outweigh the potential prejudice to some creditors;

3) It is not sufficient for the debtor to establish that the charge would be merely beneficial. It must rather establish that it is critical for the business to continue operating and to successfully restructure its affairs;

4) The debtor should normally establish an urgent need for the creation of the charge;

5) For a court to decide to create such a priority charge, there must be a reasonable prospect of a successful restructuring;

6) As it is an extraordinary remedy, the charge should only be available in limited amounts, for a brief period during the workout process, for what is enough to allow the debtor to "keep the lights on";

7) As the creation of such priority charge involves the use of its inherent jurisdiction powers, before drawing upon it, a court should be satisfied that it is just and equitable to do so in the given circumstances.

[26] Bearing these in mind, the Court is of the view that many reasons explain why this case is not one where it should exercise its inherent jurisdiction to allow the creation of the Employee Retention Charge sought:

a) The Employee Retention Charge is aimed at guaranteeing the payment of the base amounts of the Programme to the employees covered, regardless of the

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[10] The Initial or Extension Orders issued in the restructuring of Jetsgo Corporation, Papiers Gaspesia Inc., Mines Jeffrey Inc., Les Boutiques San Francisco Inc., Concert Industries Inc. and Microcell Communications Inc. are some examples of this trend.

outcome of the *CCAA* proceedings. Hence, the guarantee exists even if the *CCAA* process fails and ends up in a liquidation.

It is rather difficult to justify the creation of a priority charge in this context when the case law suggests that courts should make orders for priority charges only when there exists a reasonable prospect of a successful restructuring[11].

b) The Employee Retention Charge would, in essence, entail the financing of a "salary increase" for MEI's remaining employees by its unsecured creditors. These include trade creditors and employees, many of whom not only have no such salary increase but also lost their employment.

Thus, as a result, these "salary increase" claims of the employees remaining on board will be better protected than the claims of those who are now unemployed. It is difficult to see how this can be qualified as just and equitable.

c) In the same vein, creating a charge to guarantee the payment of the base amounts of the Employee Retention Programme (which are again, in reality, a "salary increase" for the employees staying on board during the restructuring process) is hard to justify when the other unsecured creditors (including trade suppliers and employees) will, in all likelihood, be paid far less than 100 % of their outstanding claims.

The balance that must exist between interest and prejudice amongst creditors of a same class does not appear to be present here.

d) Notwithstanding MEI's representations to the effect that the charge is necessary to allow the company to complete its restructuring for the benefit of all creditors, the burden of the charge is not shared equitably between MEI's creditors.

If this Employee Retention Charge is indeed key for MEI to successfully restructure itself under the *CCAA*, it is then difficult to understand why the charge is created only at the expense of the unsecured creditors, and not the secured ones. According to the testimony of the Monitor, the secured creditors will benefit directly from a successful restructuring, since a failure of the *CCAA* process may lead to a situation where even they will not be paid in full.

Yet, the ranking of the Employee Retention Charge after all the existing security on the assets of MEI entails that they are not sharing its cost in any

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[11] *United Used Auto & Truck Parts Ltd. (Re)*, *supra*, note 4, at ¶ 30.

manner, as opposed to the unsecured creditors who end up supporting its whole burden alone.

e) According to the cash flow projections filed[12], the average outstanding balance in MEI's bank account for all the weeks ending from April 30th, 2005 to July 2nd, 2005 is $531,873. Contrary to what was noted by the British Columbia Court of Appeal in another case, MEI's situation is not one where the cash flow from operations is insufficient to assure payment and where granting a super-priority is the only practical mean of securing the payment sought[13].

Considering these cash flow projections, there appears to be other practical ways to structure the payment of the base amounts of the Employee Retention Programme and to reassure the employees so that they stay on board.

For instance, these base amounts could be paid in "tranches" to the employees over a period of two or three months, with a similar commitment of MEI towards the full payment of the amounts contemplated by the end of the *CCAA* proceedings. The cash flow projections seem to allow for it and paying the amounts progressively would likely alleviate any negative impact.

In all likelihood, the employees could be as much reassured by a commitment of the company where they are being paid their money faster than by a commitment guaranteed by a priority charge where they will only see the colour of their money at the very end of the whole process, with the potential difficulties that a negative outcome may bring about for them.

f) Finally, under all the circumstances detailed above, the Court is not convinced by the evidence that this is a situation where it is urgent that this Employee Retention Charge be created to allow MEI to "keep the lights on". In short, this is not a clear case where the exercise of the Court's judgment warrants the creation of this additional charge.

To that end, an analogy, albeit imperfect, can be drawn between the present situation and the one that existed in two decisions where, in the context of *CCAA* proceedings, the courts refused the creation of a charge to secure the payment of severance or termination pay to some employees as opposed to others[14].

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12 Exhibit P-2.

13 *United Used Auto & Truck Parts Ltd. (Re)*, *supra*, note 4, at ¶ 29.

14 *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1816 (QL) (B.C. S.C.); *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 (QL) (B.C. S.C.).

[27] In closing, even though MEI's counsel strenuously argued that in the case at bar, there was no opposition raised and, as a result, the creation of the Employee Retention Charge would not stand as a precedent for other similar *CCAA* proceedings, the Court considers that this is certainly insufficient to grant the request sought. The lack of opposition is not a good enough reason for the Court to be lenient in a situation where the criteria recognized by the jurisprudence for the granting of priority charges are not otherwise met.

[28] **FOR THESE REASONS, THE COURT:**

[29] **DISMISSES** MEI's request for the creation of an Employee Retention Charge;

[30] **WITHOUT COSTS**.

CLÉMENT GASCON, J.S.C.

Me Alain Tardif et Me Miguel Bourbonnais
McCarthy, Tétrault LLP
Attorneys for Petitioner

Date of hearing: April 29, 2005

Action No.: 0901-13483

IN THE COURT OF QUEEN'S BENCH OF
ALBERTA
JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TRIDENT EXPLORATION CORP. ULC, FORT ENERGY CORP. ULC, FENERGY CORP. ULC, 981384 ALBERTA LTD., 981405 ALBERTA LTD., 981422 ALBERTA LTD., TRIDENT RESOURCES CORP., TRIDENT CBM CORP., AURORA ENERGY LLC., NEXGEN ENERGY CANADA, INC. AND TRIDENT USA CORP.

BRIEF OF AUTHORITIES of Farallon Capital Management L.L.C., Goldmans Sachs Asset Management and Mount Kellett Capital Management LP

(MOTION RETURNABLE OCTOBER 6, 2009)

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