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.

RESPONDING BRIEF OF ARGUMENT OF THE PETITIONERS

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I. INTRODUCTION

1. This brief is provided in response to the factum of Farallon Capital Management LLC, Special Situations Investing Group, Inc. and Mount Kellett Capital Management LP (collectively, the "Required Lenders") filed, provided to the Applicants on Sunday, October 4, 2009.

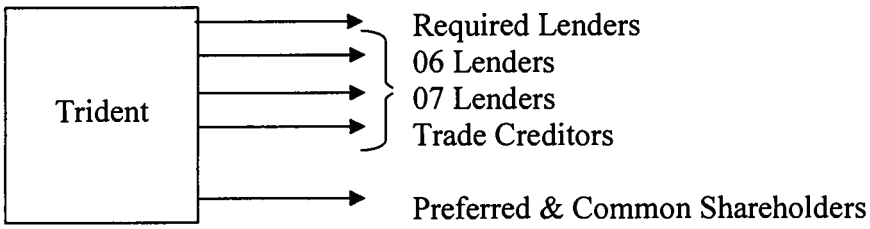
2. Unless otherwise defined herein, capitalized words have the meaning ascribed to them in the Affidavit of Todd A. Dillabough, dated September 8, 2009 (the "First Dillabough Affidavit") or the Affidavit of Todd A. Dillabough, dated October 1, 2009 (the "Second Dillabough Affidavit").

II. OVERVIEW

3. The Required Lenders seek to cast this as a restructuring of Canadian companies versus the restructuring of U.S. companies. The Applicants disagree. This is a global restructuring designed to enhance the circumstances of all of Trident's stakeholders.

4. For the Required Lenders to cast arguments along international boundaries disguises their intention of limiting available resources and impair Trident's ability to restructure for the benefit of those stakeholders whose economic interests are subsequent to the economic interests of the Required Lenders.

5. To summarize, the stakeholders of Trident, as against the primary valued assets residing in TEC, are as follows:



6. The fact that the directors of Trident are appointed by subsequent interest holders is hardly surprising. Generally, directors are appointed by the lowest ranking economic stakeholders of a corporation, the common shareholders.

7. To suggest that Trident U.S. can no longer serve its primary purpose of serving as a financing vehicle, as suggested in paragraph 10 of the Required Lenders' Factum, ignores the evidence that suggests the Financial Advisor continues in active discussions with many of Trident's stakeholders (including a DIP proposal put forward by the Required Lenders). It also ignores the continuing value of property held by Trident US.

- Paragraph 41 of the Second Dillabough Affidavit and Exhibit "B" to the Affidavit of Richard Voon, dated October 1, 2009.

8. Given Trident's various facilities of debt and equity, the cross border issues connecting the Canadian and U.S. components of Trident, the size of Trident's business enterprise, and the adverse reactions of the Required Lenders, Trident has a real and material need for professional advisors. Notwithstanding, Trident has attempted to provide a reasonable accommodation to the Required Lenders on a number of aspects surrounding this facility, including professional fees, as set forth in the proposed Amended and Restated Initial Order attached to the Petitioners materials ("Trident's Proposed Amended and Restated Initial Order").

III. RESPONDING ARGUMENT

9. Counsel will address the Required Lenders' recitation of facts and the accommodations established in Trident's Proposed Amended and Restated Initial Order in oral submissions.

10. In response to the Required Lenders statements of issues and law, the following issues arise with respect to this application:

(a) Was an ex parte application, and the relief granted in the Initial Order, appropriate given the disclosure in the First Dillabough Affidavit?

(b) Should the Petitioners be permitted to transfer assets to Trident US?

(i) Is the restructuring of Trident US Necessary?

(ii) Are the Inter-company Loans and Charges Justified?

(iii) Are the Charges and Priorities Valid

A. Justification of the Initial Order – the appropriateness of the *ex parte* order

11. Section 11(1) of the CCAA gives the court the jurisdiction to grant an initial order without notice where it sees fit.

> 11(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

- *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, s. 11. **[TAB 1]**

12. An *ex parte* order will be granted where the Applicant has demonstrated the following:

(a) urgency for the application;

(b) the reason why those against whom relief is sought *ex parte* are not being given notice; and

(c) that the applicant has given full and frank disclosure of the material facts.

- *Re Encore Developments Ltd.*, 2009 BCSC 13 at para. 27. **[TAB 2]**

13. At the initial application, Trident adequately demonstrated urgency and the need for no notice as follows:

(a) Trident was in a state of insolvency;

(b) the breach of financial covenants on September 30, 2009 was inevitable; and

(c) as discussed in the initial application, Trident was concerned about challenges to its operatorships under the 1992 CAPL Agreements, which could see Trident immediately removed from its position as operator, thereby having a material adverse effect on Trident's value and jeopardize its ability to successfully restructure.

14. The standard of disclosure for an applicant making an *ex parte* application under the CCAA must be realistic.

- *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 at para. 14. **[TAB 3]**

15. In *Re Phillips Manufacturing Ltd.*, MacDonald J. found when looking at whether an alleged fact was material, the court must look at whether the facts alleged to not be disclosed, when taken all together, would have influenced the decision to grant the *ex parte* application in the first place.

- *Re Phillips Manufacturing Ltd.* (1992) 60 B.C.L.R. (2d) 311 (B.C.S.C.) at para. 18. **[TAB 4]**

16. The applicants seek to rely on cases, which cite material and fundamental events of non-disclosure, all of which are distinguishable on the facts from the case at bar:

(a) *Re Encore Developments Ltd.*: the debtor had misstated the financials of and the equity held by the company and the company was not operating and was effectively shutdown. The court found based on these omitted facts, there was no urgency for the application.

- *Re Encore Developments Ltd.* (2009), 52 C.B.R. (5th) 30. **[TAB 2]**

(b) *Re Marine Drive Properties Ltd.*: the debtor misstated the amount of equity held by the debtor company in development project and the urgency of the application. The court held the *ex parte* order should be set aside.

- *Re Marine Drive Properties Ltd.* (2009), 52 C.B.R. (5th) 47. **[TAB 5]**

(c) *Re Hester Creek Estate Winery Ltd.*: the debtor misstated the amounts of material debt obligations, and withheld other debt obligations from the court. The court held that there was not full and frank disclosure of all the material facts.

- *Re Hester Creek Estate Winery Ltd.* (2004), 50 C.B.R. (4th) 73. **[TAB 6]**

17. Trident fully and frankly disclosed all material facts to the court. None of the above cases are similar or applicable to the case at bar, nor demonstrate grounds for the dismissal or amendment of the Initial Order.

B. Transferring Assets to Trident US

1. The restructuring of Trident US is necessary

18. This is a global restructuring and Trident is seeking to restructure its affairs on behalf of all stakeholders. Each applicant has a role in the Trident Group and houses stakeholders in this reorganization.

19. As discussed above, it would be inappropriate to characterize this as a Canadian versus U.S. restructuring. Creditors should not seek to utilize the CCAA to manoeuvre for better positioning amongst other stakeholders of the restructuring company.

- *Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368 (B.C.C.A.). **[TAB 7]**

20. The limitations suggested by the Required Lenders would significantly prejudice the 2006 and 2007 Lenders, Trade Creditors, and Preferred and Common Shareholders. Granting the Required Lenders' proposed form of order would allow them to ring-fence Trident's primary assets to their sole benefit and at the detriment of the other creditors and stakeholders, and Trident as a whole. This would significantly jeopardise the restructuring of Trident.

2. The Justification of the Inter-Company Loans and Charges

21. While Trident believes the cases cited in the Required Lenders' Factum are distinguishable, the issue appears moot in light of the fact that the Inter-Company Loans and Charges are largely addressed in Trident's Amended and Restated Initial Order.

22. The cash-flows attached to the First Monitor's Report demonstrate that only $1 million is transferred to the U.S. Entities in any event.

23. Trident does note that *Re Smurfit Stone Container Inc.* did facilitate inter-company funding in similar circumstances when the Court noted the Monitor was able to review

and report on all aspects of the requested relief and allowed a Canadian guarantee of the U.S. facility. The Monitor in the present case has the same capability.

- *Re Smurfit-Stone Container Inc.* (2009), 50 C.B.R. (5th) 71. **[TAB 8]**

3. The Validity and Priority of Charges

(a) The Administrative Charge

24. As a result of the complex, integrated international structure of Trident, and the proposed Canadian and United States proceedings, Trident requested an Administrative Charge, largely in the form of the Alberta Template CCAA Order, to secure the fees and disbursements of the following professionals involved in this restructuring proceeding:

(a) Trident's financial consultants, Rothschild Inc.;

(b) Trident's Canadian and U.S. legal counsel, Fraser Milner Casgrain LLP and Akin Gump Strauss Hauer & Feld LLP ("Akin Gump");

(c) the Monitor in these proceedings; and

(d) the Monitor's Canadian and U.S. legal counsel.

The US based practitioners – Rothschild and Akin Gump – are retained on behalf of all the Trident entities and allocate fees eighty percent to twenty percent among the Canadian and U.S. Applicants, respectively.

25. Trident submits that the granting of an Administrative Charge on the debtors' assets is at the Court's discretion. Further, Trident submits the granting of Administrative Charges in CCAA proceedings fall within the scope of the Court's inherent jurisdiction to make such an order, and should be granted where the benefit to debtor and all of its stakeholders outweighs the potential prejudice.

26. In Alberta, the leading case on priming is is *Re Hunters Trailer & Marine Ltd.*, where Wachowich J. (as he was then) found the following

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the *CCAA* process. Hunters brought its initial *CCAA* application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the *CCAA* effectively would be denied a debtor company in many cases.

[Emphasis added.]

- *Re Hunters Trailer & Marine Ltd.* (2001), 295 A.R. 113. **[TAB 9]**

27. There are many recent cases where an administrative charge has been granted to reflect the realities of a cross-border restructuring:

(a) in *Re Hunjan International Inc.* the Court granted a charge securing the fees of the Monitor under the CCAA, and also as a foreign representative in a foreign jurisdiction;

- *Re Hunjan International Inc.*, Initial Order granted May 4, 2005 at paragraph 53. **[TAB 10]**

(b) in *Re Multy Industries Inc.*, the Court granted a charge in the Initial Order securing the Monitor and its Canadian and U.S. counsel, and the applicant debtor and its Canadian and U.S. counsel;

- *Re Multy Industries Inc.*, Initial Order granted June 16, 2008 at paragraph 33. **[TAB 11]**

(c) in *Re Muscletech Research and Development Inc.*, the Court empowered the Monitor to act as a foreign representative in the U.S., and granted an administrative charge to secure the Monitor and applicant debtor's legal counsel in Canada and any other jurisdiction of related proceedings;

- *Re Muscletech Research and Development Inc.*, Initial Order granted January 18, 2006 at paragraph 38. **[TAB 12]**

(d) in *Re Hollinger Inc.*, the Court authorized the payment of the fees of the Monitor and the applicant debtor's Canadian and U.S. legal counsel; and

- *Re Hollinger Inc.*, Initial Order granted August 1, 2007 at paragraph 19. **[TAB 13]**

(e) in *Re Nortel Networks Corp.*, the Court granted an administrative charge in favour of Canadian and U.S. counsel to both the applicant debtors and the Monitor.

- *Re Nortel Networks Corp.*, Initial Order granted January 14, 2009 at paragraph 30. **[TAB 14]**

(f) In *Re Canadian Airlines*, the Court granted an administrative charge in favour of the the Monitor, Canadian and US counsel to both the applicant debtors and the Monitor.

- *Re Canadian Airlines International.*, Initial Order granted March 24, 2000 at paragraph 24. **[TAB 15]**

28. Given the complex, integrated, cross border nature of the proposed Trident restructuring proceedings, it is submitted that the court correctly used its discretion and inherent jurisdiction in granting the Administrative Charge outlined in the Initial Order.

29. The proposed Administrative Charge will result in negligible prejudice to Trident's Canadian stakeholders, and it would be grossly disproportionate to the potential prejudice to Trident should the charge be modified, and that Trident could suffer irreparable harm without the assistance of their Assistants, and cross border representation. The benefits of the charge, and the retention if its current restructuring advisors and counsel substantially outweighs any detriment Trident and its stakeholders may otherwise realize as a result of this charge.

IV. RELIEF SOUGHT

30. Trident makes these submissions in support of the Application for Trident's Amended and Restated Initial Order, and in objection of the suggested changes of the Required Lenders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

FRASER MILNER CASGRAIN LLP,
Solicitors for the Petitioners

Per: _____
David W. Mann

LIST OF AUTHORITIES

TAB 1

of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

R.S., c. C-25, s. 7.

créanciers ou actionnaires qui, selon l'opinion du tribunal, n'est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l'article 6.

S.R., ch. C-25, art. 7.

Scope of Act

8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

R.S., c. C-25, s. 8.

Champ d'application de la loi

8. La présente loi n'a pas pour effet de limiter mais d'étendre les stipulations de tout instrument actuellement ou désormais existant relativement aux droits de créanciers ou de toute catégorie de ces derniers, et elle est pleinement exécutoire et effective nonobstant toute stipulation contraire de cet instrument.

S.R., ch. C-25, art. 8.

PART II

JURISDICTION OF COURTS

PARTIE II

JURIDICTION DES TRIBUNAUX

Jurisdiction of court to receive applications

9. (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Le tribunal a juridiction pour recevoir des demandes

9. (1) Toute demande prévue par la présente loi peut être faite au tribunal ayant juridiction dans la province où est situé le siège social ou le principal bureau d'affaires de la compagnie au Canada, ou, si la compagnie n'a pas de bureau d'affaires au Canada, dans la province où est situé quelque actif de la compagnie.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10. Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

R.S., c. C-25, s. 10.

Forme des demandes

10. Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

S.R., ch. C-25, art. 10.

Powers of court

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Pouvoir du tribunal

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Initial application

(2) An application made for the first time under this section in respect of a company, in

Demande initiale

(2) La demande faite pour la première fois en application du présent article relativement à

TAB 2

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

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2009 CarswellBC 84

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 3

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.

END OF DOCUMENT

TAB 4

9 C.B.R. (3d) 1, 60 B.C.L.R. (2d) 311, [1992] 1 W.W.R. 651

Philip's Manufacturing Ltd., Re

Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36; Re PHILIP'S MANUFACTURING LTD.

British Columbia Supreme Court,

B.D. Macdonald J.

Heard: October 3, 10, 11 and 15, 1991
Judgment: October 17, 1991
Docket: Doc. Vancouver A913228

Counsel: David F. Tysoe, for Philip's Manufacturing Ltd.

Allan R. Caplan, for Variform Inc.

Robert J. Sewell, for Master Shield Inc.

Samuel Huberman, for Holland Imports Inc.

Peter P. Bieg, for Kuehne & Nagel International Ltd.

Valerie J. Anderson, for Aggressive Investments Inc.

David W. Donohoe, for Northern Warehouse Equipment Ltd.

Arthur L. Edgson, for K.C. Metal Products Inc.

Stephen G. Wright, for LeDrew Mfg. Ltd. and other creditors.

Douglas B. Hyndman, for Pacific Lead & Metal Inc.

Colin M. Emslie, for Hongkong Bank of Canada.

Subject: Corporate and Commercial; Insolvency

9 C.B.R. (3d) 1, 60 B.C.L.R. (2d) 311, [1992] 1 W.W.R. 651

Bankruptcy.

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangements Act.

Corporations -- Arrangements and compromises -- Companies' Creditors Arrangement Act -- Creation of "instant" trust deed and issuance of two $100 debentures thereunder for purpose of qualifying under Companies' Creditors Arrangement Act not improper -- Trust deed not constituting fraudulent conveyance -- Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36.

P Ltd. sought the protection of the Companies' Creditors Arrangement Act (the "Act"), creating an "instant" trust deed and issuing two $100 debentures thereunder for the express purpose of qualifying under s. 3 of the Act. An ex parte order was made under the Act staying all proceedings against P Ltd. for six months. The application was made on an ex parte basis because a demand for payment of P Ltd.'s bank debt was imminent and because it would have been impractical to serve the more than 300 creditors with adequate notice. The order extended to P Ltd.'s directors, officers, employees, agents and consultants. Various creditors applied to set aside the ex parte order, arguing that there was less than full disclosure in the material in support of the order, and that the creation of the "instant" trust deed and the issuance of the $100 debentures thereunder did not suffice to bring P Ltd. within the Act. Alternatively, they sought amendments to the order.

Held:

The applications were allowed in part.

The level of disclosure sought here was completely impractical in respect of applications under the Act.

The creation of an "instant" trust deed for the purpose of qualifying under the Act was not improper, and such a trust deed did not constitute a fraudulent conveyance under the Fraudulent Conveyance Act (B.C.).

It was appropriate to remove the prohibition in the order against proceedings against directors, officers and other individuals.

Cases considered:

Canadian Pacific Railway v. U.T.U., Local 144 (1970), 14 D.L.R. (3d) 497 (B.C. S.C.) -- considered

Gulf Islands Navigation Ltd. v. Seafarers' International Union of North America (Canadian District) (1959), 27 W.W.R. 652, 18 D.L.R. (2d) 216 (B.C. C.A.)] [affirmed (1959), 28 W.W.R. 652, 18 D.L.R. (2d) 625 (B.C. C.A.) -- considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) -- followed

Johns-Manville Corp., Re, 40 B.R. 219 [reversed in part 41 B.R. 926] (U.S., 1984) -- distinguished

Norm's Hauling Ltd., Re, 6 C.B.R. (3d) 16, [1991] 3 W.W.R. 23, (sub nom. Norm's Hauling Ltd. v. Canadian Imperial Bank of Commerce) 91 SAsk. R. 210 (Q.B.) -- not followed

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. Elan Corp. v.

Comiskey) 41 O.A.C. 282, 1 O.R. (3d) 289 -- considered

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

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) -- applied

United Maritime Fishermen Co-operative, Re (1988) 67 C.B.R. (n.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.) [varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333, reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, (sub nom. Canadian Co-op. Leasing v. United Maritime Fisherman Cp-op.) 224 A.P.R. 253, 51 D.L.R. (4th) 618 (C.A.)] -- distinguished

229531 Brirish Columbia Ltd., Re (1989), 72 C.B.R. (N.S.) 310 (B.S. S.C.) -- considered

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 --

s. 178

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

Builders Lien Act, R.S.B.C. 1979, c. 40.

Commercial Tenancy Act, R.S.B.C. 1979, c. 54.

Companies Creditors Arrangement Act, R.S.C. 1952, c. 54 [am. S.C. 1952-53, c. 3] [now R.S.C. 1985, c. C-36].

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

s. 3

s. 3(b)

s. 11

Fraudulent Conveyance Act, R.S.B.C. 1979, c. 142 --

s. 1

Industrial Relations Act, R.S.B.C. 1979, c. 212.

Personal Property Security Act, S.B.C. 1989, c. 36.

United States Bankruptcy Code, 11 U.S.C.A. --

s. 105(a)

9 C.B.R. (3d) 1, 60 B.C.L.R. (2d) 311, [1992] 1 W.W.R. 651

Winding-up Act, R.S.C. 1985, c. W-11.

Applications by creditors to set aside or vary ex parte order made under Companies Creditors Arrangement Act, R.S.C. 1985, c.C-36.

***Macdonald J.*:**

1 On September 3, 1991, an ex parte order was made in this matter which stayed all proceedings against Philip's Manufacturing Ltd. (the "company") for a period of six months, within which the company has leave to file a reorganization plan. The order was made under the authority of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act") and in particular, s. 11 thereof. The application was considered on an ex parte basis because a demand for payment of the company's bank debt was imminent (demand for payment was served two hours after the ex parte order was made) and because it would have been impractical to serve the more than 300 creditors with adequate notice.

The Present Applications

2 Now before the court are a number of applications brought by various creditors of the company in reaction to the ex parte order of September 3, 1991. Those applications seek orders to:

3 (a) set aside the ex parte order on two grounds; or, if the stay is not vacated, to:

4 (b) remove therefrom any prohibition against suing directors and officers of the company (in respect, inter alia, of allegations that credit has recently been extended to the company on the basis of their deceit);

5 (c) reduce the time available to the company to file its reorganization plan, or in the alternative, to crystallize the date which is applicable under the *Bankruptcy Act*, R.S.C. 1985, c. B-3 to review able transactions in which the company may have been involved;

6 (d) expand the duties of the monitor appointed by the ex parte order so as to provide the creditors with useful information regarding such matters as the causes of the company's present financial problems, the past benefits received by the directors and officers, and the true liquidation value of the business;

7 (e) exclude particular claims from the stay of proceedings to permit specific actions against the company to proceed, including the landlord's claim for possession under the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, a claim under the *Builders Lien Act*, R.S.B.C. 1979, c. 40, and several claims for rescission of contracts for sale and for preservation of the goods in question.

8 Since several of the applicants support the orders sought by others, and since this hearing of necessity involved several "rounds" of argument, I shall treat the several applications now before me to set aside or vary the ex parte order as if they were one, involving claims for alternative relief.

The Application To Set Aside

9 Two grounds were advanced in support of the application to set aside or vacate the ex parte order made on September 3, 1991:

10 (a) There was less than full disclosure in the material in support of the ex parte order.

11 (b) The company was not one qualified to apply under the Act, and its creation of an "instant" trust deed and the issue of two $100 debentures thereunder is not sufficient to bring it within the Act.

Inadequate Disclosure

12 In *Re 229531 British Columbia Ltd.* (1989), 72 C.B.R. (N.S.) 310 at p. 318 (B.C. S.C.), where the court rejected a reorganization plan under the Act despite approval by the creditors because it was unfair to a minority creditor who would have been forced to abandon his personal guarantees, the failure to disclose some material information in the affidavits filed in support of the original ex parte order was characterized as another "matter of concern."

13 Many of the authorities which deal with the obligation of an applicant to disclose all material facts on an ex parte application arise from labour injunctions granted by this court in the years before the *Industrial Relations Act*, R.S.B.C. 1979, c. 212 and its predecessor. One of those cases is *Canadian Pacific Railway v. U.T.U., Local 144* (1970), 14 D.L.R. (3d) 497 at pp. 500 and 501 (B.C. S.C.), where Mr. Justice McIntyre of this court (as he then was) states:

> 14 I must consider whether ... full disclosure was made to me by the plaintiff on the ex parte motion.
>
> 15 ... if the facts above referred to had been before me, it might have influenced my decision on the question of granting the *ex parte* motion. The omission to disclose is, in my view, fatal.

16 In reaching that conclusion, Mr. Justice McIntyre relied upon statements by then Chief Justice Wilson of this court in *Gulf Islands Navigation Ltd. v. Seafarers' International Union of North America (Canadian District)* (1959), 27 W.W.R. 6652, 18 D.L.R. (2d) 216 at p. 218 [D.L.R.] to the effect that there must be a full and frank disclosure of relevant facts or the ex parte order will be vacated.

17 Several breaches of that standard are cited by the present applicants. One of them points to the fact that it was blamed for the company's present financial troubles whereas the dispute with it is clearly only a part of the story. Another raises the evidence of the company in response to an application for an injunction earlier this year to the effect that the company was able to pay any judgment which might be recovered against it. There are complaints about the omission of comparative financial statements and the "snapshot" financial picture contained in the material which does not disclose the six-fold increase in accounts payable between December 31, 1990 and the time of the application for the ex parte order. There are allegations regarding bonuses paid to officers and directors while that growth in accounts payable was occurring and applications for further credit were being made. The affidavit of Mr. Alan Petrie of Northern Warehouse Equipment, filed herein on November 7, 1991, contains some 17 paragraphs alleging less than "full and frank" disclosure.

18 After considering all those allegations, I have concluded that none of the facts alleged, or even all of them taken together, would have influenced my decision to grant the ex parte order in the first place. That is not to say that they may not have a bearing on the ultimate approval or rejection by this court of any reorganization plan which the company may ultimately present.

19 The complicated financial picture, which may not be fully known at the time of the application, cannot be completely covered in the initial application. The level of disclosure which the applicants suggest is completely impractical in respect of applications under the Act. There is still, and will always remain, a risk that by applying ex parte, the order may subsequently be set aside for material non-disclosure. However, the financial situation of the company remains much the same as it was represented in the material and on the application for the ex parte order. I would still be prepared, despite the arguments I have now heard, but subject to the variations discussed below, to direct the stay of proceedings under the Act which I pronounced ex parte on September 3, 1991.

20 Further material now filed reveals that the level of disclosure in this case was determined by counsel experienced in these matters. I consider that advice to have been adequate, in this case, in respect of an application under the Act.

The "Instant Trust Deed"

21 Section 3 of the Act states:

> 22 3. This Act does *not* apply in respect of a debtor company unless
>
> 23 (*a*) the debtor company has outstanding an issue of ... bonds ... issued under a trust deed ... and
>
> 24 (*b*) the compromise ... includes a compromise or an arrangement between the ... company and the holders of an issue referred to in paragraph (*a*).

[Emphasis added.]

25 The company did not have "an outstanding issue of bonds issued under a trust deed" until it created one (after consulting counsel in early July 1991 in respect of its financial problems) for the express purpose of qualifying it under s. 3 of the Act.

26 In the recent decision in *Re Norm's Hauling Ltd.*, 6 C.B.R. (3d) 16, [1991] 3 W.W.R. 23, (sub nom. *Norm's Hauling Ltd. v. Canadian Imperial Bank of Commerce)* 91 Sask. R. 210 (Q.B.), the practice of "creating insubstantial trust deeds for the purpose of qualifying under the Act" was rejected [at p. 25 W.W.R.]. At p. 26, the court states:

> 27 It is the duty of the court to give effect to legislation, not to emasculate it. The plain language of s. 3 offers no other conclusion than that it was enacted to exclude certain companies from the benefits of the Act. No company is excluded if all that is required is an 'entrance fee' in the form of a trust deed created not to raise capital but simply to gain access to a legal remedy not otherwise available ... In my opinion, s. 3 contemplates the existence of securities characterized by genuineness in the sense that they were issued to raise capital or secure existing indebtedness and not, as here, to achieve an oblique purpose.

28 That approach is consistent with the remarks of the Minister of Justice at the time he introduced the amendment to the Act in 1952 which forms the present s. 3. He stated that the amendment "left com panies with complex financial structures free to resort to the Act, but excluded companies which had only unsecured mercantile creditors." That statement is perhaps the explanation for the relative obscurity of the Act until the last few years.

29 Instant trust deeds (for the express purpose of qualifying under s. 3 of the Act) are not universally rejected. In *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.) [at pp. 55-56 C.B.R.], the court speaks directly to the use of "instant" trust deeds and refuses to read any words into s. 3 of the Act which would limit its availability based upon the purpose for which the issue of bonds and the trust deed were created. It must be noted in that case that the debt was an outstanding and genuine one and only the documentation was created to enable the company to qualify under s. 3.

30 Two judgments in this province support, or appear to support, the practice. *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) rejected the argument that an instant trust deed was a "sham" and held that it was not a fraud to create such an instrument solely for the purpose of complying with s. 3 of the Act. A similar conclusion can be drawn from the decision in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R.

(3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.). While the sole issue on that appeal was whether or not the bank's s. 178 security was affected by the stay granted under the Act, both the chambers judge appealed from and the Court of Appeal were well aware that the trust deed and the unsecured $50 bond issued thereunder were created for the express purpose of qualifying the company under s. 3 of the Act.

31 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 382, 1 O.R. (3d) 289 [at pp. 123-127 C.B.R.] deals squarely with the instant-trust-deed issue. That analysis appears in a dissenting judgment, since the majority found it unnecessary to deal with the question. The dissent, after considering the New Brunswick and British Columbia decisions referred to above, reaches the opposite conclusion to that expressed in *Re Norm's Hauling Ltd.*, supra, and concludes that there is no purpose in denying a debtor company resort to the Act because the debt and the accompanying documentation was created for the specific purpose of bringing the application.

32 I find myself in a position on this issue where there is no authority which I regard as binding upon me. The Saskatchewan and Ontario decisions, which reach opposite conclusions, do not bind me. The New Brunswick decision is in a similar position and can be distinguished on its facts because the debt there was "genuine" in the sense of having no connection with any proceedings under the Act. The issue was not argued before the Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra. This court did not have the benefit of the judicial opinions referred to above in *Re Stephanie's Fashions Ltd.*, supra.

33 The question falls to be decided on the basis of which approach I adopt. A strict approach to the interpretation of s. 3, coupled with a search for the intention of Parliament, would lead inevitably to the result in *Re Norm's Hauling Ltd.* On the other hand, a public policy approach taking into consideration those factors outlined in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (at pp. 91 and 92 [B.C.L.R.]) leads to the opposite result; an acceptance and endorsement of the practice of instant trust deeds to qualify a company under s. 3 of the Act. I adopt the latter approach.

34 The bankruptcy proposal procedures are quite impractical for the average company because they do not bind secured creditors, such as the bank and the lien claimant in this case. While that deficiency appears to have been recognized, based on the bankruptcy amendments presently proposed, the Act now forms the only practical means of avoiding liquidation in the event of insolvency. That means, and access to it by the greatest number of potential debtors, should be preserved. The practice of gaining access to the Act by the "entry fee" of an instant trust deed is by no means new. It has been condoned by this and other courts on numerous occasions in the past. If that is judicial legislation, so be it.

35 The applicants urge upon me the argument that an instant trust deed is void under the *Fraudulent Conveyance Act*, R.S.B.C. 1979, c. 142, s. 1, as being "a bond ... made to delay, hinder or defraud creditors ... of their ... lawful remedies". They argue that it is not saved by the exclusion clause (a disposition for good consideration to a person without notice or knowledge of collusion) because the trustee and debenture holders are always "tame" in the instant-trust-deed situations, and certainly are here. The court in *Re Norm's Hauling Ltd.* would likely agree. I do not.

36 If an instant trust deed is regarded by the court as a proper means of qualifying under s. 3 of the Act, how can the court regard it as a fraudulent conveyance? That Act has no application here.

37 I also reject the argument that, because of the dictionary definitions of the words "compromise" and "arrangement" in s. 3(*b*) of the Act (which involve concepts such as settlement of a dispute and agreements between contending parties) there can never be an arrangement with a "tame" trustee or bond-holder.

The Stay Against Directors, etc.

38 Section 11 of the Act authorizes the court to restrain proceedings against the company, including those which might be taken under the *Bankruptcy Act* or the *Winding-up Act*, R.S.C. 1985, c. W-11. The ex parte order made here extended that stay to cover directors, officers, employees, agents or consultants of the company. The present applicants attack the authority of this court to so extend the stay and the wisdom of so doing.

39 The company relies on the "floodgates" argument to support the extended stay. It says that many of its creditors will attempt to attack it indirectly through its officers and directors if this stay is lifted to that extent. It points to the need for such personnel to devote their time and energy to the formulation of its reorganization plan rather than the defence of misrepresentation actions against themselves in respect of company business dealings. It points to Chapter 11 Bankruptcy proceedings in the United States such as *Re Johns-Manville Corp.*, 40 B.R. 219 (1984), and argues that proceedings under the Act are analogous.

40 However, there is a specific provision under the *United States Bankruptcy Code*, 11 U.S.C.A. (s. 105(*a*)), which empowers the court to issue "any order ... necessary or appropriate" to carry out the provisions of the Code. In the *Johns-Manville* case there were literally thousands of pending asbestos-related cases to consider. Here, the only authority which the company can suggest for the breadth of the stay which was granted in the ex parte order is the inherent jurisdiction of this court.

41 I have grave doubts that the United States authorities go so far as to bar fraud actions against directors and officers. The floodgates argument has little validity in this situation, particularly where the rights of potential claimants are merely postponed as against the company itself. Even if the inherent jurisdiction of this court is sufficient to support a restraint on actions against officers and directors, and I would require further argument to so convince me, I am not satisfied that this is a case where such an order should be made. There is, however, a legitimate interest in the company having its employees and officers available to it in connection with preparation of the reorganization plan. There will be liberty to apply should the situation degenerate to the point where actions against officers and directors become a significant factor in that regard. In the meantime, the stay in regard to proceedings against anyone other than the company itself is removed.

The Six-Month Stay

42 Six months is the usual period for the initial stay. In complicated cases, it has been extended, sometimes more than once, to enable the company to arrive at agreement with a majority of the creditors in each class. After hearing argument on these motions, and in light of the expansion of the monitor's duties on which I have decided, I am satisfied that the length of the stay originally ordered is appropriate. One and one-half months of that six have already gone by. The first report of the monitor, filed October 8, 1991, makes it clear that much remains to be done before a reorganization plan can be presented to the creditors and the court.

43 Several applicants suggested during the hearing that the results of a "straw vote" among counsel indicate that the company has no hope of achieving a 75 per cent vote in favour of any reorganization plan. Those expressions of opinion occurred before the monitor's report of October 8, 1991 was filed. It projects the amount available to creditors on liquidation as insufficient to pay the bank; there would be nothing available for unsecured creditors. I would not act on such a "straw vote" in any event, because it may take time for the unsecured creditors to accept that a reorganization plan will benefit them.

44 There is, however, one aspect of the length of the stay which causes me some concern. At least some of the creditors suspect that there may be transactions subject to attack under the *Bankruptcy Act*. Some of such transactions, if any are found to exist, may fall outside the time periods set out in the *Bankruptcy Act* by the time the stay is lifted or expires. To guard against that possibility, I am prepared to permit the filing of a petition for a receiving order in bankruptcy against the company.

45 That step will crystallize the date from which all such time periods pertaining to settlements and preferences under the *Bankruptcy Act* will be calculated. No further steps will be permitted in that bankruptcy proceeding until the stay is lifted or expires. A successful reorganization plan will carry with it an order for the dismissal of that petition.

46 I am the first to appreciate, as the company submits, that the filing of a petition in bankruptcy will not make life any easier for it. However, I see no practical alternative to avoiding potential harm to the creditors if the company's reorganization plan fails to gain their approval. The presumption which arises under the preference provisions of the *Bankruptcy Act* is a powerful tool in the hands of a trustee in bankruptcy.

Duties of the Monitor

47 Several of the applicants complain of the lack of adequate disclosure and voice suspicions about the conduct of management of the company in respect of the causes of its present financial difficulties and the payment of bonuses and management or consulting fees in the face of an accelerating list of accounts payable. K.C. Metal Products Inc. suggests fairly extensive revisions to the ex parte order, designed to ensure the bona fides of the company's efforts to reorganize under the Act and to provide the creditors with information which may answer many of their questions.

48 While I am not prepared to go as far, at least at this time, as K.C. Metal Products suggests, I am prepared to adopt several of its suggested changes in response to the concerns expressed by a number of the applicants. The duties of the monitor will be expanded in the following respects:

49 1. Details of all management salaries, bonuses and fees of whatever kind (including the cost of leasing property used by management) paid by the company to or for shareholders, officers and directors of the company during 1990 and 1991 will be reported to the court by December 15, 1991.

50 2. The monitor shall report to the court, and provide copies to all counsel appearing on these applications, on the causes of the company's current financial problems. To the extent possible, that report should minimize the disclosure of confidential information. It should include copies of any comprehensive reports to management dealing with such matters as expansion projects undertaken by the company during 1990 and 1991 (edited as may be appropriate to maintain confidentiality) and the estimated commencement and completion dates as well as the projected and actual costs thereof. That report should also deal with the disposition or acquisition of capital assets valued at over $10,000 during those periods, including the person to whom they were disposed or from whom they were acquired. That report will be filed by December 15, 1991 or such later date as may be ordered.

51 3. The monitor shall forthwith report to the court any payment by the company, in respect of an obligation incurred prior to September 3, 1991 other than to the Hongkong Bank of Canada, and the company shall not apply any of its cash flow for such purpose.

52 4. No arrangement or compromise by the company with any creditor shall be made unless first approved by the monitor as being in the best interests of the company, provided that court approval of any such arrangement involving a debt in excess of $10,000 must first be obtained.

53 5. The monitor's approval shall be required for the sale of any fixed assets of the company or any sale of inventory out of the ordinary course of business, provided that no such sale for an amount in excess of $10,000 (book value or cost, whichever is the greater) shall be approved without prior court order.

The Specific Applications

(a) Variform Inc.

54 This application seeks removal of the prohibition against proceedings against officers, directors, etc. and a reduction of the time within which the company may file its reorganization plan. Both of those matters are dealt with above. It also seeks "particulars of [the company's] assets and liabilities as of the date of the Petition." That matter has been dealt with by broadening the monitor's responsibilities.

(b) Master Shield Inc.

55 This applicant has an action pending against the company and two of its employees claiming, among other things, rescission of an agreement to supply vinyl siding and related products to the company. Master Shield wishes to continue with its action and to have the balance of the inventory which it supplied preserved in the meantime. If the company is allowed to continue selling the product which Master Shield supplied, its action for rescission will gradually become academic.

56 There are three difficulties with granting such an order. First, Master Shield attempted to obtain, and was denied, such an order in its own action albeit on the basis of material filed by the company on July 2, 1991 that it was "a good credit risk, on good terms with most of its suppliers, and had never missed a bank payment." That was hardly full and frank disclosure! Secondly, there is a serious question as to whether or not the title to the goods supplied by Master Shield has passed to the bank under its s. 178 security. Even though Master Shield might otherwise be entitled to rescission against the company, its action in that regard may already be academic.

57 Finally, the court must take care not to "carve out one portion of the order and give advantage to one creditor over another": see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.) at p. 108. No doubt all of the company's suppliers would like their product returned for the appropriate credit. The prejudice that will necessarily occur to a few creditors is offset by the potential advantage to those who would receive nothing should a stay be refused: see *Re Stephanie's Fashions Ltd.*, supra, at p. 252. Here, in light of the monitor's first report of October 8, 1991, it is obvious that the only hope for the vast majority of the more than 300 ordinary creditors is a successful reorganization plan.

58 Except to the extent that it is in a position to advance a claim against Messrs. John Gross and Gerald Baer personally, Master Shield's action is stayed. Its requests for preservation of the inventory which it supplied and for a special listing thereof by the monitor are denied.

(c) Holland Imports Inc.

59 Holland is the company's landlord in respect of some 57,000 sq. ft. of warehouse space. Holland alleges that both leases in question expire on October 31, 1991 and that the company failed to give the six months' notice in writing which was necessary to entitle it to a renewal term. It seeks leave to commence proceedings against the company under the *Commercial Tenancy Act*. It also asks that the period of the stay be reduced to one month, a time which expired on the day its application was heard. I dealt earlier with the length of the stay.

60 A successful reorganization plan will necessarily involve an agreement with Holland which will enable the company to continue in occupation of its present premises. The question of whether or not there has been an effective renewal notice (the leases provide for settlement of the renewal rent by arbitration if the parties cannot agree) may be important in the context of whether such an agreement can be reached. That agreement is important to the unsecured creditors as a whole.

61 There is no substantial prejudice to Holland in the short run as the ex parte order requires payment of the ongoing rent in the amount applicable at the date of the order. However, I consider that it would be appropriate to try the issue of whether or not there has been notice of renewal. That can be conveniently done in the context of proceed-

ings under the *Commercial Tenancy Act*, so long as those proceedings stop short of an order for possession should Holland prove to be successful.

62 There will be leave to Holland to commence and pursue such proceedings despite the general stay, but any order for possession therein will be stayed for so long as the ex parte order remains in effect, to be dealt with in the context of any reorganization plan ultimately brought before the court.

(d) Kuehne & Nagel International Ltd.

63 This applicant, a customs broker, sued on June 20, 1991 for some $85,000, of which all but $4,000 was duties and taxes paid on the company's behalf. As late as August 13, 1991, that action was settled by a part payment of $10,000, the delivery of post-dated cheques for the balance, and a possessory lien on some $30,000 worth of merchandise.

64 During the course of argument on these motions, I ordered that Kuehne & Nagel could not realize on its possessory lien, but was not obliged to deliver up the merchandise except against payment until further order. That order was not intended to affect the rights, if any, of a third party such as the bank.

65 Despite my initial sympathy for Kuehne & Nagel, arising out of the settlement which it achieved and the small proportion of its account arising from its own fees, more mature consideration brings the realization that it is really no different than suppliers of inventory. They have made expenditures for material and labour to produce the goods which they supplied to the company. They are out of pocket as Kuehne & Nagel is. Its application for leave to continue with its action is denied.

66 Kuehne & Nagel's request for "a detailed statement of all management wages and bonuses paid by [the company] during '... 1990 and 1991 ...' " was dealt with in the context of the monitor's expanded duties. During the course of argument, I also directed that no further bonuses or management or consulting fees be paid without prior order, and that remuneration to directors and officers of the company be limited for the time being to the salaries listed in para. 19 of the affidavit of John Gross sworn October 3, 1991 and filed herein.

(e) Aggressive Investments Inc.

67 This applicant, which carries on business as Able Office Products, sold office furniture and filing cabinets to a total value of approximately $10,000 to the company around mid-July of 1991. Title to the furniture was retained by the vendor until payment in full. On September 12, 1991, before becoming aware of the ex parte order, it started a small claims action against the company for $10,000. It seeks leave to continue that action. That leave is denied for reasons expressed above.

68 Aggressive also seeks an order that title to the goods "be vested" in it. This is not the forum for such a declaration. Aggressive's final request, that the company be restrained from disposing of those goods, may be unnecessary in the light of Aggressive's filing under the *Personal Property Security Act*, S.B.C. 1989, c. 36, but considering the circumstances of the company at the time of that purchase, I have decided that Aggressive is entitled to such a restraining order, at least until further order of this court.

(f) Northern Warehouse Equipment Ltd.

69 Northern supplied to the company, in connection with its plans to expand into the vinyl-siding business, a used racking or storage system which is now installed in its rented premises. Northern's claim for about $100,000 is the subject of a claim of builder's lien against the interests of both the company and its landlord in those premises.

70 In addition to leading the charge against the validity of the ex parte order, Northern applies for a preservation order in respect of the racking system and leave to continue its lien action, at least against the landlord, or alternatively, for leave to cross-examine John Gross, the president of the company, on his affidavits filed in these proceedings.

71 The company alleges that the racking system is unsuitable and plans to replace it. Whether that is a genuine concern or merely an excuse for delay is not for me to determine. Northern submits that the racking system which it supplied, and the debt arising from the contract to supply it, should be treated differently than inventory intended for resale. Except to a very limited extent, I disagree. I am prepared to restrain the company from disposing of the components of the racking system without further order so long as the stay of proceedings is in effect. Those components may well have a much greater value to Northern than to any third party. Such additional value should not be lost, whether it accrues to Northern alone or to the creditors generally.

72 I am not prepared to permit Northern to continue with its lien action, except to the extent of obtaining a date for trial. It would be pointless for that action to continue against Holland Imports Inc. alone because the company is entitled to be heard on the question of whether the racking system is an "improvement" and a "fixture," and the amount of any lien can only be determined on the basis of what is owing to Northern by the company.

73 Any cross-examination of Mr. Gross should await further investigation by the monitor. There will be liberty to apply in that regard at a future stage of these proceedings. Several questions must be resolved before such an examination proceeds. How many counsel will be entitled to question Mr. Gross? How will he (or she or them) be chosen? What limits, if any, should be placed on the scope of such a cross-examination? I believe those questions will be more easily answered once the monitor has provided further reports in the context of its expanded duties.

Judgment

74 1. The applications to set aside the ex parte order are dismissed. The level of disclosure here was adequate for such an order. For public policy reasons, the "instant" trust deed device is acceptable.

75 2. The prohibition against proceedings against directors, officers, employees, agents or consultants is deleted from the order of September 3, 1991, with liberty to apply should the volume of such litigation threaten the ability of the company to prepare a reorganization plan.

76 3. The six-month period initially ordered will remain unchanged.

77 4. Variform Inc. and Master Shield, Inc. jointly, or either of them (but not each of them separately) shall have liberty to file a petition against the company for a receiving order under the *Bankruptcy Act*. No further proceedings may be taken in respect of that petition so long as the stay in the September 3, 1991 order remains in effect.

78 5. The duties of the monitor are expanded as set out in these reasons.

79 6. The specific applications to vary the ex parte order are disposed of in the manner set out in these reasons.

80 7. There will be no order for the costs of these applications at this time. The issue of such costs is reserved until further order.

Applications allowed in part.

9 C.B.R. (3d) 1, 60 B.C.L.R. (2d) 311, [1992] 1 W.W.R. 651

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TAB 5

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 6

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.

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TAB 7

15 C.B.R. (3d) 265, 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134

H

1992 CarswellBC 524

Pacific National Lease Holding Corp., Re

Re PACIFIC NATIONAL LEASE HOLDING CORPORATION, PACIFIC NATIONAL FINANCIAL CORPORATION, PACIFIC NATIONAL LEASING CORPORATION, PACIFIC NATIONAL VEHICLE LEASING CORPORATION, SOUTHBOROUGH HOLDINGS INC. and PAC NAT EQUITIES CORPORATION

British Columbia Court of Appeal

Macfarlane J.A. [in Chambers]

Heard: October 22, 1992

Judgment: October 28, 1992

Docket: Doc. Vancouver CA016047

Counsel: H.C. Ritchie Clark and D.D. Nugent, for petitioners (appellants).

W.E.J. Skelly, for Sun Life Trust Company.

M.P. Carroll, for Mutual Life Assurance Company of Canada.

W.C. Kaplan, for Commcorp Financial Services Inc. and National Trust.

H.W. Veenstra, for National Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangements Act -- Application of Act.

Corporations -- Arrangements and compromises -- Companies' Creditors Arrangement Act -- Court refusing to authorize company to set aside funds to fulfil its obligations under Employment Standards Act -- Company applying for leave to appeal from order -- Leave being denied as appeal likely to delay or frustrate re-organization efforts -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-46 -- Employment Standards Act, R.S.B.C. 1979, c. 10.

The petitioners made an application under the Companies' Creditors Arrangement Act ("CCAA") for a stay of all proceedings so that they might attempt a re-organization of their affairs. The stay was granted, but the petitioners subsequently applied to set aside over $1 million in a trust fund to meet their obligations under the Employment Standards Act (B.C.). The petitioners' application was dismissed because to allow the petitioners' application would be an unacceptable alteration of the status quo in effect when the order was granted. The petitioners sought leave to appeal.

Held:

The application was dismissed.

In supervising a proceeding under the CCAA, orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems. In that context, appellate proceedings may well upset the balance and delay or frustrate the process under the CCAA. Accordingly, it was not appropriate to grant leave to appeal.

Cases considered:

> Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) -- considered
>
> Westar Mining Ltd., Re (1992), 14 C.B.R. (3d) 95 (B.C. S.C.) -- referred to

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1.

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

Employment Standards Act, R.S.B.C. 1979, c. 10.

Application for leave to appeal from order made under Companies' Creditors Arrangement Act.

***Macfarlane J.A.*:**

1 This is an application for leave to appeal an order of Mr. Justice Brenner pronounced August 17, 1992 pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A.").

2 The petitioners had become insolvent prior to July 22, 1992 when they made an application under the C.C.A.A. for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the C.C.A.A.

3 Mr. Justice Brenner made an ex parte order on July 23, 1992. The effect of the order was to stay all proceedings against the petitioners.

4 The order permitted the petitioners to maintain in trust a sum not exceeding $1,500,000, to satisfy the potential liabilities of directors and officers of the petitioner companies with respect to the payment of wages under provincial legislation and remittances in connection therewith pursuant to federal legislation. The petitioners had previously established that fund to protect its directors and officers from potential personal liability under the *Employment Standards Act*, R.S.B.C. 1979, c. 10, for failing to make the payments mandated by that statute.

5 On July 31, 1992 Mr. Justice Brenner heard a number of applications brought by various interested parties seeking to set aside the ex parte stay order or, if the stay order was not set aside, to vary its terms. Mr. Justice Brenner amended and replaced the stay order with an order on terms proposed by the parties. That order has not yet been entered and has gone through a number of amendments. The order provided that on an interim basis, pending the hearing and determination of an application on the merits of the issues, the petitioners should not,

without further order of the court, make any payment to any employee or employees of the petitioners in respect of unpaid wages, severance, termination, lay-off, vacation pay or other benefits arising or otherwise payable as a result of the termination of an employee or employees.

6 The merits were argued in August, and on August 17 Mr. Justice Brenner delivered the reasons for judgment and made the order which is the subject of this application.

7 The operative portions of the order read as follows:

> THIS COURT ORDERS that the application by the Petitioners to make statutory severance payments or to maintain a trust fund to indemnify its directors and officers with respect to statutory severance payments is dismissed;
>
> THIS COURT FURTHER ORDERS that any proceedings that may be brought by employees of the Petitioners to compel payment of statutory severance payments are stayed.

8 The appeal concerns the order made under para. 1 of the order, not against the stay granted in para. 2.

9 The reasons for judgment of Mr. Justice Brenner are careful and detailed and are contained in 17 pages. The reasons contain a review of the essential facts, including the circumstances which gave rise to the financial difficulties of the petitioners, the competing arguments with respect to the need and the ability to make severance payments to employees whose services had been terminated, a consideration of the purposes of the C.C.A.A., the principle derived from the judgment of Mr. Justice Macdonald in *Re Westar Mining Ltd.*, unreported reasons for judgment, August 11, 1992 [now reported at 14 C.B.R. (3d) 95 (B.C. S.C.)] (which dealt with a similar issue), and the application of that principle to the facts of this case.

10 The essential facts are that the petitioners are a group of interrelated companies that have carried on a leasing business for some years. Just prior to the commencement of the C.C.A.A. proceedings the petitioners had over $246,000,000 in lease portfolios under administration. They had a workforce of approximately 230 which, by the time Mr. Justice Brenner gave his reasons on August 17, 1992, had been reduced to 60. The provisions of the *Employment Standards Act* had not, by August 17, 1992, given rise to any actual liability with respect to the severance of the employees who had left the company. The potential liability was not known but the company said that it could be as much as $1,500,000.

11 Mr. Skelly informed me, upon the hearing of the application, that the latest information indicated a liability for severance pay in an amount of approximately $850,000 and for vacation pay in an amount of approximately $150,000 for a total potential liability of $1,000,000. I understand from counsel that once the funders are repaid there may be as much as $61,000,000 available to meet other liabilities.

12 Mr. Clark, for the petitioners, was not prepared to concede that the potential liability had been reduced, and submits that a trust fund of about $1,300,000 is required.

13 The petitioners were in the business of purchasing equipment or vehicles and entering into leases with third parties. The initial purchases were financed with security on such leases granted in favour of National Bank of Canada and by way of a trust deed in favour of Canada Trust Company and Royal Trust Company. Additional financial advances were obtained from the other respondents, who are 27 other financial institutions, referred to in the material as the "funders." The funders advanced moneys and took security, in part by way of as-

signment of the lease revenue stream. The moneys advanced by the funders exceeded the amount which the petitioners had paid for the equipment or vehicles. The difference, together with other revenue, was the petitioners' profit.

14 The arrangements with the funders provided that the petitioners would continue the ongoing administration of the leases, including collection of the monthly lease payments, which would be forwarded to the funders.

15 The petitioners got into financial difficulties, which they revealed to the funders. The funders and the petitioners were not able to agree to a plan to deal with this crisis. As a result the petitioners sought protection under the C.C.A.A.

16 The appellants seek an order of this court setting aside the order made August 17, 1992, and authorizing the petitioners to comply with the statutes governing their operations (and in particular the *Employment Standards Act*) and permitting them to continue to maintain the trust funds with respect to possible claims against directors and officers arising out of the various federal and provincial statutes.

17 The petitioners assert that Mr. Justice Brenner erred:

18 1. In ordering the appellants not to abide by the relevant mandatory statutory provisions including those under the *Employment Standards Act*, requiring the appellants to pay all the statutory payments in full, and thereby ordering the appellants to breach a mandatory statute regarding statutory payments.

19 2. In ruling that he had the inherent jurisdiction under the *Companies' Creditors Arrangement Act* or otherwise to order the appellants to breach the *Employment Standards Act* regarding statutory payments and thereby order the petitioners to commit offences under such statute.

20 3. In failing to properly apply the relevant legal principles applicable to a decision regarding the payment of statutory payments including such payments to former employees.

21 4. In ruling that the payment of unpaid wages and holiday and vacation pay accruing to the appellants' employees was to be treated in the same manner as severance pay.

22 5. In suspending the provisions of the July 23, 1992 order authorizing the trust fund.

23 6. In failing to provide any protection to the directors and officers of the appellants by way of the trust fund when ordering the petitioners to breach the *Employment Standards Act*, thereby exposing the directors and officers of the petitioners to liabilities under that statute and to prosecution for offences thereunder.

24 I understand the submission of the respondents to be that the real issue is whether a judge, acting pursuant to the powers given by the C.C.A.A., may make an order the purpose of which is to hold all creditors at bay pending an attempted reorganization of the affairs of a company, and which is intended to prevent a creditor obtaining a preference which it would not have if the attempted reorganization fails and bankruptcy occurs.

25 I think that the answer is given in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.). In that case Mr. Justice Gibbs, at pp. 88-89 [B.C.L.R.], said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an in-

> solvent 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.

26 In the same case, at p. 92, Mr. Justice Gibbs considered whether security given under the *Bank Act* [R.S.C. 1985, c. B-1] gave preference to the bank over other creditors, despite the provisions of the C.C.A.A. He said:

> It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the *Bank Act* which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

27 Mr. Justice Brenner, after reviewing that and other authorities, said:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent manoeuvers for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze

of relative pre-stay positions.

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

Counsel do not suggest that statement of principles is incorrect.

28 Mr. Justice Brenner then referred to the judgment of Mr. Justice Macdonald in *Westar*, supra, and con- cluded:

> In my view, to allow the petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

29 He said earlier that he did not understand Mr. Justice Macdonald to be saying in *Westar* that in no case should a court ever authorize severance payments when a company is operating under the C.C.A.A.

30 He held, in effect, that it was a proper exercise of the discretion given to a judge under the C.C.A.A. to order that no preference be given to any creditor while a reorganization was being attempted under the C.C.A.A.

31 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.

32 So far as the directors and officers are concerned, they were personally liable for potential claims under the *Employment Standards Act* before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

33 This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.*, supra. Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

34 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

35 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

36 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

37 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

38 In all the circumstances I would refuse leave to appeal.

Application dismissed.

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TAB 8

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

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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 9

[2001] A.W.L.D. 482, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 295 A.R. 113

Hunters Trailer & Marine Ltd., Re

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

In the Matter of Hunters Trailer & Marine Ltd.

Alberta Court of Queen's Bench

Wachowich J.

Heard: May 2, 2001
Judgment: June 21, 2001
Docket: Edmonton 0003-19315

Counsel: Kentigern A. Rowan, for Canadian Western Bank

Terrence M. Warner, for CIT Financial Ltd.

Douglas H. Shell, for Deutsche Financial Services

Juliana E. Topolniski, Q.C., for Gillespie Farrell

Charles P. Russell, for Reynolds, Mirth, Richards and Farmer

Michael J. McCabe, K. Becker, for Hunters Trailer & Marine Ltd.

Subject: Insolvency

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

On September 25, bank agreed to company's proposal that company would apply for order pursuant to Companies' Creditors Arrangement Act and would attempt to formulate plan acceptable to creditors -- Bank provided interim financing to cover critical spending pending granting of

order under Act -- On October 11 stay of proceedings was granted and limited debtor-in-possession financing with super-priority over other claims was authorized -- Bank, as debtor-in-possession lender, was authorized to be reimbursed for advances made between September 25 and October 11 -- Financial advisors and legal counsel were granted charge against company's property in priority to all other charges except debtor-in-possession security including for work done between September 25 and October 11 -- Stay of proceedings under Act was extended on notice to creditors, was subsequently terminated and receiver was appointed -- Creditors took issue with administrative charges relating to company's legal and financial advisors and questioned jurisdiction to direct that funds advanced prior to proceedings under Act receive super-priority -- Court had inherent or equitable jurisdiction to grant super-priority for debtor-in-possession financing and administrative costs, including costs invoked when initial application under Act was made -- Jurisdiction was invoked when initial applications is made under Act, but court was not limited to granting only priority for costs arising after date of initial order -- If costs were reasonably advanced to maintain status quo pending application under Act or were incurred in preparation for proceedings under Act, they fell under super-priority -- Likely that company would have ceased to carry on business if bank had not advance money from September 25 -- Legal and accounting services were essential for company to have possibility of arriving at arrangement with creditors -- Priority was granted as there was no alternative to assure that services would be available -- Legal and accounting expenses prior to refusal to extend stay were reasonably incurred -- Legal and accounting fees incurred prior to initial order were incurred in connection with initial application and received same priority as post-application expenses -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by Wachowich J.:

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

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

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

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada) [1991] 2 W.W.R. 136 (B.C. C.A.) -- referred to

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.) -- considered

Pacific National Lease Holding Corp., Re (August 17, 1992), Doc. A922870 (B.C. S.C.) -- considered

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

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.) -- referred to

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.) -- referred to

Royal Oak Mines Inc., Re (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) -- considered

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

Smoky River Coal Ltd., Re, [2000] 10 W.W.R. 147, 83 Alta. L.R. (3d) 127, 19 C.B.R. (4th) 281, 2000 ABQB 621 (Alta. Q.B.) -- considered

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

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) -- considered

United Used Auto & Truck Parts Ltd., Re, **2000 BCCA 146, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96** (B.C. C.A.) -- followed

United Used Auto & Truck Parts Ltd., Re, 2000 CarswellBC 2132, 2000 CarswellBC 2133, 261 N.R. 196 (note), 149 B.C.A.C. 160 (note), 244 W.A.C. 160 (note) (S.C.C.) -- referred to

Statutes considered:

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

Generally -- referred to

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

Generally -- considered

s. 11.3 [en. 1997, c. 12, s. 124] -- referred to

RULING regarding super-priority for debtor-in-possession financing and administrative costs.

***Wachowich J.*:**

Background

1 On October 11, 2000 I granted Hunters Trailer & Marine Ltd. ("Hunters"), *ex parte*, a 30 day stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as. am. ("*CCAA*") and further authorized limited debtor in possession ("DIP") financing with a super-priority status over other claims. I granted the Monitor appointed by my Order and Hunters' counsel and financial advisors a charge against the present and future property of Hunters ("Administrative Charge") in priority to all other charges except the DIP security. In addition, I ordered that Canadian Western Bank ("CWB"), the DIP lender, be reimbursed from the authorized DIP financing for any advances made between September 25, 2000 and the date of my Order. Those advances amount to $150,596.10, approximately 94 percent of which was used to cover Hunter's payroll. The balance was for payment of essential expenses such as security for the premises. My Order of October 11th also contained a standard comeback clause in which a two day notice period was specified.

2 The stay of proceedings was extended by Wilson J. on November 8, 2000. By Order dated December 7, 2000 I terminated the stay and appointed Deloitte Touche Inc. as interim receiver of the company under the *Bankruptcy and Insolvency Act*. Deutsche Financial Services ("Deutsche") and Bank of America Specialty Group Ltd. ("Bank of America"), two of Hunters' floor plan financiers, take issue with the Administrative Charge as it relates to Hunter's legal and financial advisors. Along with C.I.T. Financial Ltd. ("CIT"), they also question this Court's jurisdiction to direct that funds advanced prior to the commencement of the *CCAA* proceedings be paid from the DIP financing provided for in those proceedings and question the propriety of my direction based on the facts of this case. At the time of my October 11th Order, Deutsche, Bank of America and CIT were owed in excess of $7.5 million by Hunters, representing over 70 percent of the secured debt and 60 percent of the total indebtedness of Hunters.

Payment of Hunters' Legal and Accounting Advisors

Arguments of the Parties

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3 Deutsche recognizes that the Court has inherent jurisdiction to allow super-priority for administrative costs, thereby subordinating existing security, but argues that this jurisdiction should only be exercised in exceptional circumstances. The Bank submits that it is wrong that Reynolds Mirth Richards and Farmer ("Reynolds"), as Hunters' solicitors, and Gillespie Farrell LLP, as their accountants, should be granted a super-priority over the secured claims of Deutsche and other floor financing creditors to the extent that such costs were incurred to unsuccessfully defend the stay of proceedings granted in the *ex parte CCAA* Order of October 11, 2000. According to Deutsche, super-priority should only apply if:

> (a) the accounts were reasonably incurred for the restructuring of Hunters as opposed to any defence of the initial Order; and
>
> (b) there is clear and cogent evidence that there was a reasonable prospect of a successful restructuring.

4 Deutsche also contends that it would not be appropriate to uphold the super-priority of the Administrative Charge for the payment of the accounts as Hunters did not seek the cooperation of Deutsche for the restructuring of its affairs prior to bringing its *ex parte* application, Deutsche has never agreed to super-priority for the Administration Charge and Deutsche and the other floor financing secured creditors ultimately were successful in securing an order lifting the stay of proceedings.

5 During oral argument, Deutsche indicated that it was no longer contesting the legal fees for the period October 11th to November 17th, the date on which Deutsche, CIT and Bank of America brought application to have the stay of proceedings lifted and the *CCAA* Order vacated.

6 In presenting its initial application for a stay, Hunters put affidavit evidence before the Court stating that Bank of America had indicated its willingness to participate in a work-out plan. Bank of America maintains that this representation was misleading. Bank of America did not have the benefit of legal counsel until after my initial Order was granted. While it was prepared to consider reasonable proposals by Hunters as an alternative to liquidation, it had not been provided with current financial statements which would have demonstrated the magnitude of Hunters' financial problems and it did not indicate that it would consider an arrangement based on a *CCAA* order such as the Order granted.

7 Bank of America suggests that it was inappropriate for the initial *CCAA* Order or at least those clauses in the Order dealing with the accounting and legal fees to have been sought or granted on an *ex parte* basis given that the relief claimed was clearly prejudicial to the rights and interests of the first charge secured lenders and no emergent or extraordinary need existed to prioritize the legal and accounting fees of the debtor's advisors over the interests of those lenders.

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8 The primary argument advanced by Bank of America appears to be that super-prioritization of the fees of the debtor's professional advisors is not justified as the *CCAA* proceedings were doomed to failure.

9 CWB makes no submissions with respect to payment of Hunters' legal and accounting expenses, but indicates that it is prepared to pay its fair share thereof if the Court deems that these expenses properly form part of the Administrative Charge.

10 Gillespie notes in its submissions that one of its partners, Brian Farrell, acted as Hunters' external accountant for approximately 10 years and during that period also effectively functioned as its chief financial officer. From about September 30 to December 7, 2000, Mr. Farrell performed some of the functions of Hunters' comptroller. Mr. Farrell deposed in an affidavit filed in these proceedings that he had believed that a restructuring of Hunters' financial affairs could be accomplished under the *CCAA* and that secured creditors could have been paid out in full if Hunters was permitted to carry on its operations during what was its traditionally low season. He further indicated that Gillespie would not have provided professional services to Hunters without the assurance provided by the Administrative Charge that it would be compensated for its work. Gillespie suggests that there was unreasonable delay on the part of Deutsche and Bank of America in bringing their application challenging this aspect of the Administrative Charge.

11 Gillespie argues that while the *CCAA* was intended to preserve the status quo, that does not mean preservation of the relative pre-debt status of each creditor nor is it intended to create a rigid freeze of relative pre-stay positions.

12 Hunters and Reynolds submit that it is not uncommon for orders to be sought under the *CCAA* either on short notice or without notice to certain creditors and with little opportunity on the part of the court for review and consideration of the facts and issues in advance.

13 They argue that the affidavit of Kent Andrews confirms that Bank of America participated in some discussions with Hunters regarding a work-out prior to October 11, 2000 and the affidavit of Gerhard Rodrigues demonstrates that up until the motion to set aside the initial Order Bank of America was considering how it might participate in a restructuring of Hunters.

14 Hunters and Reynolds suggest that it was reasonable for Hunters to continue working towards an arrangement under the *CCAA* and to incur legal costs in the process at least so long as the stay was in place. They contend that a debtor company requires legal advice in order to successfully restructure its affairs under the *CCAA* and that legal counsel must be given reasonable assurance of payment.

Analysis

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15 The aim of the *CCAA* is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1 (S.C.C.), at 2; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at 315-316).

16 Madam Justice Huddart in *Alberta-Pacific Terminals Ltd., Re* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) and Mr. Justice Brenner in *Pacific National Lease Holding Corp., Re* (August 17, 1992), Doc. A922870 (B.C. S.C.), leave to appeal denied(1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), suggested that maintaining the status quo does not necessarily mean preservation of the relative pre-stay debt status of each creditor as other interests are served by a stay order under the *CCAA*.

17 Finlayson J.A. (Krever J.A. concurring) in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.), at 120 agreed with the statement made by Gibbs J.A. in *Hongkong Bank of Canada* that the Act was designed to serve a "broad constituency of investors, creditors and employees" and instructed that:

> Because of that "broad constituency", the Court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," [(1947) 25 Can. Bar Rev. 587] at p. 593.

18 I agree with the statement made by Mackenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* **(2000), 16 C.B.R. (4th) 141** (B.C. C.A.), at 146 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."

19 To qualify for *CCAA* protection a company must be insolvent. The reality is that most companies that find themselves in such a position are unlikely to have the financial resources to pay for the advisors required to embark upon, formulate and present a restructuring plan under the *CCAA*. As a result, the practice has developed whereby debtor companies in the initial application for *CCAA* protection seek to secure payment of their professional advisors through an administrative charge on the assets of the company in priority to the claims of other secured creditors, except possibly the DIP lender.

20 In *Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]), the British Columbia Supreme Court considered whether the fees of professional advisors other than the monitor should be paid in priority to the claims of creditors in *CCAA* proceedings.

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As in the present case, the initial *ex parte* order had provided for such priority. However, on reconsideration of the stay, Saunders J. noted that there was no evidence presented as to whether the priority for professional fees was required to enable the operations of the debtor company to continue. She concluded that the protection of s. 11.3 of the Act permitting a person providing services to require immediate payment for those services and the significant cash flow projections of the company would serve as adequate protection for the fees for professional services. The terms of the initial order therefore were amended to provide for priority only for the monitor's fees. However, it was apparent that Saunders J. was of the view that the court had the jurisdiction to grant a super-priority for the administrative charge and that she considered it important that professional fees be protected in some manner.

21 Many initial orders under the *CCAA* are sought on short notice or on an *ex parte* basis. In fact, the Act allows for initial *ex parte* orders and gives the applicant 30 days in which to generate support for the order among its creditors.

22 As Mr. Justice Blair recognized in *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), the court in most cases is asked on the initial application to respond with little advance opportunity to examine the materials filed in support of the application. In view of the "real time" nature of such applications, he recommended to those drafting initial stay orders that they confine the relief sought to what is essential for the continued operations of the company during a brief "sorting out" period. He suggested that extraordinary relief such as DIP financing and super-priorities be kept in the initial order to what is reasonably necessary to meet the debtor company's urgent needs during the sorting-out period since such measures may involve a significant re-ordering of the pre-application priorities. At p. 322 he advised that:

> Such changes should not be imported lightly, if at all, into the creditor's 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.

23 Although Mr. Justice Blair did not specify what he considered to be a reasonable "sorting out" period, he did state at p. 319:

> 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 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

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proceedings are thereby attenuated.

24 Mr. Justice Farley, who subsequently took carriage of the *Royal Oak Mines Inc., Re* case, held at (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) that, "in light of the very general framework of the *CCAA*, judges must rely upon inherent jurisdiction to deal with *CCAA* proceedings. However, inherent jurisdiction is not limitless; if the legislative body has not left a functional gap or vacuum, the inherent jurisdiction should not be brought into play." He refused to interfere with the super-priority granted by Blair J. for DIP financing as he felt that Mr. Justice Blair had properly engaged in the necessary balancing of the interests of the debtor company, the creditors and other interested parties.

25 Michael B. Rotsztain, in an article entitled "Debtor-In-Possession Financing in Canada: Current Law and a Preferred Approach," presented on February 22, 2000 at the Conference of the Canadian Turnaround Management Association, Toronto, Ontario suggested that DIP financing as a whole only be considered to meet urgent short-term needs and that further DIP financing be granted only in limited circumstances.

26 The jurisdiction of the court to grant super-priority for legal expenses incurred by a debtor-in-possession in connection with its efforts to restructure its affairs under the *CCAA* was considered by an appellate court for the first time in *United Used Auto & Truck Parts Ltd., Re*, *supra* (leave to appeal to S.C.C. granted [2000] S.C.C.A. No. 142 (S.C.C.), appeal discontinued). The chambers judge, Tysoe J., had granted an *ex parte* order which specified that the reasonable fees and disbursements of counsel for the debtors should be included with the monitor's fees and disbursements in an administrative charge which was to be given super-priority over the charges of other creditors. The secured creditors brought an application to set aside the order. The application was heard 11 days after the initial order was granted. Tysoe J. continued the charge as he considered that these were necessary expenses for the successful restructuring of the company. At pp. 154-155 of his decision ((1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers])), Mr. Justice Tysoe held:

> ... 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 burdens of the expense of the lawyers for the Petitioners in acting against them. The secured lenders should not be expected to underwrite the expense of lawyers who act unreasonably or who act on unreasonable instructions to frustrate them in the recovery of the monies owed to them.
>
> Hence, I am 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

and would have to look to other sources for payment.

27 It was apparent in ***United Used Auto & Truck Parts Ltd., Re*** that the cash flow of the business would be insufficient to pay the legal expenses, particularly in the absence of DIP financing which Tysoe J. refused to grant. Mackenzie J.A., who delivered the judgment of the Court of Appeal, commented at p. 152 in terms of the super-priority granted for the monitor's expenses:

> 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.

28 Mackenzie J.A. characterized the administrative charge as a limited substitute for DIP financing. He was of the view that the jurisdiction to grant super-priority for the debtor's legal fees was dependent on the court's power to allow a super-priority for DIP financing. This type of super-priority was first allowed over the objections of a secured creditor in *Dylex Ltd., Re* (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.). Houlden J.A. in that case considered that the broader interest of 12,000 employees of the debtor company justified imposing a super-priority for bridge financing.

29 Mackenzie J.A. also indicated in ***United Used Auto & Truck Parts Ltd., Re*** at p. 151 that the jurisdiction to grant a super-priority for the debtor's legal expenses, whether alone or as part of DIP financing, rests on the same equitable foundation as the monitor's fees and disbursements. He drew an analogy between the jurisdiction to grant the monitor's fees and the jurisdiction to secure the fees of a court-appointed receiver. Both are rooted in equity but as Mackenzie J.A. pointed out at p. 150: "the monitors' jurisdiction serves a broader statutory objective under the *CCAA*." Therefore, the court's inherent or equitable jurisdiction cannot be restricted as it is in a receivership where the receiver's fees and disbursements may only be charged against the security held by the secured creditors of the debtor:

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

(*Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 (Ont.

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C.A.)).

30 In commenting on ***United Used Auto & Truck Parts Ltd., Re*** at the Eleventh Annual Conference and General Meeting of the Insolvency Institute of Canada held in October, 2000, Douglas I. Knowles suggested that as the Supreme Court of Canada had granted leave to appeal:

> ... monitors and DIP financiers must carefully consider whether or not to become involved in [the] ***CCAA*** process absent some other source of security for their fees and loans until the Supreme Court of Canada has affirmatively concluded that the jurisdiction to create such priority charges exist. If such is not the conclusion of the Supreme Court of Canada then, at least with respect to the Monitor's fees, the CCAA will only be available to those insolvent companies with sufficient unencumbered assets or unencumbered cash flow to ensure payment of the monitor's fees without the necessity of creating such a charge.

31 The appeal has since been discontinued.

32 Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the *CCAA* process. Hunters brought its initial *CCAA* application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the *CCAA* effectively would be denied a debtor company in many cases.

33 I am aware, however, that administrative costs and DIP financing can erode the security of creditors. LoVecchio J. in *Smoky River Coal Ltd., Re* (2000), 19 C.B.R. (4th) 281 (Alta. Q.B.), at 290, raised a caution flag in this regard, stating at p. 290:

> While the ***CCAA*** requires a large and liberal interpretation in order to be effective, the need for caution arises when the Court exercises its inherent jurisdiction under this statute. Although the ***CCAA*** serves a vital and important role in a reorganization, the general statutory scheme of priorities of creditors must not be overlooked. As the Court is altering this scheme, the exercise of the power of the Court to create classes of creditors with a super-priority status should not be taken lightly. Especially in light of the fact that this action could prejudice the recovery of creditors who would, but for the Order, enjoy a priority if a receivership or bankruptcy ultimately ensues.

34 It is preferable that priority for administrative costs and DIP financing be dealt with on notice to all interested parties. However, if the circumstances warrant, priority may be granted on the initial application, but on a limited basis only until the matter is considered on notice to those

affected by the order. That is precisely what occurred in this case. Hunters brought an application on November 8th for an extension of the stay of proceedings. This application was made on notice to the secured creditors. If they had wanted to challenge the initial Order before that date, they could have done so on two days' notice.

35 In my view, the services of both Reynolds and Gillespie were essential if Hunters was to have any possibility of arriving at an arrangement with its creditors which would allow Hunters to carry on its business. The priority assigned to the Administrative Charge in my Order of October 11, 2000 was granted as there was no other reasonable alternative to assure that the services of Reynolds and Gillespie would be available to Hunters. The Administrative Charge met the debtor company's urgent needs during the sorting-out period.

36 I do not accept the argument advanced by the objecting creditors that it is only in the case of a successful arrangement under the *CCAA* that priority for the fees and disbursements of professional advisors should be confirmed. Professional advisors acting for a debtor company must act in a reasonable manner, but they are not guarantors of the success of restructuring. Nor is it unreasonable for the debtor company to defend a creditor's challenge to the initial *CCAA* order.

37 My initial Order was granted as I was satisfied on the facts then before me that there was a reasonable prospect that Hunters could make arrangements with its creditors which would allow it to remain in business. Despite the express provision in my Order of October 11, 2000 permitting interested parties to apply on two days notice to vary the Order or to seek other relief, the first indication received by the Court from Bank of America that it opposed the Order was the application of Hunter's major secured creditors to have the initial Order vacated and the supporting affidavit of Kent Andrews filed on November 17, 2000.

38 Counsel for Bank of America had sent a letter to Hunters and CWB on November 8th expressing concern with the terms of the Order, particularly the terms of the DIP financing, but no mention was made of the Administrative Charge. The letter indicated that unless a satisfactory agreement could be reached on amendment of the Order, an application would be brought to have the terms of the Order varied or to terminate the stay. On December 1, 2000 I refused Hunters' request for an extension of the stay but extended the existing stay to December 8, 2000. It was apparent at that time that there was insufficient evidence to establish that the benefits of DIP financing (and the Administrative Charge) would clearly outweigh the potential prejudice to the objecting creditors.

39 In my view, the legal and accounting expenses of Hunters incurred up to Dec. 1st were reasonably incurred in connection with the *CCAA* proceedings and restructuring efforts. Any such expenses incurred after December 1st are not entitled to super-priority status.

40 Certain of the accounts of Reynolds are for work undertaken between September 25, 2000

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and October 11th in preparation for the initial *CCAA* application. I have concluded below that this Court has jurisdiction to grant priority to DIP financing advanced prior to my Order of October 11th. I reach the same conclusion in terms of the legal and accounting fees and disbursements which pre-date the initial *CCAA* order. Hunters' expenses in this regard were incurred in connection with the initial application and should receive the same priority as the post-application expenses. incurred in connection with the initial application and should receive the same priority as the post-application expenses.

Jurisdiction to Order Pre-CCAA CWB Advances to be Paid from DIP Financing

Background

41 According to CWB, it was informed by representatives of Hunters on September 22, 2000 that Hunters was insolvent. As of that date, Hunters was indebted to CWB in an amount in excess of $1 million. On September 25, 2000 CWB agreed to a proposal presented by Hunters whereby Hunters would apply for an order pursuant to the *CCAA* and then would attempt to formulate a plan of arrangement acceptable to its creditors. CWB also agreed to provide DIP financing if the *CCAA* Order could be obtained.

42 CWB recognized that it would take Hunters some time to make the initial *CCAA* application. Therefore, it agreed to provide interim financial assistance to cover Hunters' payroll and other critical expenses pending the granting of a *CCAA* order on condition that, if Hunters was successful in obtaining the order and DIP financing, CWB's advances would form part of the DIP financing to be repaid in priority to other creditors.

Position of Canadian Western Bank

43 CWB contends that the Court's inherent jurisdiction is sufficiently broad to allow for an order that pre-*CCAA* advances may be paid from DIP financing. According to CWB, the *CCAA* is remedial legislation that should be given a wide and liberal interpretation in order to effect a practical result. The intention of the legislation is to give corporations facing a business failure breathing room in order to negotiate with creditors.

44 CWB further argues that since its actions were directed toward the preservation of the assets and business of Hunters for the benefit of all creditors, it was appropriate that the advances be reimbursed from the DIP financing. In an affidavit filed in support of the application by CWB, Richard Hallson, a manager of commercial banking for CWB, deposes that it was the opinion of CWB at the time that Hunters was suffering a financial crisis by reason of the seasonal nature of its business and the fact that it was entering into the slowest portion of its business cycle. It was also the opinion of CWB that Hunters had a reasonable prospect of formulating an acceptable and reasonable plan of arrangement.

[2001] A.W.L.D. 482, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 295 A.R. 113

45 CWB argues that the purpose of the *CCAA* should not be frustrated by denying the benefits of the Act to those debtors who cannot finance their minimum expenses while they prepare a *CCAA* application.

Position of Other Secured Creditors

47 CIT takes the position that this Court does not have the jurisdiction to grant super-priority status to advances made before commencement of the *CCAA* as the Court's jurisdiction arises from the *CCAA*. It argues that creation of a super-priority for such charges would result in the reordering of existing priorities and other vested interests established prior to the date the initial Order was issued. CIT suggests that as DIP financing is an extraordinary remedy, there must be clear evidence that its benefits outweigh the potential prejudice to lenders.

48 CIT also contends that principles of fairness dictate that CWB should not be permitted to foist the entire burden of its unilateral decision to continue to support Hunters on the other secured creditors. Accordingly, if the Court determines that it is appropriate to permit payment of this portion of the DIP financing to CWB, such payment should be prorated so that CWB bears its proportionate share of the burden of the DIP financing.

49 Bank of America adopts the submissions of CIT with regard to the pre-October 11, 2000 advances on DIP financing.

Conclusion

50 In *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), the Supreme Court of Canada recognized that there is a limit to the inherent jurisdiction of superior courts, stating at p. 480:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

51 As I have indicated above, I am of the view that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative costs, including those of the monitor and professional advisors of the debtor company. While this jurisdiction is invoked when an initial application is made under the *CCAA*, the Court is not limited to granting a priority only for those costs which arise after the date of the application or initial order. So long as the monies were reasonably advanced to maintain the status quo pending a *CCAA* application or the costs were incurred in preparation for the *CCAA* proceedings, justice dictates and practicality demands that they fall under the super-priority granted by the Court. To deny them priority

[2001] A.W.L.D. 482, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 295 A.R. 113

would be to frustrate the objectives of the *CCAA*.

52 In the present case, it is likely that if the advances had not been made by CWB, Hunters' would have ceased to carry on business. The advances were used to cover Hunters' payroll and for security for the premises. Under these circumstances, I am prepared to order that the advances made by CWB from September 25, 2000 to October 11th be paid out of the DIP financing.

Costs

53 Reynolds, Gillespie, and CWB shall have their costs of this application on a party and party basis.

Order accordingly.

END OF DOCUMENT

TAB 10

Court File No. 05-CL-5886

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE	)	**WEDNESDAY, THE 4TH DAY**
	)	
MR. JUSTICE GROUND	)	**OF MAY, 2005**

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 HUNJAN INTERNATIONAL INC. AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A" HERETO

ORDER

THIS APPLICATION, made by Hunjan International Inc. ("International"), Hunjan Moulded Products Ltd., Hunjan Tools & Mould Ltd. and Hunjan Holdings Ltd. (collectively, the "Applicants", a term which in this Order includes any or all of the Applicants) for an order for the relief set out in the Applicants' Notice of Application was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the Affidavit of Balbir Hunjan sworn May 3, 2005 (the "Affidavit"), the consent of Deloitte & Touche Inc. as proposed monitor of the Applicants, and on hearing submissions of respective counsel for the Applicants, Canadian Imperial Bank of Commerce ("CIBC") and other interested parties;

Service and Filing

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Application and Application Record is abridged so that the application may be heard today and that further service on any interested party is dispensed with.

Application of the CCAA

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are debtor companies to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") applies.

Stay of Proceedings

3. **THIS COURT ORDERS** that during the 30-day period from the date of this Order or during the period of any extension granted by further order of this Court (the "Stay Period") and except as otherwise provided in this Order:

   (a) no person (a term which in this Order includes, without limitation, an individual, corporation, firm, partnership, agent, government, governmental authority, regulatory or administrative body, trade union or any other entity) shall commence, exercise or continue any suit, action, enforcement process, extra-judicial proceeding, right, remedy or other proceeding of any kind against or in respect of an Applicant or any or all present or future rights, property, assets or undertaking of the Applicants, or any of them, whether real or personal, wherever located, and whether held in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise, including, without limitation, any or all real property, personal property or intellectual property of any Applicant or any or all securities, instruments, debentures, notes or bonds issued to or held by or on behalf of any Applicant (collectively, the "Property"), and any and all proceedings previously commenced against or in respect of any of the Applicants or the Property are hereby stayed and suspended; and

(b) all persons are enjoined and restrained from realizing upon or enforcing by court proceedings, private seizure or otherwise, any security of any nature or description held by such person on the Property of any Applicant or from otherwise seizing or retaining possession of any Property.

4. **THIS COURT ORDERS** that during the Stay Period, no person shall assert, enforce or exercise any right (including, without limitation, any right under subsection 224(1.2) of the *Income Tax Act* (Canada) or its provincial equivalents, any right of dilution, registration, attornment, encumbrance, buy-out, divestiture, repudiation, rescission, pre-emptive right of purchase, option to purchase on default, forced sale, acceleration, set-off (other than to the extent permitted to do so pursuant to the provisions of the CCAA or this Order), repossession, revendication, stoppage in transit, distress, conversion, possession, termination, suspension, modification or cancellation or right to revoke or terminate any qualification, agreement, registration or lending or licensing arrangements), option or remedy arising by law (including, without limitation, the registration or enforcement of any lien) by virtue of, under or in respect of any arrangement or agreement, or by any other means:

(a) against any Applicant or any Property;

(b) as a result of any default or non-performance by an Applicant; or

(c) as the result of the making of this Order, the terms of this Order or the filing of these proceedings or any allegation, admission or evidence in these proceedings.

5. **THIS COURT ORDERS** that, during the Stay Period, no person shall, without leave of this Court first being obtained on no fewer than five days notice to the Applicants and every person listed in the then most recent service list established in these proceedings, accelerate, discontinue, suspend, dishonour, fail to renew or extend, alter, modify, interfere with, cancel or terminate any right, contract, lease of real or personal property, licence, permit, joint venture agreement, sales

agreement, bank account and other operating accounts, credit and debit card agreements and any other agreements or arrangements (including, without limitation, any arrangement for the supply of resin or other raw materials or inventory):

(a) in favour of or held by the Applicants or forming part of or in respect of the Property;

(b) as a result of any default or non-performance by the Applicants; or

(c) as a result of the making of this Order, the terms of this Order or the filing of these proceedings or any admission, allegation or evidence in these proceedings.

6. **THIS COURT ORDERS** that all persons having other arrangements or agreements, whether written or oral, with the Applicants, in respect of the occupation by the Applicants of any premises leased, sub-leased, licensed or sub-licensed by the Applicants, are hereby restrained from accelerating, terminating, suspending, modifying, determining, or canceling such arrangements or agreements, notwithstanding any provision therein contained to the contrary, without the prior written consent of the applicable Applicants or leave of this Court. All such persons shall continue to perform and observe the terms, conditions and provisions contained in such agreements on their part to be performed or observed. Without limiting the generality of the foregoing, all persons, including the landlords of premises leased, sub-leased, licensed or sub-licensed by the Applicants, be and they are hereby restrained until further Order of this Court from terminating, suspending, modifying, canceling, disturbing or otherwise interfering in any way with the present or future occupation by the Applicants of any premises leased, sub-leased, or occupied by the Applicants, and the landlords of premises leased or sub-leased by the Applicants are hereby specifically restrained from taking any steps to terminate any lease, sub-lease, occupancy or other agreement, which the Applicants enjoy or to which any of them are a party, whether by notice of termination or otherwise, or to terminate

any ancillary agreements or arrangements, including without limitation, leasehold improvement arrangements with the Applicants, or exercise any other remedies with respect thereto, without prior written consent of the applicable Applicants or leave of this Court, subject to the obligation of the Applicants to pay all amounts constituting rent or payable as rent under the applicable lease for the period commencing from the date of this Order for leased premises occupied by the Applicants, but not in arrears, in accordance with the terms of the applicable lease for such premises.

7. **THIS COURT ORDERS AND DECLARES** that neither the commencement of this proceeding nor the granting of this Order or any supplementary order shall constitute a default or event of default under any agreement, contract or arrangement (in each case whether written or oral) to which any of the Applicants is a party.

8. **THIS COURT ORDERS** that during the Stay Period, no person having any written or oral agreement or arrangement with any of the Applicants or any statutory or regulatory mandate for the supply of goods, equipment, services or licensing rights by or to any Applicant or to any of the Property, including without limitation the supply of resin or other raw materials or inventory, computer hardware or software, electronics, internet, telephone and other telecommunications related services or infrastructure, communication or other data services, leases of real or personal property, rights of way, stock exchange services, insurance including directors' and officers' liability insurance, transportation services, utility services or other required services, by or to the Applicants or the Property shall, without leave of this Court, discontinue, fail to renew on reasonable terms, alter, interfere with, deny access to or use of, cut-off or terminate the supply of goods, equipment, premises or services so long as the normal prices or charges for any goods, equipment, premises and services received after the date of this Order are paid in accordance with current payment practices or any future payment practices hereafter agreed to by the Applicants with the consent of the Monitor (as defined by paragraph 40 of this Order and

hereinafter referred to as the "Monitor"), and that any existing directors' and officers' liability insurance which expires during the Stay Period, to the extent such insurance applies to the directors and officers of any Applicant, provided that the Applicants pay or cause to be paid the premiums at the current rates required under such policies of insurance, shall be deemed to be extended by a period of time equivalent to the duration of the Stay Period unless the applicable insurer, on seven days notice to the Monitor and the Applicants, obtains leave of this Court not to renew such directors' and officers' liability insurance.

9. **THIS COURT ORDERS** that the term of any right, obligation, time period or limitation period relating to the Applicants or the Property that expires or terminates with the passage of time (other than the term of a lease) is extended by a period equivalent to the duration of the Stay Period; for greater certainty, if any of the Applicants become bankrupt or a receiver is appointed in respect of any of them within the meaning of subsection 243(2) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended (the "BIA"), the Stay Period shall not be counted in determining the 30-day period referred to in section 81.1 or the 15-day period referred to in section 81.2 of the BIA.

10. **THIS COURT ORDERS** that, notwithstanding anything contained in this Order, no creditor of the Applicants shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants (including honour for payment any cheque or other order for payment if there are insufficient cleared funds in the applicable account).

11. **THIS COURT ORDERS** that during the Stay Period, no action may be commenced or continued against any of the directors of the Applicants with respect to any claim against the directors that arose before the date of this Order and that relates to any obligations of the Applicants in which the directors are liable or alleged under any law to be liable in their capacity as directors for the payment or performance of such obligations, until such plan or plans as the

Applicants or any of them may propose is or are sanctioned by this Court or refused by the creditors of the Applicants or this Court.

12. **THIS COURT ORDERS** that from 12:01 a.m. (Toronto time) on the date of this Order, to the time of granting this Order, any act or action taken or notice given by creditors or other persons and their agents in furtherance of their rights to commence or continue realization or to take or enforce any step or remedy against the Applicants, including the application of funds in reduction of any debt, set-off or consolidation or combination of accounts (other than to the extent permitted by law), will be deemed not to have been taken or given, as the case may be, subject to the right of such persons to apply to this Court in respect of such step, act, action or notice given, provided that nothing in this Order shall prevent any secured creditor from filing financing statements or financing change statements or prevent any secured creditor from renewing any registrations.

13. **THIS COURT ORDERS** that the Applicants shall be entitled to exercise any rights of set-off and claim any allowances or benefits which they are entitled to claim against amounts payable by the Applicants to any person including, without limitation, amounts payable to any creditor, any supplier of goods or services or any landlord of premises leased or occupied by the Applicants and including rights arising in connection with any agreements or arrangements with any supplier.

13A. **THIS COURT ORDERS** that for the purposes only of paragraphs 3 to 13 of this Order, Property shall include assets in the possession of an Applicant on the date of this Order.

Plan of Compromise or Arrangement

14. **THIS COURT ORDERS** that the Applicants (or one or more of them) shall file with this Court and submit to their or its creditors one or more plans of compromise or arrangement under the CCAA (collectively, a "Plan") between,

inter alia, the Applicants or any of them and one or more classes of their creditors, as the Applicants deem advisable.

15. **THIS COURT ORDERS** that, before the Applicants submit the Plan to the Applicants' applicable creditors, the Applicants shall move for directions concerning the service of the Plan on their applicable creditors and others and the holding of a meeting or meetings with creditors to consider and vote on the Plan.

Carrying on Business

16. **THIS COURT ORDERS** that, subject to the terms of this Order, the Applicants shall remain in possession and control of their Property and shall continue to carry on business in a manner consistent with the preservation of their businesses and Property.

17. **THIS COURT ORDERS** that, subject to the terms of this Order, the Applicants may make the following payments and may take the following steps in carrying on their businesses and in preserving their businesses and Property:

(a) each Applicant may pay for goods and services purchased by it in the ordinary course of its businesses which are delivered to such Applicant on or after the date of this Order and pay for the transportation of such goods (including without limitation all such goods in transit on the date of this Order);

(b) each Applicant may pay to equipment lessors rent and other amounts payable to such lessors in the ordinary course of business in respect of the period on and after the date of this Order pursuant to operating leases of equipment granted to it as lessee provided that the foregoing shall not apply to leases intended as security;

(c) the Applicants may transfer funds to and between other Applicants to meet their respective cash requirements in the ordinary course provided the Monitor or the Court approves such transfers;

(d) each Applicant may make payments or transfer funds to any of the corporations listed in Schedule "B" hereto (collectively, the "U.S. Debtors") only to pay for goods and services delivered to such Applicant by or on behalf of such U.S. Debtor on or after the date of this Order in the ordinary course of business and provided the Monitor approves such payments;

(e) despite subparagraph (d), International may pay to Hunjan Moulded Products (Michigan) Ltd. an amount not exceeding $50,000 per calendar month to enable it to continue its sales activities in the United States on behalf of the Applicants in the ordinary course of business;

(f) the Applicants may make realty tax payments, property and public liability insurance premiums and public utility payments with respect to any and all real properties owned or leased by them (except for such pre-filing amounts related to leased premises); and

(g) the Applicants may pay when due the amounts owing from time to time pursuant to the engagements referred to in paragraph 27.

18. **THIS COURT ORDERS** that, during the Stay Period, all persons with control over any locations and premises where any Property is located shall provide the Applicants and the Monitor with unfettered access to such locations and premises during normal business hours or other agreed-upon times.

19. **THIS COURT ORDERS** that the Applicants may continue to retain, engage and pay their current agents, accountants, advisors, employees, lawyers and consultants, and may retain, engage and pay other persons as they consider reasonably necessary or desirable to carry on their businesses in a manner consistent with this Order and the preservation of their businesses and Property or to carry out the terms of this Order, provided that the Applicants will not enter into any director, employee or officer retention, bonus, incentive or similar agreement without approval of the Monitor and further order of this Court.

20. **THIS COURT ORDERS** that, subject to the terms of this Order, the Applicants may make the following payments:

(a) payments in respect of outstanding and future wages, salaries, vacation pay and employee benefits accrued and accruing due to, or for the benefit of, employees of the Applicants employed by an Applicant on or after the date of this Order, including withholdings and statutory deemed trust amounts, in accordance with existing arrangements to the extent such existing arrangements are required by a collective bargaining agreement or are no less advantageous to the Applicants than the arrangements in effect on the date of this Order;

(b) premiums on existing insurance (including any existing directors' and officers' liability insurance or renewals of such liability insurance, provided that any renewals are approved by the Monitor or the Court);

(c) the reasonable fees and disbursements of the directors of the Applicants paid in accordance with the practice in effect on the date of this Order and as approved by the Monitor or as approved by the Court;

(d) expenses, in addition to those otherwise permitted by this Order, which are reasonably necessary to carry on their businesses in a manner consistent with the preservation of their businesses and Property provided the Monitor consents thereto;

(e) the fees and disbursements of any counsel, auditor, financial advisor or other professional retained by any of the Applicants as of the date hereof in respect of this proceeding and the Plan; and

(f) other payments specifically permitted by this Order.

21. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or shall pay:

(a) all amounts in favour of the Crown in right of Canada or of any province thereof or any other taxation authority which are required to be deducted from employees' wages or other compensation including, without limitation, amounts in respect of employment insurance, Canada Pension Plan, Quebec Pension Plan and income taxes;

(b) amounts accruing and payable by the Applicants in respect of employment insurance, Canada Pension Plan, Quebec Pension Plan, workers compensation, employer health taxes and similar obligations of any jurisdiction with respect to employees;

(c) all goods and services tax and sales taxes payable or collectable by the Applicants in connection with the sale of goods and services by the Applicants on or after the date of this Order;

(d) other requirements of the Applicants similar to those requirements referred to in the foregoing subparagraphs 21(a), (b) and (c), in any jurisdictions where related proceedings may be commenced; and

(e) any payment required to be deposited into, or otherwise held in trust pursuant to applicable laws or regulations.

22. **THIS COURT ORDERS** that, during the Stay Period, except as otherwise provided in this Order or further Order of this Court, the Applicants shall:

(a) subject to subparagraph 20(d), make no payments, whether of principal, interest, accounts payable or otherwise, on account of, or with respect to any amounts owing, as at the date of this Order, by Applicants to any of their respective suppliers or other creditors (or any interest accruing on any such amounts on or after the date of this Order) or owing pursuant to any guarantee by an Applicant or Applicants of payment of any such amount;

(b) make no payments, whether of rent or otherwise, owing by Applicants on account of or with respect to any amounts owing, as of the date of this Order (and no payments of any rent or other amounts payable on or after the date of this Order) pursuant to any lease or agreement in effect on the date of this Order that creates or purports to create a security interest in personal property of an Applicant that secures payment or performance of an obligation;

(c) make no payments to any director, officer or senior management employee of any Applicant except for amounts payable on or after the date of this Order in the ordinary course at the rate or in the same amount as was in effect prior to the date of this Order;

(d) not grant any mortgage, charge, security interest, hypothec, lien or other encumbrance over any of their present or future Property; and

(e) not supply goods or services to any U.S. Debtor except on a cash on delivery or pre-payment basis.

Permitted Restructuring

23. **THIS COURT ORDERS** that to facilitate the orderly restructuring of their respective businesses (the "Restructuring"), the Applicants may with the consent of the Monitor:

(a) permanently or temporarily cease, downsize or shut down operations and locations;

(b) terminate the employment of employees or lay off employees;

(c) abandon premises and terminate or repudiate any leases, licences and any ancillary agreements relating to any leased or licensed real property, on at least ten days prior notice in writing delivered by telecopier or courier to the last known address of the applicable landlord or licensor and to pay all

amounts of rent payable under the applicable lease or licence on a *per diem* basis during such notice period;

(d) terminate or repudiate arrangements, contracts and agreements of any nature whatsoever (including leases of personal property in favour of an Applicant as lessee), whether written or oral, except for any credit agreements, trust indentures, notes, guarantees, security or the DIP Credit Documentation (as hereinafter defined); and

(e) sell inventory out of the ordinary course of business for sales prices not less than the fair market value of such inventory and with the consent of the DIP Lender (as hereinafter defined) but, for greater certainty, nothing herein shall prevent any Applicant from selling any inventory in any amount in the ordinary course of business without the Monitor's consent.

24. **THIS COURT ORDERS** that any sale made pursuant to subparagraph 23(e) of this Order shall be deemed not to be a sale in bulk and shall not be in contravention of any laws of any province of Canada prohibiting, restricting or regulating the sale of such goods, property or assets including, without limitation, the *Bulk Sales Act* (Ontario).

25. **THIS COURT ORDERS** that, the Applicants may provide by agreement or, failing agreement, shall provide in the Plan for the consequences of any steps taken in pursuance of the Restructuring permitted by this Order.

26. **THIS COURT ORDERS** that, in the event a leased or licensed location is vacated or abandoned by an Applicant, the applicable landlord shall be entitled to take possession of the leased or licensed location without waiver of, or prejudice to, any claims or rights of the landlord or licensor against the Applicants in respect of the vacating or abandonment of the location, and the landlord or licensor shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and lease or license the location to third

parties on such terms as the landlord or licensor may determine, subject to the obligation of the landlord or licensor, if any, to mitigate any damages.

27. **THIS COURT ORDERS** that the Applicants shall retain Deloitte & Touche Corporate Finance Inc. (the "Marketing Agent") to conduct a marketing and bid process to explore all feasible alternatives to effect the potential refinancing, restructuring and/or sale of the Applicants and their respective businesses and the Applicants may retain such other consultants as they deem necessary to assist with such process. Such process shall consist of the following procedures and milestones:

(a) on or before May 6, 2005, the Applicants shall have retained the Marketing Agent;

(b) on or before May 10, 2005, the Applicants shall have provided to the DIP Lender the terms and conditions of such process;

(c) on or before May 13, 2005, the Marketing Agent shall have issued teaser letters to potential purchasers, investors and lenders;

(d) on or before May 24, 2005, the Applicants shall have established a data room and prepared a confidential information memorandum in respect of such process;

(e) on or before June 1, 2005, the Applicants shall have received letters of interest for the purchase of the Property, the refinancing of, and/or investment in the Applicants from qualified bidders, lenders or investors;

(f) on or before June 30, 2005, the Applicants shall have entered into a binding agreement or agreements with one or more purchasers, lenders and/or investors; and

(g) on or before July 29, 2005 the Applicants shall have sold the Property or completed the refinancing or investment in the Applicants.

28. **THIS COURT ORDERS** that, subject to the provisions of this Order in furtherance of the Restructuring, the Applicants shall be permitted to carry on their businesses without any interference of any kind and, in the manner and to the extent determined by them, to dispose of any or all of the Property wherever situate without any interference of any kind from landlords (despite the terms of any leases) and, for greater certainty, the Applicants shall have the right to deal with their Property and other assets in such manner and at such locations as they deem suitable or desirable for the purpose of maximizing the proceeds and recovery therefrom and to make provision for the consequences of such actions in the Plan.

Debtor in Possession Facility

29. **THIS COURT ORDERS** that notwithstanding any of the other provisions of this Order, International is hereby authorized and empowered to enter into arrangements to obtain a credit facility (the "DIP Facility") from CIBC (the "DIP Lender") in the maximum total principal amount of $1,000,000, substantially on terms and conditions to be set forth in a commitment agreement between the DIP Lender and International to be filed with the Court, as such agreement may from time to time be amended by the parties thereto with the consent of the Monitor (the "DIP Term Sheet"), to fund the ongoing, ordinary course activities of International and (by way of loans by International to the other Applicants) of the other Applicants and to permit them to pay such amounts as may be permitted by the terms of this Order and the DIP Term Sheet and the DIP Term Sheet is hereby approved, ratified and confirmed and the terms and provisions thereof are binding upon the Applicants.

30. **THIS COURT ORDERS** that International shall be authorized to borrow and otherwise obtain credit from the DIP Lender, in accordance with the DIP Term Sheet, provided that the total outstanding principal amount thereunder does not at any time exceed $1,000,000 and each of the Applicants is hereby authorized and directed to perform all of its obligations under the DIP Term Sheet and the DIP

Credit Documentation (as defined below), and the Applicants shall pay when due all principal and interest under the DIP Facility, provided that nothing in this Order shall oblige the DIP Lender to make any advance to any Applicant.

31. **THIS COURT ORDERS** that International is hereby authorized to borrow, repay and reborrow from the DIP Lender by way of the revolving operating facility referenced in the DIP Term Sheet in such amounts from time to time as International may consider necessary or desirable and in accordance with the terms and provisions of the DIP Term Sheet. The Applicants are hereby authorized and directed to deposit all receipts to their accounts with the DIP Lender and to perform all their obligations to the DIP Lender under the agreements relating to the operation of bank accounts. The DIP Lender is hereby authorized, despite any other provision of this Order, to debit, charge back and set-off from and against the balances in the Applicants' accounts with the DIP Lender and to exercise its rights of combination of accounts against such amounts as may be necessary to repay:

(i) all overdrafts on the accounts, beyond the credit limit established in the DIP Term Sheet;

(ii) any deposits that are dishonoured; and

(iii) all amounts from time to time then payable to the DIP Lender in respect of the DIP Facility,

free and clear of all present and future fixed and floating charges, liens, mortgages, hypothecs and security interests and all other encumbrances and security, including the Charges created by this Order. In respect of the Applicants' accounts with the DIP Lender, the DIP Lender shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken in the operation of the accounts, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the accounts; and the DIP Lender shall

be entitled to provide the banking and credit services without any liability, whether statutory, contractual, trust, proprietary or otherwise, in respect thereof to any person.

32. **THIS COURT ORDERS AND DECLARES** that all Property is hereby charged by:

(a) a fixed and floating charge, mortgage, hypothec, lien and security interest; and

(b) any charge, mortgage, hypothec, lien or security interest included among or contemplated by the DIP Credit Documentation (as defined below),

(the charges, mortgages, hypothecs, liens and security interests referred to in the forgoing paragraphs (a) and (b) being collectively referred to as the "DIP Charge") in favour of the DIP Lender, as security for all present and future indebtedness, obligations and liabilities of the Applicants to the DIP Lender under the DIP Term Sheet, the DIP Credit Documentation (as defined below) and this Order (and any of them) together with all interest, fees, charges and other amounts payable in respect thereof including, without limitation, the fees and disbursements of the DIP Lender's counsel and financial consultants on a full indemnity basis (the "DIP Liabilities").

33. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order, the Applicants are hereby authorized and empowered to execute and deliver such mortgages, charges, hypothecs, security agreements, debentures (collectively, the "DIP Security") and such other agreements, notes, guarantees and documents (together with the DIP Security, the "DIP Credit Documentation") as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender from time to time in respect of the borrowings under the DIP Facility.

34. **THIS COURT ORDERS AND DECLARES** that all encumbrances created or granted under the DIP Security or the DIP Charge shall attach, as of the effective time of this Order, to all Property of each of the Applicants.

35. **THIS COURT ORDERS** that the Applicants shall pay the DIP Lender when due all amounts owing, and shall perform all other obligations of the Applicants to the DIP Lender pursuant to the DIP Term Sheet, the DIP Credit Documentation and this Order (and any of them).

36. **THIS COURT ORDERS AND DECLARES** that, subject to the following, nothing in this Order shall apply to prevent, enjoin, restrain or stay:

(a) any right of the DIP Lender to terminate the making of or refuse to make advances to the Applicants under the DIP Term Sheet and to make demands thereunder, and from issuing any notices of intention to enforce security, notices of powers of sale, notices of disposition or other such notices, and from exercising any acceleration rights or rights of set-off or combination of accounts, or any rights and remedies under the DIP Credit Documentation, the DIP Charge or the DIP Security;

(b) without limiting paragraph (a) above, prevent the DIP Lender from applying to this Court for the appointment of an interim receiver, receiver and manager and/or for the appointment of a trustee in bankruptcy in connection with the enforcement of the DIP Charge and the DIP Security or the payment of the DIP Liabilities or for other relief;

(c) the right of the DIP Lender to receive and apply all amounts received from the Applicants in accordance with the DIP Term Sheet, the DIP Credit Documentation and this Order provided the leave of the Court is first obtained;

(d) the DIP Lender from exercising its rights and remedies as against the Applicants in respect of the DIP Charge and the DIP Credit Documentation; and

(e) the Applicants from paying amounts from time to time on account of the DIP Liabilities to the extent permitted by this Order in accordance with the DIP Term Sheet and the DIP Credit Documentation.

Notwithstanding any other provision of this Order, the DIP Lender shall not enforce any security (or, subject to paragraph 31, exercise any right of set-off or combination of accounts) without the prior leave of this Court, provided that the DIP Lender may deliver to the Applicants demands and notices and exercise acceleration rights without the leave of the Court.

37. **THIS COURT ORDERS AND DECLARES** that the DIP Lender, in such capacity, shall, unless it otherwise agrees, be treated in all respects as an unaffected creditor in these proceedings and in any Plan filed by any Applicant.

38. **THIS COURT ORDERS** that the DIP Lender and its advisors shall be given clear and unfettered access to the books and records of the Applicants and such other information as the DIP Lender and its advisors deem necessary or appropriate.

39. **THIS COURT ORDERS** that no order shall be made varying, rescinding or otherwise affecting the provisions of this Order with respect to the DIP Facility, the DIP Credit Documentation or the DIP Charge unless either: (a) notice of a motion for such order is served on the DIP Lender by the moving party within ten days after such moving party is served with a copy of this Order; or (b) the DIP Lender applies for or consents to such order.

Monitor

40. **THIS COURT ORDERS** that Deloitte & Touche Inc. (the "Monitor") is appointed as an officer of this Court to monitor the businesses and affairs of the Applicants, with all of the powers and obligations set out in the CCAA and the additional powers and obligations set out in this Order.

41. **THIS COURT ORDERS** that the Applicants and their shareholders, officers, directors, employees, agents and representatives shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations, including providing the Monitor with access to the Applicants' books, records, assets and premises as the Monitor requires.

42. **THIS COURT ORDERS** that the Monitor shall:

(a) assist the Applicants in developing and implementing the Plan including, without limitation, participating as the Applicants consider appropriate in discussions and negotiations with creditors, investors, customers or others;

(b) advise and assist the Applicants, to the extent required by the Applicants, in reviewing the Applicants' businesses and assessing opportunities for cost reduction and revenue enhancement, provided that the extent of the retainer and the quantum of the fees for such services shall be subject to the DIP Lender's consent;

(c) advise and assist the Applicants with, and chair any meetings of creditors to consider and vote on the Plan;

(d) assist the Applicants in their preparation of cash flow statements and in their dissemination of financial and other information which may be used in these proceedings, including reporting on such information as may from time to time be required by the DIP Lender;

(e) assist the Applicants, to the extent required by the Applicants, in any shut-down, disposal, distribution, sale or other disposition of any of their respective Property that has been approved by the Monitor and is permitted by this Order;

(f) inquire into and report to creditors, at or prior to any meetings to consider and vote on the Plan, on the financial condition and prospects of the Applicants affected by the Plan;

(g) report to this Court as the Monitor considers appropriate or this Court directs, in respect of the Plan, the Restructuring, the businesses of the Applicants, the validity or priority of security granted by an Applicant, or any other matter deemed by the Monitor or the Court, as appropriate, to be relevant to this proceeding;

(h) otherwise report or provide information to the DIP Lender as may, from time to time, be reasonably requested, with a copy of any written reports to be provided to the Applicants;

(i) monitor all receipts and disbursements of the Applicants on such basis as the Monitor considers appropriate;

(j) have full access to the books, records and key personnel of the Applicants as may be necessary for the completion of its duties under this Order;

(k) be at liberty to give such consents and approvals as are contemplated by this Order or any further Order of this Court and, in doing so, the Monitor may give or withhold such consents and approvals in its reasonable discretion having regard to, among other things, the preservation and orderly restructuring of the Applicants' businesses; and

(l) perform such other duties as are required by this Order or any further Order of this Court.

43. **THIS COURT ORDERS** that the Monitor may engage legal counsel and other agents and advisors (including other members of Deloitte & Touche Inc. or persons affiliated with Deloitte & Touche LLP) as it considers necessary to advise and assist it in the exercise of its powers and discharge of its obligations.

44. **THIS COURT ORDERS** that the Monitor is authorized but not obligated to provide all interested parties, including but not limited to affected creditors pursuant to the Plan, with the Monitor's report or assessment of the Plan. The Monitor is authorized, to the extent requested by the Applicants, to complete valuation and liquidation analyses of the Property of the Applicants or any of them to support its report or assessment of the Plan. The Monitor shall incur no liability as a result of any report or assessment that it may provide pursuant to this Order.

45. **THIS COURT ORDERS** that the Monitor may provide any creditor with any information about the Applicants that the creditor reasonably requests in writing, provided that the Monitor may only provide information that the Applicants advise is confidential with the consent of the Applicants or on the direction of this Court. The Monitor shall have no liability for information provided pursuant to this paragraph.

46. **THIS COURT ORDERS** that the Monitor shall not take ownership or possession of any Property, or control or manage any business or affairs of the Applicants and that it shall not be considered to be an owner or in possession, control or management of any Property or of any business or affairs of the Applicants for any purpose, including without limitation any legislation enacted for the protection of the environment, health or safety or any other statute, regulation or rule of law or equity.

47. **THIS COURT ORDERS** that the appointment of the Monitor shall not constitute the Monitor an employer, successor employer, related employer or payor for any purpose whatsoever including, without limitation, with respect to pensions or employee benefits..

48. **THIS COURT ORDERS** that nothing in this Order shall vest in the Monitor the care, ownership, control, charge, occupation, possession or management (separately and collectively, "Possession"), or require or obligate the Monitor to occupy, or to take Possession of any Property or any source of contaminant which may be environmentally contaminated or contain a dangerous or designated substance or be or contain a pollutant or contaminant or cause or contribute to a spill, discharge, release or deposit of a substance in respect of which obligations of any sort may be imposed under any legislation enacted for the protection or conservation of the indoor or outdoor environment including, without limitation, the *Canadian Environmental Protection Act,* the *Transportation of Dangerous Goods Act,* the *Environmental Protection Act* (Ontario), the *Emergency Plans Act* (1983) (Ontario), the *Ontario Water Resources Act,* the *Occupational Health and*

Safety Act (Ontario) or the regulations thereunder, or under any other federal or provincial legislation, or rule of law or equity in any jurisdiction affecting the indoor or outdoor environment or the transportation of dangerous goods (collectively, "Environmental Laws"). For greater certainty, the Monitor shall not be deemed as a result of this Order to be in Possession within the meaning of any Environmental Laws of any Property or source of contaminant.

49. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the CCAA, elsewhere in this Order, or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the fulfillment of its duties in the carrying out of the provisions of this Order including, without limitation, actions taken by the Monitor in its capacity as foreign representative (if it becomes a foreign representative), except for gross negligence or willful misconduct on its part, and no action or other proceeding shall be commenced against the Monitor as a result of, or relating in any way to its appointment as Monitor or, if applicable, as a foreign representative, respectively, the fulfillment of its duties as Monitor or foreign representative or carrying out of any of the orders of this Court, except with prior leave of this Court on at least seven days notice to the Monitor and its counsel and upon further order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with any such action or proceeding. The entities related to the Monitor and referred to in paragraphs 27 and 43 of this Order shall also be entitled to the protections of this paragraph, *mutatis mutandis*.

50. **THIS COURT ORDERS** that the Monitor shall, within thirty business days after the date of the entry of this Order, send a notice of this proceeding (and any other document or information which the Monitor is requested by International to include in connection with this proceeding or the Plan) to the known creditors of each of the Applicants (other than employees and creditors to which an Applicant owes less than $5,000.00), at their addresses as they appear on the Applicants' records and, in the case of the Applicants' landlords, to the landlords' or landlords' property managers' addresses, advising that such creditors may obtain

a copy of this Order on the internet at a website to be established and maintained by the Monitor and that, if any creditor is unable to obtain it by that means, such creditor may request a copy from the Monitor and the Monitor shall so provide it. Such notice shall constitute sufficient compliance with the applicable requirements of subsection 11(5) of the CCAA.

51. **THIS COURT ORDERS** that, if required by any Applicant, the Applicant may pay to the Monitor funds necessary for payment of goods or services supplied or to be supplied to the Applicant after the date of this Order, and the Monitor shall have the right and authority to make reasonable arrangements (including without limitation, trust or escrow arrangements) for the payment of suppliers in exchange for the delivery of goods or services supplied to the Applicant and, for greater certainty, the Monitor shall not be liable for any obligations or liabilities for the supply of any such goods or services, provided that of any funds placed into trust or escrow arrangements shall be subject to the Charges created in this Order, which Charges shall be discharged only with respect to the amounts of funds actually paid by the Monitor for goods or services supplied.

52. **THIS COURT ORDERS** that the Monitor may apply to this Court for advice and directions in connection with the discharge or variation of its powers and duties under this Order.

Fees and Disbursements of the Monitor and Legal Advisors of the Applicants

53. **THIS COURT ORDERS** that the Applicants shall pay the reasonable fees and disbursements of the Monitor whether in its capacity as a monitor or a foreign representative (including reasonable fees and disbursements of its legal counsel (on a solicitor and his own client full indemnity basis)) and the reasonable fees and disbursements of the Applicants' legal counsel (on a solicitor and his own client full indemnity basis) with respect to the Applicants, this proceeding, any related proceedings in other jurisdictions, the Plan or Plans or the Restructuring, whether such fees and disbursements were incurred before, on or after the making of this Order.

54. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order, the financial advisors to and the counsel for the DIP Lender (collectively, the "Creditor Advisors"), shall be paid, on a timely basis in accordance with their existing arrangements with the Applicants and such other arrangements as may be agreed to hereafter with any of the Applicants, their reasonable fees and disbursements when rendered, on a full indemnity basis and, in the case of counsel for the DIP Lender, on a solicitor and his own client full indemnity basis in accordance with the standard hourly rates of such advisors, whether such fees and disbursements were incurred before, on or after the making of this Order.

55. **THIS COURT ORDERS** that the Applicants may pay to the Monitor, legal counsel to the Monitor and legal counsel to the Applicants, such retainers as may be agreed to by the Applicants to be held by such parties as security for payment of their respective fees and disbursements.

56. **THIS COURT ORDERS** that the Monitor, the Monitor's legal counsel, the Applicants' legal counsel, and the Creditor Advisors may render accounts on a weekly or bi-weekly basis, and the Applicants shall pay such accounts promptly when rendered.

Administration Charges Against Property

57. **THIS COURT ORDERS** that the Monitor, the Monitor's legal counsel and the Applicants' legal counsel are hereby granted a fixed and floating charge, lien and security interest in and against all Property of the Applicants, in the maximum aggregate amount of $1,000,000 (the "Administration Charge") as security for the payment of their reasonable fees and disbursements incurred before, on or after the making of this Order in respect of the Applicants, this proceeding, the Plan or Plans and the Restructuring.

Directors' and Officers' Indemnity

58. **THIS COURT ORDERS** that each Applicant shall indemnify:

(a) each of the present and future directors and officers of such Applicant from and against all costs, claims, liabilities and obligations of any nature whatsoever arising on or after the date hereof actually and reasonably incurred by the director or officer in such capacity with respect to the business and affairs of the Applicants (including without limitation, legal costs on a solicitor and his own client full indemnity basis) as a result of his or her position or involvement with the Applicants on or after the date hereof and based on an event or events first occurring on or after the date hereof (including, without limitation, any amount with respect to any environmental claim by whomsoever sought and any amount paid to settle an action or satisfy a judgment in a civil, criminal or administrative action or proceeding to which he or she may be made a party by reason of being or having been a director, officer or person who manages the business of an Applicant), provided that the director or officer:

(i) acted honestly and in good faith with a view to the best interests of the Applicant; and

(ii) in the case of a criminal or administrative action, had reasonable grounds for believing his or her conduct was lawful,

except to the extent that the director or officer has been oppressive, grossly negligent or guilty of willful misconduct; and

(b) each of the present and future directors and officers of such Applicant from and against all costs, claims, liabilities and obligations which any director or officer of an Applicant sustains or incurs by reason of, or in relation to his or her capacity as a director or officer of an Applicant (including, without limitation, legal costs on a solicitor and his own client full indemnity basis) relating to the failure of the Applicants or any of them at any time to pay any obligations or amounts incurred after the making of this Order in respect of which the director or officer may be liable in his or her capacity as such referred to in paragraphs 20(a), 21(a),

21(b), 21(c), 21(d), 21(e) or 21(f) of this Order or incurred prior to the making of this Order in respect of the matters referred to in paragraph 20(a), any obligation or payment owing to former employees in respect of employee entitlements referred to in paragraph 20(a), or any obligation with respect to goods and services tax or sales taxes, except to the extent that the director or officer has been grossly negligent or guilty of willful misconduct,

provided that this paragraph shall not constitute a contract of insurance and shall not constitute other valid and collectible insurance (as such term or a similar term may be used in any policy of insurance issued in favour of, or for the benefit of the Applicants or any of their directors or officers).

Charge for Directors and Officers

59. **THIS COURT ORDERS** that, as security for the obligations of the Applicants to indemnify directors and officers of the Applicants pursuant to paragraph 58, the directors and officers of the Applicants are hereby granted a fixed and floating charge, lien and security interest in and against all Property of the Applicants, to a maximum aggregate amount of $1,000,000 (the "Directors' Charge").

Charges Against Property

60. **THIS COURT ORDERS** that the Applicants shall execute the documents and take the other actions necessary or appropriate to give effect to the Administration Charge, the DIP Charge and the Directors' Charge (collectively, the "Charges" and individually, a "Charge").

61. **THIS COURT ORDERS** that each Charge shall attach to all present and future Property of all Applicants, including any lease, sublease, offer to lease or other contract, except that the Charge shall not attach to the last day of the term of any lease of real property or to any such lease, sublease, offer to lease, or other contract to the extent that such attachment would constitute a breach of its terms or permit a party to terminate such agreement. If the Charge does not attach to any

Property in accordance with this paragraph, the Applicants shall hold their interests in such lease, sublease, offer to lease or other contract or any proceeds therefrom in trust for the chargees of the Charges and shall assign such interests to such chargees or their assignees upon obtaining the required consent or upon order of the Court.

62. **THIS COURT ORDERS** that each of the Charges has priority over all mortgages, charges, security interests, liens and encumbrances (collectively, "Encumbrances" and individually, an "Encumbrance") of any kind or nature in or against any of the Property of the Applicants, subject to applicable prior statutory liens.

63. **THIS COURT ORDERS** that, except as otherwise expressly provided for herein, the Applicants shall not grant any Encumbrance of any Property that ranks in priority to, or *pari passu* with, any of the Charges unless the Applicants obtain the prior written consent of the DIP Lender and approval of the Court.

64. **THIS COURT ORDERS** that none of the Charges, the obligations of the Applicants pursuant to the Charges, or any of the documents delivered pursuant thereto, shall be illegal, invalid or non-binding obligations of the Applicants or otherwise be rendered unenforceable against the Applicants or any of the Property, nor shall they be void or voidable by creditors or shareholders of any of the Applicants, a trustee in bankruptcy of any of the Applicants or any other person, by reason of:

(a) the pendency of these proceedings and the declarations of insolvency made herein;

(b) the pendency of any petitions for a receiving order or any receiving orders issued under the BIA in respect of the Applicants, or any assignment under the BIA being made or deemed to have been made; or

(c) the provisions of any federal or provincial law.

65. **THIS COURT ORDERS** that the Charges have relative priority as follows:

(a) firstly, the Administration Charge;

(b) secondly, the DIP Charge; and

(c) thirdly, the Directors' Charge.

66. **THIS COURT ORDERS** that if the persons entitled to the Administration Charge or the Directors' Charge have claims that in the aggregate exceed the authorized amount of such Charge, they shall share in the benefit of such Charge on a *pro rata* basis but in any event subject to the applicable aggregate maximum authorized amount.

67. **THIS COURT ORDERS** that none of the beneficiaries of the Charges shall be required to file, register, record or perfect the Charges, notice thereof or any financing statement with respect thereto and that each of the Charges shall be valid and enforceable for all purposes against all existing and after-acquired Property for all purposes, with priority over any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, despite any failure to file, register, record or perfect the Charges, notice thereof, or any financing statement with respect thereto. Despite anything in this Order, the beneficiaries of the Charges may take such steps as they deem necessary or appropriate to register, record or perfect the Charges, notice thereof or any financing statement with respect thereto, if they deem it advisable to do so.

68. **THIS COURT ORDERS** that the creation of the Charges and any payments made by the Applicants, and any agreements, instruments or other documents delivered pursuant to this Order, do not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable or reviewable transactions under any applicable law.

69. **THIS COURT ORDERS** that none of the Charges, the DIP Facility, the DIP Credit Documentation or the DIP Security, shall be, or be deemed to be, invalid or

ineffective by reason of any negative covenants, prohibitions or other similar provisions with respect to incurring debt or other obligations or the creation of any Encumbrance contained in any agreement to which any of the Applicants are party and, despite any provision to the contrary in such agreements:

(a) none of the Charges, the obtaining of the DIP Facility, or the creation of any of the DIP Credit Documentation, nor the execution, delivery, perfection or registration of any agreements, instruments or other documents delivered pursuant thereto shall create or be deemed to constitute a breach by the Applicants of any agreement to which they are party; and

(b) no person shall have any liability to any other person whatsoever as a result of any breach of any agreement caused by or resulting from the Charges, the obtaining of the DIP Facility, the creation of any of the DIP Credit Documentation or the execution, delivery or registration of any agreements, instruments or other documents delivered pursuant thereto.

Privacy

70. **THIS COURT ORDERS AND DECLARES** that, pursuant to subsection 7(iii)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, in the course of the restructuring process, including any sale, refinancing or other transaction, the Applicants shall be permitted to disclose personal information in respect of identifiable individuals in their possession or control to stakeholders or prospective purchasers or bidders for, and investors or strategic parties interested in, all or part of the businesses of any one or more of the Applicants or all or part of any Property of any of the Applicants, and to their advisors (collectively, the "Third Parties"), to the extent desirable or required to negotiate and complete the restructuring process or any such transaction, provided that the persons to whom such personal information is disclosed enter into confidentiality agreements with the Applicants binding them to maintain and protect the privacy of such information and to limit the use of such information to

the extent necessary to complete the restructuring or such transaction then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Applicants or destroyed. In the event that a Third Party acquires personal information as part of the restructuring or as part of any such transaction, such Third Party shall be entitled to continue to use the personal information in a manner which is in all material respects identical to the use of such personal information by the Applicants.

Service of Orders, Notices and Other Documents

71. **THIS COURT ORDERS** that the Applicants be and are at liberty to serve this Order, any other orders in this proceeding, the Plan, any notices of meetings and all other notices, and to deliver any letters to creditors, information circulars, proofs of claim, proxies and disallowances of claims, by forwarding true copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors at their respective addresses as last shown on the records of the Applicants and that any service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding or, if sent by ordinary mail, on the third business day after mailing.

72. **THIS COURT ORDERS** that the Applicants, the Monitor, CIBC or any other party in these proceedings that has served a Notice of Appearance on the solicitors for the Applicants may serve any Court materials (including, without limitation, application records, motion records, facta and orders) electronically, by e-mailing a PDF or other electronic copy of such materials (other than any book of authorities) to counsels' e-mail addresses as recorded on the service list; provided that such party shall deliver hard copies of full materials to any other party requesting same as soon as practicable thereafter.

Effect, Recognition, Assistance

73. **THIS COURT ORDERS** that this Order and any other order in this proceeding shall have full force and effect in all provinces and territories in Canada, outside Canada and against all persons against whom they may be enforceable.

74. **THIS COURT ORDERS** that this Court requests the assistance of other courts in Canada in accordance with section 17 of the CCAA, and requests that the Federal Court of Canada and the courts and judicial, regulatory and administrative bodies of or constituted by the provinces and territories of Canada, the Parliament of Canada, the United States, the states and other subdivisions of the United States and other nations and states act in aid of and be complementary to this Court in carrying out the terms of this Order and any other order in this proceeding.

Effective Time

75. **THIS COURT ORDERS** that this Order shall be effective from 12:01 a.m. (Toronto time) on the date of this Order.

Directions, Further Relief and Variation

76. **THIS COURT ORDERS** that any interested person may apply to this Court to vary, rescind or amend this Order or to seek other relief on seven days notice (or such other notice, if any, as this Court may order) to the respective counsel of each of the Applicants, the Monitor and the DIP Lender and to any other person likely to be affected by this Order or by the relief sought.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAY 04 2005

PER/PAR:

SCHEDULE "A"

Hunjan Moulded Products Ltd.

Hunjan Tools & Mould Ltd.

Hunjan Holdings Ltd.

SCHEDULE "B"

List of U.S. Debtors

Hunjan Holdings (U.S.A.) Ltd.

Hunjan Moulded Products (Michigan) Ltd.

Hunjan Moulded Products (Alabama) Ltd.

Court File No: 05-CL-

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 Hunjan International Inc. et al.

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding Commenced At Toronto

O R D E R

FRASER MILNER CASGRAIN LLP
Barristers and Solicitors
P.O. Box 100, 1 First Canadian Place
Toronto, Ontario M5X 1B2

R. Shayne Kukulowicz
LSUC No.: 30729S
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E-mail: shayne.kukulowicz@fmc-law.com

Solicitors for the Applicants

TAB 11

NOTARIAL CERTIFICATE OF TRUE COPY

CANADA	)	**TO ALL TO WHOM THESE PRESENTS**
	)	
PROVINCE OF ONTARIO	)	**MAY COME, BE SEEN OR KNOWN**
	)	
TO WIT:	)	
	)	
	)	

I, MELANEY J. WAGNER

a Notary Public, in and for the Province of Ontario, by Royal Authority duly appointed, residing at the Town of Oakville, in said Province,

DO CERTIFY AND ATTEST that the paper-writing hereto annexed is a true copy of a document produced and shown to me and purporting to be an Order of the Ontario Superior Court of Justice granted by the Honourable Mr. Justice Morawetz on June 16, 2008, the said copy of the Order having been compared by me with the said copy of the original document, an act whereof being requested I have granted under my Notarial Form and Seal of Office to serve and avail as occasion shall or may require.

IN TESTIMONY WHEREOF I have hereto subscribed my name and affixed my Notarial Seal of Office at Toronto this 16th day of June, 2008.

A Notary Public in and for the Province of Ontario

GOODMANS\\5601900.1

Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 16TH
	)	
JUSTICE MORAWETZ	)	DAY OF JUNE, 2008

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 MULTY INDUSTRIES INC. AND THE COMPANIES LISTED ON SCHEDULE "A" HERETO (collectively, the "Applicants")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Derek Erdman sworn June 12, 2008 and the Exhibits thereto and the Report of RSM Richter Inc. as proposed Monitor dated June 13, 2008 and on hearing the submissions of counsel for the Applicants, and counsel for Wachovia Capital Finance Corporation (Canada) and Wachovia Bank, National Association (collectively, the "**Bank**") and on reading the consent of RSM Richter Inc. to act as Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that each of the Applicants is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**") between, *inter alia*, the Applicants and one or more classes of its secured and/or unsecured creditors as it deems appropriate.

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (collectively, the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their businesses (collectively, the "**Business**") and Property. The Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that all Persons (as defined in paragraph 18 of this Order), including, without limitation, third party finishers, shall forthwith advise the Applicants and the Monitor of any Property (including, without limitation, raw materials and molds owned by the Applicants) in such Person's possession or control, shall grant immediate and continued access to the Property to the Applicants and shall deliver all such Property to the Applicants immediately upon the Applicants' request.

6. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of Derek Erdman sworn June 12, 2008 (the "**Erdman Affidavit**") (the "**Cash Management System**")

and that the Bank and the Bank of Nova Scotia ("**BNS**") and any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide and operate the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. **THIS COURT ORDERS AND DIRECTS** that BNS, as a provider of the Cash Management System, shall stop payment on any outstanding cheques issued in respect of the Business prior to the date hereof upon the written request of the Applicants.

8. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay, bonuses to arm's length employees and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges; and

(c) costs and expenses that are deemed necessary for the preservation of the Property and/or the Business by the Applicants with the consent of the Monitor.

9. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

10. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan and (iii) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

11. **THIS COURT ORDERS** that until such time as the Applicants repudiate a real property lease in accordance with paragraph 13(c) of this Order, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated by the Applicants

from time to time ("**Rent**"), for the period commencing from and including the date of this Order, bi-weekly, in advance (but not in arrears).

12. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

13. **THIS COURT ORDERS** that the Applicants shall have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $1,000,000 in the aggregate, subject to paragraph (c), if applicable;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) subject to the terms of this Order, vacate, abandon or quit the whole but not part of any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days' notice in writing to the relevant landlord, and pay any Rent, but not arrears of Rent, owing for the whole of the notice period to the relevant landlord, on such terms as may be agreed upon between the Applicants and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan, provided that any such repudiations will be conducted under this paragraph (c);

(d) repudiate such of its arrangements or agreements of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may

be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; and

(e) pursue all avenues of refinancing and offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a), above),

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

14. **THIS COURT ORDERS** that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further Order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants repudiate the lease governing such leased premises in accordance with paragraph 13(c) of this Order, they shall not be required to pay Rent under such lease pending resolution of any such dispute, and the repudiation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

15. **THIS COURT ORDERS** that if a lease is repudiated by the Applicants in accordance with paragraph 13(c) of this Order, then (a) during the notice period prior to the effective time of the repudiation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the effective time of the repudiation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on

which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

16. **THIS COURT ORDERS** that, subject to the other provisions of this Order (including the payment of Rent as herein provided) and any further Order of this Court, the Applicants shall be permitted to dispose of any or all of the Property located (or formerly located) at such leased premises without any interference of any kind from landlords and, for greater certainty, the Applicants shall have the right to realize upon the Property and other assets in such manner and at such locations, including leased premises, as they deem suitable or desirable for the purpose of maximizing the proceeds and recovery therefrom.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

17. **THIS COURT ORDERS** that until and including July 16, 2008, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

18. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) exempt the Applicants from compliance with statutory or regulatory provisions relating to health,

safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

19. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

20. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with any of the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, third party finishing services, conversion of raw materials services, freight services, all computer software, communication and other data services, centralized banking services, payroll services, insurance (including without limitation, directors' and officers' liability insurance and general liability insurance), transportation, services, utility or other services to the Business or any of the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

21. **THIS COURT ORDERS** that, without limiting paragraph 20 hereof, all Persons providing freight services to the Applicants shall deliver all shipments relating to the Applicants or their Business or Property in transit as at the date hereof (the "**In Transit Shipments**") in accordance with the arrangements and delivery instructions in place with respect to the In Transit Shipments. The Applicants are hereby directed to pay to the

applicable freight provider the freight costs associated with the In Transit Shipments within five (5) business days following the date hereof.

NON-DEROGATION OF RIGHTS

22. **THIS COURT ORDERS** that, notwithstanding anything else contained herein, but subject to paragraph 37 of this Order, no creditor of the Applicants shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

23. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

24. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers from all claims, costs, charges and expenses relating to the failure of the Applicants, after the date hereof, to make payments of the nature referred to in subparagraphs 8(a), 10(a), 10(b) and 10(c)of this Order which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers of the Applicants except to the extent that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct.

25. **THIS COURT ORDERS** that, as security for the indemnity provided in paragraph 24 of this Order, the directors and officers of the Applicants shall be entitled to the benefit of and

are hereby granted a charge on the Property (the "**Directors' Charge**"), including, without limitation, a charge on the real property municipally known as 100 Pippin Drive, Concord, Ontario (the "**Owned Real Property**") that will be in addition to the charge limited to the principal amount of $7.5 million plus interest and costs that is registered against the real property in favour of the Bank. The Directors' Charge shall not exceed an aggregate amount of $1,000,000 and shall have the priority set out in paragraphs 40 and 42 herein.

26. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 24 of this Order.

APPOINTMENT OF MONITOR

27. **THIS COURT ORDERS** that RSM Richter Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the Applicants' conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their respective shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

28. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the Bank and its advisors of financial and other information as agreed to between the Applicants and the Bank which may be used in these proceedings, including reporting on a basis to be agreed with the Bank;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the Bank, which information shall be reviewed with the Monitor and delivered to the Bank and its advisors on a periodic basis as agreed to by the Bank;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the books, records and management, employees and advisors of the Applicants and to the Business and the Property to the extent required to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan;

(j) to act as foreign representative in any proceedings under Chapter 15 of the United States Bankruptcy Code or under any similar laws or legislation of any other country; and

(k) perform such other duties as are required by this Order or by this Court from time to time.

29. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the

Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

30. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

31. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants, including the Bank, with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

32. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this

Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

33. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor (including, without limitation, Canadian and U.S. counsel) and counsel to the Applicants (including, without limitation, Canadian and U.S. counsel) shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Monitor, counsel for the Monitor and counsel for the Applicants are hereby directed to render accounts to the Applicants (with copies to the Bank) bi-weekly and the Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a bi-weekly basis. In addition, the Applicants are hereby authorized to pay to (i) the Monitor and its counsel, and (ii) counsel to the Applicants, retainers in the amounts of $52,500 and $26,250, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

34. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

35. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, if any, and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings; provided that the Administration Charge shall not secure any fees or disbursements of the Monitor, Monitor's counsel or the Applicants' counsel that are not billed within sixty (60) days of the incurrence of such fees and disbursements. The Administration Charge shall have the priority set out in paragraphs 40 and 42 hereof.

FINANCING

36. **THIS COURT ORDERS** that the Forbearance Agreement dated as of June 6, 2008 among the Bank and the Applicants (the "**Forbearance Agreement**") is hereby authorized and approved.

37. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to borrow under the existing revolving facility provided by the Bank to certain of the Applicants pursuant to a Credit Agreement dated June 29, 2007, as amended pursuant to a first amendment to the Credit Agreement dated December 14, 2007 and pursuant to the Forbearance Agreement (collectively, the "**Amended Credit Agreement**"), on the terms and conditions set out in the Amended Credit Agreement, such funds as are required in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures.

38. **THIS COURT ORDERS** that the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Bank under and pursuant to the Amended Credit Agreement as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

39. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the Bank shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), with respect to any advances made under the Forbearance Agreement or the Amended Credit Agreement;

(b) upon the expiry of the Forbearance Period (as defined in the Forbearance Agreement), the Bank may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Amended Credit Agreement and the existing security held by or on behalf of the Bank in respect of the Applicants (the "**Existing Security**"), but subject to the priorities as set out in paragraphs 40 and 42 of this Order; and

(c) the foregoing rights and remedies of the Bank shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

40. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge and the Existing Security, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – Directors' Charge on the Owned Real Property (to the maximum amount of $500,000);

Third – the Existing Security; and

Fourth – Directors' Charge on the Property (including, without limitation, the Owned Real Property) (to the maximum amount of $500,000).

41. **THIS COURT ORDERS** that the filing, registration or perfection of the Directors' Charge and the Administration Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

42. **THIS COURT ORDERS** that each of the Directors' Charge and the Administration Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person provided that any priority over the Existing Security is to the limits as set forth at paragraph 40.

43. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge or the Administration Charge, unless the Applicants also obtain the prior written consent of the

Monitor and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

44. **THIS COURT ORDERS** that the Directors' Charge, the Administration Charge and the Forbearance Agreement shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery or performance of the Forbearance Agreement shall create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Applicants pursuant to this Order, the Forbearance Agreement and the granting of the Charges do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

45. **THIS COURT ORDERS** that notwithstanding anything contained in this Order to the contrary, the charge purported to be created over leases of real property shall not be effective to create any interest in real property (including any leasehold interest) and shall only apply to the proceeds of such real property leases.

SEALED DOCUMENTS

46. **THIS COURT ORDERS** that all unaudited, internal financial statements pertaining to the Applicants submitted in support of the Erdman Affidavit (the "**Financial Statements**") and the Forbearance Agreement shall be treated as confidential, sealed and shall not form part of the public record until further Order of this Honourable Court.

SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Applicants shall, within ten (10) business days of the date of entry of this Order, send a notice of the issuance of this Order and that a copy of this Order has been posted on the Monitor's website (www.rsmrichter.com) to the Applicants' known creditors, other than employees and creditors to which the Applicants owe less than $1,000, at their addresses as they appear on the Applicants' records, and shall promptly send (a) a notice of this Order and that a copy of this Order has been posted on the Monitor's website to all parties filing a Notice of Appearance in respect of this Application, and (b) a notice that a copy of this Order has been posted on the Monitor's website to any other interested Person requesting a copy of this Order, and the Monitor is relieved of its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process.

48. **THIS COURT ORDERS** that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

49. **THIS COURT ORDERS** that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial

List to the extent practicable, and the Monitor may post a copy of any or all such materials on its website at www.rsmrichter.com.

GENERAL

50. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

51. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

52. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

53. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

54. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

55. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.

Joanne Nicoara
Registrar, Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 16 2008

PER/PAR: JSN

SCHEDULE "A"

Multy Industries (USA) Inc.

1291945 Ontario Inc.

1306943 Ontario Limited

1444240 Ontario Inc.

Multy Industries Flexible Products Group Inc.

Multy Industries (U.S.A.), Inc.

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 MULTY INDUSTRIES INC. AND THE COMPANIES LISTED ON SCHEDULE "A" HERETO

Applicants

Court File No.: _____

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

Proceeding commenced at Toronto

INITIAL ORDER

Goodmans LLP
Barristers & Solicitors

250 Yonge Street, Suite 2400
Toronto, Canada M5B 2M6

Joseph Pasquariello (LSUC# 37389C)
Melaney J. Wagner (LSUC# 44063B)

Tel: 416.979.2211
Fax: 416.979.1234

Solicitors for the Applicants

TAB 12

Court File No. 06-CL-6241

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	WEDNESDAY, THE 18th
	)	
MR. JUSTICE FARLEY	)	DAY OF JANUARY, 2006

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

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

INITIAL ORDER

THIS APPLICATION made by MuscleTech Research and Development Inc. and those entities listed on Schedule "A" hereto (collectively, the "**Applicants**") for an Order substantially in the form attached at Tab 5 of the Application Record herein was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the Affidavit of Barry Kadoch sworn January 13, 2006 and the exhibits thereto (the "**Affidavit**"), the Report of RSM Richter Inc. ("**Richter**") dated January 13, 2006, the consent of Richter to act as monitor (the "**Monitor**") of the Applicants as contemplated hereunder, all filed, and on hearing submissions of respective counsel for: (i) the Applicants; (ii) the Monitor; (iii) Paul Timothy Gardiner ("**Gardiner**"); and (iv) Iovate Health Sciences Group Inc. and each of those entities listed on Schedule "B" hereto (collectively, the "**Iovate Companies**"), and on being advised that none of the other persons who might be interested in these proceedings was served with the Notice of Application or the

Application Record herein, and on being satisfied that circumstances exist that make the granting of this Order appropriate.

Service

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Application and Application Record herein be and it is hereby abridged so that the application may be heard today and that further service on any interested party is hereby dispensed with.

Application of the CCAA

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are debtor companies to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") applies.

Plan of Arrangement

3. **THIS COURT ORDERS** that, in order to facilitate the orderly restructuring of their business and affairs (the "**Restructuring**"), the Applicants may pursue any and all restructuring strategies, including negotiating the settlement or other resolution of the Product Liability Litigation (as defined below).

4. **THIS COURT ORDERS** that, in connection with the Restructuring, the Applicants shall have the exclusive authority to prepare and file, and are hereby authorized and permitted to prepare and file, with this Court and to submit to their creditors one or more plans of compromise or arrangement under the CCAA (a "**Plan**") between, *inter alia*, the Applicants and one or more classes of their creditors as the Applicants or any of them may deem appropriate on or before the expiry of the Stay Period (as defined below) or such later time or times as may be allowed by this Court.

5. **THIS COURT ORDERS** that the Monitor or the Applicants may apply to this Court for an Order or Orders establishing a claims process for the purposes of calling for claims, voting on a Plan and specifying the materials necessary to summon and convene meetings between the Applicants and their respective class or classes of creditors under a Plan to consider and approve a Plan.

Stay of Proceedings

6. **THIS COURT ORDERS** that, effective from 12:00 a.m. on the date hereof up to and until 11:59 p.m. on Friday, February 17, 2006, or such later date or dates that may be provided for in further Orders of this Court (the "**Stay Period**") and except as otherwise provided in this Order:

(a) *Stay of Proceedings:* no person (which term, in this Order, includes, without limitation, an individual, corporation, firm, partnership, agent, government, governmental authority, regulatory or administrative body, trade union or any other entity) shall commence, exercise or continue any suit, action, private seizure, collection, proceeding, enforcement process, realization, judicial or extra-judicial proceeding, right, remedy or other proceeding of any kind in Canada, the United States of America or elsewhere (a "**Proceeding**"), including, without limitation, the Product Liability Litigation (as defined below), against or in respect of the Applicants, or any of them, or their respective directors, officers, or employees or in respect of any present or future rights, property, assets or undertaking of the Applicants, whether real or personal, wherever located, and whether held in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise (collectively, the "**Property**"), including, without limitation, any or all intellectual property of the Applicants, or any of them, and any and all Proceedings previously commenced against or in respect of the Applicants or their respective Property are hereby stayed, restrained and suspended. Without limiting the foregoing, the right of any person (including, without limitation, any authority with jurisdiction to levy taxes) to commence or continue Proceedings in respect of any encumbrance, tax, lien, security interest, charge, mortgage, guarantee, attornment of rents, hypothecation, pledge or other security or proprietary interest held in relation to, or any trust attaching to or deemed to attach to or comprise any of the Property (collectively, "**Encumbrances**" and each an "**Encumbrance**"), is hereby stayed, restrained, and suspended. "**Product Liability Litigation**" means all Proceedings in the

United States of America in which the Applicants, Gardiner, the Paul Gardiner Family Trust (the "**Trust**"), the Iovate Companies and/or the officers and directors of the Applicants and/or the Iovate Companies have been named as defendants in connection with the past or present business or Property of the Applicants, including the research, marketing, manufacture, distribution and sale of products containing any one or more of the following ingredients: ephedra or prohormones;

(b) *Extra-Judicial Proceedings*: without limiting the foregoing, all persons are hereby restrained from exercising any extra-judicial remedy against the Applicants, or any of them;

(c) *Exercise of Rights*: the right of any person to assert, enforce or exercise any Rights (as defined below), where such Rights arise out of, relate to or are triggered by: (i) the occurrence of any breach, default, event of default, non-fulfillment or non-performance by any of the Applicants of or relating to any covenant, representation, warranty, agreement or obligation of such Applicant, whether under any Agreement (as defined below) or otherwise; (ii) the insolvency of any of the Applicants; (iii) the making or terms of this Order; (iv) the commencement of these proceedings; or (v) any admission, allegation or evidence contained in these proceedings (collectively, a "**Default**"), is hereby stayed, restrained, and suspended. "**Rights**" mean any rights, options or remedies available to any person against or in respect of any of the Applicants or any of the Property, including, without limitation, any rights:

(i) to make any demand, to send any notice, to crystallize any security interest, to exercise any pre-emptive first right, interfere with the Applicants' quiet possession of any Property, or otherwise deal with any Property;

(ii) under subsection 224(1.2) of the Income Tax Act (Canada) or its provincial equivalents; or

(iii) of dilution, buy-out, divestiture, repudiation, rescission, revendication, resiliation, set-off (other than to the extent permitted to do so pursuant to the provisions of the CCAA), pre-emptive right of purchase, option to purchase on default, seizure, forced sale, distress, foreclosure, acceleration, termination, suspension, modification, cancellation, possession, repossession, stoppage in transit of any goods supplied by or shipped to any of the Applicants, non-renewal or non-extension,

whether arising under or in respect of any arrangement, agreement, contract, right, permit, license or lease (whether of real or personal property), oral or written, to which the Applicants, or any of them, are a party or in which the Applicants, or any of them, have an interest (an "**Agreement**"), but excluding, for greater certainty, any eligible financial contract within the meaning of the CCAA, or otherwise;

(d) *Non-Interference with Agreements:* no person party to any Agreements with or in favour of the Applicants, or any of them, or forming part of or in respect of any of the Property, shall, without leave of this Court first being obtained:

(i) accelerate, discontinue, suspend, withdraw, dishonour, fail to renew or extend on reasonable terms, amend, modify, cut-off, interfere with, deny access to or use of, cancel or terminate (collective, "**Change**") any Agreement with, in favour of or held by the Applicants, or any of them, or forming part of or in respect of any of the Property, as a result of a Default, and all persons having Agreements with, in favour of or held by the Applicants, or any of them, shall continue to perform and observe the terms and conditions contained in such Agreements (including, without limitation, the payment of all sums to be paid in respect of goods or services provided or to be provided by the Applicants);

(ii) Change any licences, royalty arrangements, permits or approvals or rights relating to uses of product or brand names issued or granted to the Applicants, or any of them, whether under any license agreements or

otherwise or in connection with any of the Property and from pursuing any rights or remedies arising thereunder;

(iii) Change any such Agreements or pursuing any Rights thereunder or in respect thereof without the prior written consent of the Applicants, or any of them, and concurrence of the Monitor or leave of this Court; or

(iv) Change any utility or required services (including telephone, at existing telephone numbers, facsimile or other communications services at the present numbers used by the Applicants, or any of them, in respect of any of the Property), the furnishing of oil, gas, water, heat or electricity, the supply of equipment, computer software, hardware support and electronic, internet, electronic mail and other data services,

so long as the Applicants pay 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 Applicants shall have no obligation to pay or grant) for such goods and services received after the date of this Order as the same become due and payable in accordance with present payment practices, or as may be hereafter agreed by the Applicants from time to time; and provided further 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

(e) *Directors and Officers:* no Proceedings may be commenced or continued against any of the former, present or future directors or officers of the Applicants, or any of them, including the Product Liability Litigation, with respect to any claim against such directors or officers that arose before the date of this Order and that relates to any obligations of any of the Applicants in which the directors or officers are liable or alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until the expiry of the Stay Period. Any existing directors' and officers' liability insurance that expires during the Stay Period, to the extent such insurance applies to the

directors and officers of the Applicants and provided that the Applicants pay or cause to be paid the premiums at the current rates required under such policies of insurance, shall be deemed to be extended by a period of time equivalent to the duration of the Stay Period unless the applicable insurer obtains leave of this Court not to renew such directors' and officers' liability insurance.

7. **THIS COURT ORDERS** that nothing herein shall exempt the Applicants from compliance with applicable statutory or regulatory provisions relating to health, safety or the environment.

8. **THIS COURT ORDERS** that the term of any Right, obligation, time period or limitation period relating to the Applicants, or any of them, or any of the Property that expires or terminates with the passage of time (other than the term of a lease) is extended by a period equivalent to the duration of the Stay Period; for greater certainty, if the Applicants, or any of them, become bankrupt or a receiver is appointed in respect of the Applicants within the meaning of subsection 243(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), the Stay Period shall not be counted in determining the 30-day period referred to in Section 81.1 or the 15-day period referred to in Section 81.2 of the BIA, provided that this paragraph shall not be construed to extend the term of any lease that expires during the pendency of such stay of proceedings.

9. **THIS COURT ORDERS** that, notwithstanding anything contained in this Order, no person shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants, or any of them (including honour for payment any cheque or other order for payment if there are insufficient cleared funds in the applicable account).

10. **THIS COURT ORDERS** that from 12:01 a.m. (Toronto time) on the date of this Order, to the time of granting this Order, any act or action taken or notice given by creditors or other persons and their agents in furtherance of their rights to commence or continue realization or to take or enforce any step or remedy against the Applicants, or any of them, including the application of funds in reduction of any debt, set-off or consolidation or combination of accounts (other than to the extent permitted by law), will be deemed not to have been taken or given, as

the case may be, subject to the right of such persons to apply to this Court in respect of such step, act, action or notice given.

11. **THIS COURT ORDERS** that nothing in this Order shall prevent any secured creditor from filing financing statements or financing change statements under applicable legislation, nor prevent any secured creditor from renewing any existing registrations. Subject only to the foregoing, no Encumbrances shall be registered against the Applicants, or any of them, or any of the Property during the Stay Period without the prior written consent of the Monitor or leave of this Court.

12. **THIS COURT ORDERS** that the Applicants shall be entitled to exercise any rights of set-off and claim any allowances or benefits that they are entitled to claim against amounts payable by the Applicants to any person including, without limitation, amounts payable to any creditor.

13. **THIS COURT ORDERS** that, notwithstanding anything herein, the provisions of this Order do not stay the exercise of any of the remedies referred to in Section 11.1(2) or 11.1(3) of the CCAA with respect to "eligible financial contracts" as defined in Section 11.1(1) of the CCAA.

14. **THIS COURT ORDERS** that the provisions of paragraphs 6 to 13 of this Order apply *mutatis mutandi* in accordance with their terms to stay any and all Proceedings or to restrain any matter provided therein that may be commenced or taken against any person who is or may be directly or indirectly obligated for any obligations of the Applicants, or any of them (otherwise than under any letter of credit in respect of any such obligations) or otherwise obligated as a result of, or in connection with, the past or present business and Property of the Applicants, including, without limitation, the persons listed in Schedule "C" hereto (the "**Non-Applicant Defendants**").

Preservation of Property

15. **THIS COURT ORDERS** that, subject to the terms of this Order, the Applicants shall remain in possession and control of their Property and shall act in a manner consistent with the preservation of the Property.

16. **THIS COURT ORDERS** that, subject to the terms of this Order, the Applicants shall be entitled, but not required, to make the following payments:

(a) the Applicants may pay all expenses reasonably necessary for the preservation of the Property, including, without limitation, payments on account of insurance, maintenance and security;

(b) the Applicants may continue to retain, engage and pay their current agents, accountants, financial advisors, auditor, officers, lawyers, consultants and other professionals, and may retain, engage and pay other persons in Canada or the United States of America they consider reasonably necessary or desirable for the preservation of the Property or otherwise in connection with this proceeding and the Restructuring (including, without limitation, the resolution of the Product Liability Litigation);

(c) the Applicants may continue on and after the date hereof to buy and sell goods and services, and allocate, collect and pay costs, from and to each of their affiliates (as that term is defined in the *Business Corporations Act*, R.S.O. 1990, c. B.16);

(d) the Applicants may pay when due the fees and disbursements of the Monitor, including the fees and disbursements, on a solicitor and his own client basis, of any counsel retained by the Monitor;

(e) the Applicants may pay premiums on existing insurance (including any existing directors and officers' liability insurance or renewals of such liability insurance, provided that any renewals are approved by the Monitor or the Court);

(f) the Applicants may pay the reasonable fees and disbursements of the directors of the Applicants paid in accordance with the practice in effect on the date of this Order and as approved by the Monitor or this Court;

(g) make payments from time to time in respect of the costs, expenses and disbursements contemplated in the cash flow projections forming part of the Affidavit; and

(h) the Applicants may make any other payments specifically permitted by this Order.

17. **THIS COURT ORDERS** that, during the Stay Period, all persons with control over any locations and premises where any of the Applicants' Property is located shall provide the Applicants and the Monitor with unfettered access to such locations and premises during normal business hours or other agreed-upon times.

18. **THIS COURT ORDERS** that, during the Stay Period, except as otherwise provided in this Order or further Order of this Court, the Applicants shall:

(a) make no payments, whether of principal, interest, accounts payable or otherwise, on account of, or with respect to any amounts owing, as at the date of this Order, by the Applicants, or any of them, to any of their creditors (or any interest accruing on any such amounts on or after the date of this Order) or owing pursuant to any guarantee by the Applicants, or any of them, of payment of any such amount;

(b) make no payments, whether of rent or otherwise owing by the Applicants, or any of them, on account of or with respect to any amounts owing, as of the date of this Order (and no payments of any rent or other amounts payable on or after the date of this Order) pursuant to any Agreement in effect on the date of this Order that creates or purports to create a security interest in personal property of the Applicants, or any of them, that secures payment or performance of an obligation;

(c) grant no Encumbrances upon or in respect of any of their present or future Property; and

(d) make no payments to any of their directors or officers except for amounts payable on or after the date of this Order in the ordinary course at the rate or in the same amount as was in effect prior to the date of this Order.

Permitted Restructuring

19. **THIS COURT ORDERS** that, in order to permit the Applicants to proceed in an orderly manner in connection with the Restructuring, the Applicants, or any of them, shall have the right to:

(a) terminate or repudiate Agreements, except for any credit agreements, notes, guarantees or security agreements, as an Applicant deems necessary or appropriate and to make provision for any consequences thereof in a Plan;

(b) take such other steps for the purpose of conserving cash, limiting expenses or increasing and preserving the value of any of the Property as the Applicants deem necessary or appropriate;

(c) settle claims of any customer or supplier that are in dispute, with the approval of the Monitor; and

(d) pursue, with the assistance of the Monitor, the Restructuring, including, subject to Court approval, the settlement or other resolution of the Product Liability Litigation.

Monitor

20. **THIS COURT ORDERS** that Richter is appointed as an officer of this Court to monitor the Property and affairs of the Applicants, with all of the powers and obligations set out in the CCAA and the additional powers and obligations set out in this Order.

21. **THIS COURT ORDERS** that the Applicants and their shareholders, officers, directors, employees, agents and representatives shall cooperate fully with the Monitor in the exercise of its powers and discharge of its obligations, including providing the Monitor with such access to the Applicants' books, records, Property and premises as the Monitor requires.

22. **THIS COURT ORDERS** that the Monitor shall:

(a) assist the Applicants in developing, negotiating and implementing a Plan or otherwise assisting and facilitating the Restructuring, including, without limitation, participating as the Applicants consider appropriate in discussions and negotiations with creditors, claimants, or others and assisting and facilitating the settlement or other resolution of the Product Liability Litigation;

(b) assist the Applicants in developing a claims process;

(c) advise and assist the Applicants with and chair any meetings of creditors to consider a Plan;

(d) assist the Applicants in their preparation and dissemination of financial statements, cash flow projections and other information that may be used in these proceedings;

(e) assist the Applicants, to the extent required by the Applicants, in any shutdown, disposal, distribution, sale or other disposition of any of the Property that has been approved by the Monitor and is permitted by this or any other Order;

(f) inquire into and report to creditors of the Applicants on the financial condition and prospects of the Applicants;

(g) report to this Court as the Monitor considers appropriate or this Court directs, in respect of the Restructuring, a Plan, the Property, the validity or priority of security granted by the Applicants, the settlement or other resolution of the Product Liability Litigation, or any other matter deemed by the Monitor to be relevant to this proceeding;

(h) monitor all receipts and disbursements of the Applicants on such basis as the Monitor considers appropriate;

(i) have full access to the books and records of the Applicants as may be necessary for the completion of its duties under this Order;

(j) be at liberty to give such consents and approvals as are contemplated by this Order or any further Order of this Court and, in doing so, the Monitor may give or withhold such consents and approvals in its reasonable discretion having regard to, among other things, the preservation of the Property and the facilitation of the Restructuring (including, without limitation, the resolution of the Product Liability Litigation);

(k) act as the representative of the Applicants in foreign bankruptcy, insolvency, civil or other Proceedings, including in respect of the Product Liability Litigation; and

(l) perform such other duties as are required by this Order or any further Order of this Court.

23. **THIS COURT AUTHORIZES AND DIRECTS** the Monitor to apply to the United States Bankruptcy Court for the Southern District of New York (the "**U.S. Bankruptcy Court**") for an Order (the "**U.S. Order**"):

(a) recognizing these CCAA proceedings and giving full force and effect to this Order in the United States of America;

(b) recognizing the Monitor as a "foreign representative" under the U.S. Bankruptcy Code; and

(c) without limiting the foregoing, recognizing the within stay of proceedings and, to the extent necessary, granting a stay of proceedings of the Product Liability Litigation as against the Applicants and the Non-Applicant Defendants pending the termination of this proceeding.

24. **THIS COURT ORDERS** that the Monitor may engage legal counsel and other agents and advisors in Canada or the United States of America it considers necessary to advise and assist it in the exercise of its powers and discharge of its obligations hereunder.

25. **THIS COURT ORDERS** that the Monitor is authorized but not obligated to provide all interested parties with the Monitor's report or assessment of any proposed Restructuring or Plan, as applicable. The Monitor is authorized, to the extent requested by the Applicants, to complete

valuation and liquidation analyses of any of the Property to support its report or assessment of the Restructuring or a Plan. The Monitor shall incur no liability as a result of any report or assessment that it may provide pursuant to this Order.

26. **THIS COURT ORDERS** that, to the extent practicable, the Monitor may provide any creditor or claimant with any information about the Applicants that the creditor or claimant reasonably requests in writing, provided that the Monitor may only provide information that the Applicants advise is confidential with the consent of the Applicants or pursuant to further Order of this Court. The Monitor shall have no liability for information provided pursuant to this paragraph.

27. **THIS COURT ORDERS** that the Monitor is not empowered to take and shall not take Possession (as defined below) of any Property, or control or manage the affairs of the Applicants and that it shall not be considered to be an owner or in possession, control or management of any Property or affairs of the Applicants for any purpose, including, without limitation, any legislation enacted for the protection of the environment, health or safety or any other statute, regulation or rule of law or equity.

28. **THIS COURT ORDERS** that the appointment of the Monitor shall not constitute the Monitor an employer, successor employer, related employer or payor for any purpose whatsoever including, without limitation, with respect to pensions or employee benefits.

29. **THIS COURT ORDERS** that nothing in this Order shall vest in the Monitor the care, ownership, control, charge, occupation, possession or management (separately and collectively, "**Possession**"), or require or obligate the Monitor to occupy, or to take Possession of any Property or any source of contaminant which may be environmentally contaminated or contain a dangerous or designated substance or be or contain a pollutant or contaminant or cause or contribute to a spill, discharge, release or deposit of a substance in respect of which obligations of any sort may be imposed under any legislation enacted for the protection or conservation of the indoor or outdoor environment including, without limitation, the *Canadian Environmental Protection Act*, the *Transportation of Dangerous Goods Act*, the *Environmental Protection Act* (Ontario), the *Emergency Plans Act* (1983) (Ontario), the *Ontario Water Resources Act*, the *Occupational Health and Safety Act* (Ontario) or the regulations thereunder, or under any other

federal or provincial legislation, or rule of law or equity in any jurisdiction affecting the indoor or outdoor environment or the transportation of dangerous goods (collectively, "**Environmental Laws**"). For greater certainty, the Monitor shall not be deemed as a result of this Order to be in Possession within the meaning of any Environmental Laws of any Property or source of contaminant.

30. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the CCAA, elsewhere in this Order, or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the fulfillment of its duties in the carrying out of the provisions of this Order including, without limitation, actions taken by the Monitor in its capacity as foreign representative, except for gross negligence or wilful misconduct on its part, and no action or other proceeding shall be commenced against the Monitor as a result of, or relating in any way to its appointment as Monitor or, if applicable, as a foreign representative, respectively, the fulfillment of its duties as Monitor or foreign representative or carrying out of any of the Orders of this Court, except with leave of this Court and upon further Order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with any such action or proceeding. The appointment of the Monitor shall not disqualify it from being appointed interim receiver, receiver and manager or trustee in bankruptcy in respect of the Applicants or any of their Property, should it consent to such appointment.

31. **THIS COURT ORDERS** that the Monitor shall, within ten (10) business days after the date of the entry of this Order, send a notice of this proceeding to the known creditors of the Applicants, or their counsel, and to those claimants, or their counsel, named as plaintiffs in the Product Liability Litigation at their addresses as they appear on the Applicants' records advising that such creditors and claimants may obtain a copy of this Order on the internet at a website to be established and maintained by the Monitor and that, if any creditor or claimant is unable to obtain it by that means, such creditor or claimant may request a copy from the Monitor and the Monitor shall so provide it. Such notice shall constitute sufficient compliance with the applicable requirements of subsection 11(5) of the CCAA.

32. **THIS COURT ORDERS** that, if required by any of the Applicants, the Applicants may pay to the Monitor the funds necessary for payment of goods or services supplied or to be supplied to the Applicants after the date of this Order, and the Monitor shall have the right and authority to make reasonable arrangements (including without limitation, trust or escrow arrangements) for the payment of suppliers in exchange for the delivery of goods or services supplied to the Applicants and, for greater certainty, the Monitor shall not be liable for any obligations or liabilities for the supply of any such goods or services, provided that of any funds placed into trust or escrow arrangements shall be subject to the Charges created in this Order, which Charges shall be discharged only with respect to the amounts of funds actually paid by the Monitor for goods or services supplied.

33. **THIS COURT ORDERS** that the Monitor may apply to this Court for advice and directions in connection with the discharge or variation of its powers and duties under this Order.

Debtor-in-Possession Financing

34. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to enter into a DIP Term Sheet with Iovate Health Sciences Inc. (the "**DIP Lender**") substantially in the form attached at Tab 2C of the Application Record (the "**DIP Term Sheet**") to fund the Restructuring and to pay such other amounts as permitted by the terms of the Orders to be rendered by this Court, the DIP Term Sheet and the definitive documents contemplated thereby (the "**DIP Credit Facility**").

35. **THIS COURT ORDERS** that the Applicants shall pay when due and demanded by the DIP Lender all principal and interest, and fees and expenses owing (the "**DIP Credit Facility Expenses**") under the DIP Credit Facility.

36. **THIS COURT ORDERS** that the DIP Lender is hereby granted a fixed and floating charge, lien and security interest in and against the Property (the "**DIP Charge**") as security for the repayment of all amounts owing by any of the Applicants under the DIP Credit Facility, including principal, interest and the DIP Credit Facility Expenses, and the performance of all obligations of any of the Applicants under the DIP Credit Facility.

37. **THIS COURT ORDERS** that each of the Applicants is hereby authorized and directed to execute any and all security documents and guarantees in favour of the DIP Lender as required by the DIP Lender in respect of the DIP Credit Facility or by this Order and any and all ancillary documents in connection therewith and any steps that may have been taken to allow such execution are hereby ratified.

Fees and Disbursements of the Monitor and Legal Advisors of the Applicants

38. **THIS COURT ORDERS** that the Applicants shall pay, as part of the costs of this proceeding, the reasonable fees and disbursements of the Monitor (on the basis of a chartered accountant and their own client) whether in its capacity as Monitor or a foreign representative of the Applicants (including reasonable fees and disbursements of its legal counsel (on a solicitor and his own client full indemnity basis)) and the reasonable fees and disbursements of the Applicants' legal counsel (on a solicitor and his own client full indemnity basis) with respect to the Applicants, this proceeding, any related proceedings in other jurisdictions, the Product Liability Litigation, a Plan and the Restructuring, whether such fees and disbursements were incurred before, on or after the making of this Order (collectively, the "**Fees**").

39. **THIS COURT ORDERS** that the Applicants may pay to the Monitor, legal counsel to the Monitor and legal counsel to the Applicants, such retainers as may be agreed to by the Applicants to be held by such parties as security for payment of the Fees.

40. **THIS COURT ORDERS** that the Monitor, the Monitor's legal counsel and the Applicant's legal counsel may render accounts on a weekly or bi-weekly basis, and the Applicants shall pay such accounts promptly when rendered.

Administration Charges Against Property

41. **THIS COURT ORDERS** that the Monitor, the Monitor's legal counsel and the Applicants' legal counsel are hereby granted a fixed and floating charge, lien and security interest in and against the Property in the maximum aggregate amount of $1,500,000 (the "**Administration Charge**") as security for the payment of the Fees.

Charges Against Property

42. **THIS COURT ORDERS** that the Applicants shall execute such documents and take such other actions as are necessary or appropriate to give effect to the Administration Charge and the DIP Charge (collectively, the "**Charges**" and individually, a "**Charge**").

43. **THIS COURT ORDERS** that each Charge shall attach to the Property, except that the Charge shall not attach to any contract to the extent that such attachment would constitute a breach of its terms or permit a party to terminate such agreement. If the Charge does not attach to any of the Property in accordance with this paragraph, the Applicants shall hold its interests in such contract or any proceeds therefrom in trust for the charges of the Charges and shall assign such interests to such chargees or their assignees upon obtaining the required consent or upon further Order of the Court.

44. **THIS COURT ORDERS** that: (i) the Administration Charge has priority over all Encumbrances of any kind or nature in or against any of the Property (including the Existing Secured Indebtedness), subject to Encumbrances arising by operation of, and given priority by, any applicable statute; and (ii) the DIP Charge has priority over all Encumbrances of any kind or nature in or against any of the Property, subject to Encumbrances arising by operation of, and given priority by, any applicable statute, and excluding the Existing Secured Indebtedness, which shall have priority ahead of the DIP Charge. "**Existing Secured Indebtedness**" means all Encumbrances granted by the Applicants or any of them in favour of any of the Applicants' affiliates, including, without limitation, in respect of the promissory note dated June 28, 2004 from Muscletech Research and Development Inc. in favour of Gardiner in the amount of $26,160,947, as partially assigned to each of Iovate T. & P. Inc. and Iovate HC 2005 Trademark Ltd., together with guarantees, security agreements and ancillary documents and agreements granted by the Applicants in connection with such promissory note.

45. **THIS COURT ORDERS** that, except as otherwise expressly provided for herein, the Applicants shall not grant any Encumbrance upon or in respect of any of their Property that ranks in priority to, or *pari passu* with, any of the Charges unless the Applicants obtain the approval of the Court.

46. **THIS COURT ORDERS** that none of the Charges, the obligations of the Applicants pursuant to the Charges, or any of the documents delivered pursuant thereto, shall be illegal, invalid or non-binding obligations of the Applicants or otherwise be rendered unenforceable against the Applicants or any of their Property, nor shall they be void or voidable by creditors or shareholders of the Applicants, a trustee in bankruptcy of the Applicants or any other person, by reason of:

(a) the pendency of these proceedings and the declarations of insolvency made herein;

(b) the pendency of any applications for a bankruptcy Order hereafter issued pursuant to the BIA in respect of the Applicants and any bankruptcy Order issued pursuant to such applications; and

(c) the provisions of any federal or provincial law.

47. **THIS COURT ORDERS** that the Charges have relative priority as follows:

(a) first, the Administration Charge; and

(b) second, the DIP Charge (but, for greater certainty, such DIP Charge is subsequent in priority to the Existing Secured Indebtedness),

provided that, notwithstanding anything herein, the Charges shall not have priority over the interests and Encumbrances of the Canadian Imperial Bank of Commerce ("**CIBC**") in that Property consisting of cash equivalents in the amount of $5,700,000 held by CIBC as security in respect of an irrevocable letter of credit in favour of Zurich Insurance Company and/or Zurich American Insurance Company.

48. **THIS COURT ORDERS** that if the persons entitled to the Administration Charge have claims that in the aggregate exceed the authorized amount of such Charge, they shall share in the benefit of such Charge on a *pro rata* basis but in any event subject to the applicable aggregate maximum authorized amount.

49. **THIS COURT ORDERS** that none of the beneficiaries of the Charges shall be required to file, register, record or perfect the Charges, notice thereof or any financing statement with respect thereto and that each of the Charges shall be valid and enforceable for all purposes against all existing and future Property for all purposes, with priority over any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, despite any failure to file, register, record or perfect the Charges, notice thereof, or any financing statement with respect thereto. Despite anything in this Order, the beneficiaries of the Charges may take such steps as they deem necessary or appropriate to register, record or perfect the Charges, notice thereof or any financing statement with respect thereto, if they deem it advisable to do so.

50. **THIS COURT ORDERS** that the creation of the Charges and any payments made by the Applicants, and any agreements, instruments or other documents delivered pursuant to this Order, do not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable or reviewable transactions under any applicable law.

51. **THIS COURT ORDERS** that none of the Charges, shall be, or be deemed to be, invalid or ineffective by reason of any negative covenants, prohibitions or other similar provisions with respect to incurring debt or other obligations or the creation of any Encumbrance contained in any agreement to which the Applicants, or any of them, are a party and, despite any provision to the contrary in such agreements:

(a) none of the Charges, nor the execution, delivery, perfection or registration of any agreements, instruments or other documents delivered pursuant thereto shall create or be deemed to constitute a breach by the Applicants, or any of them, of any agreement to which the Applicants, or any of them, are a party; and

(b) no person shall have any liability to any other person whatsoever as a result of any breach of any agreement caused by or resulting from the Charges or the execution, delivery or registration of any agreements, instruments or other documents delivered pursuant thereto.

Privacy

52. **THIS COURT ORDERS AND DECLARES** that, pursuant to subsection 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, in the course of the Restructuring or a transaction or settlement in furtherance thereof, the Applicants shall be permitted to disclose personal information in respect of identifiable individuals in its possession or control to stakeholders or other parties and to their advisors (collectively, the "**Third Parties**"), to the extent desirable or required to negotiate and complete or effect the Restructuring, or a transaction or settlement in furtherance thereof, provided that the persons to whom such personal information is disclosed enter into confidentiality agreements with the Applicants binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the Restructuring, or a transaction or settlement in furtherance thereof. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Applicants or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring, or a transaction or settlement in furtherance thereof, such Third Party shall be entitled to continue to use the personal information in a manner which is in all material respects identical to the use of such personal information by the Applicants.

Service of Orders, Notices and Other Documents

53. **THIS COURT ORDERS** that the Applicants be and are at liberty to serve this Order, any other Orders in this proceeding, a Plan, any notices of meetings and all other notices, and to deliver any letters to creditors, information circulars, proofs of claim, proxies and disallowances of claims, by forwarding true copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors and claimants at their addresses as last shown on the records of the Applicants and that any service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding or, if sent by ordinary mail, on the third business day after mailing.

54. **THIS COURT ORDERS** that the Applicants, the Monitor, or any other party in these proceedings that has served a Notice of Appearance on the solicitors for the Applicants may serve any Court materials (including, without limitation, application records, motion records,

SHORTFALL CHARGE

41E. THIS COURT ORDERS that as security for any obligation of NNL to make the Shortfall Payments (as defined in the Interim Funding Agreement, as defined in the June Affidavit), Nortel Networks UK Limited shall be entitled to the benefit of and is hereby granted a charge on the Property (the "Shortfall Charge"). The Shortfall Charge shall have the priority set out in paragraphs 42 and 44 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

42. THIS COURT ORDERS that the priorities of the Administration Charge, the Goldman Charge, the Carling Facility Charges, the Excess Funding Charge, the Directors' Charge, the NNI Loan Charge, the Inter-company Charge and the Shortfall Charge on all Property:

First -

(a) the Administration Charge;

(b) the Goldman Charge (as defined in the Nortel-LGE Joint Venture Sale Process Order of this Court made on June 1, 2009), ranking *pari passu* with the Administration Charge but only with respect to the assets which are the subject of the Goldman Charge

Second – the Carling Facility Charges;

Third – the Excess Funding Charge

Fourth – the Directors' Charge;

Fifth – the NNI Loan Charge; and

Sixth -

(a) the Inter-Company Charge;

(b) the Shortfall Charge,

which Inter-company Charge and Shortfall Charge shall rank *pari passu* with one another.

43. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge, the Goldman Charge, the Carling Facility Charges, Excess Funding Charge, the Directors' Charge, the NNI Loan Charge, the Inter-company Charge and the Shortfall Charge (collectively, the "Charges") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect. Notwithstanding anything herein, the Charges shall not attach to the Retainers.

44. THIS COURT ORDERS that each of the Charges (all as constituted and defined herein), shall subject to this paragraph 44 and to paragraph 46 herein constitute a charge on the Property secured thereunder, and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. For greater certainty,

(a) the Charges shall attach to the LC Cash Collateral junior in priority to any rights or Encumbrances in favour of LC Banks in respect of LC Cash Collateral and only to the extent of the rights of the Applicants to the return of any LC Cash Collateral from the LC Banks following the exercise of the rights of the LC Banks as against any such LC Cash Collateral pursuant to the LC Agreements or section 18.1 of the CCAA, and

(b) the Charges shall attach to the EDC Cash Collateral junior in priority to any rights or Encumbrances in favour of EDC in respect of EDC Cash Collateral and only to the extent of the rights of NNL to the return of any EDC Cash Collateral from EDC following the exercise of the rights of EDC as against any such EDC Cash Collateral pursuant to the EDC Support Agreements or section 18.1 of the CCAA

notwithstanding anything to the contrary contained in this Order.

45. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges charging such Property,

unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of such Charges, or by further Order of this Court.

46. THIS COURT ORDERS that none of the Charges, the LC Agreements and the EDC Support Agreements shall be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") thereunder, the rights of the LC Banks under LC Agreements and the rights of EDC under the EDC Support shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges, the entering into of the LC Agreements and the issuance or renewal of LC's thereunder and the entering into of the EDC Support Agreements and the provision of Secured Support, as defined and contemplated thereunder, shall not create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;

(b) none of the Chargees, the LC Banks and EDC shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from, the creation of the Charges, the entering into of the LC Agreements or the issuance or renewal of LC's thereunder or the entering into of the EDC Support Agreements and the provision of Secured Support; and

(c) the payments made by the Applicants pursuant to this Order and the granting of the Charges and the entering into of the LC Agreements and the EDC Support Agreements do not and will not constitute fraudulent preferences, fraudulent

conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

47. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

FLEXTRONICS AMENDING AGREEMENT

48. THIS COURT ORDERS that the Flextronics Amending Agreement in the form attached as Exhibit "B" to the Doolittle Affidavit be and is hereby approved and NNL is hereby authorized and directed to comply with its obligations thereunder.

CROSS-BORDER PROTOCOL

49. THIS COURT ORDERS that the cross-border protocol, as amended, in the form attached as Schedule "A" hereto be and is hereby approved and shall become effective upon its approval by the United States Bankruptcy Court for the District of Delaware and the parties to these proceedings and any other Person shall be governed by it and shall comply with the same.

FOREIGN PROCEEDINGS

50. THIS COURT ORDERS that the Monitor is hereby authorized and directed to apply for recognition of these proceedings as "Foreign Main Proceedings" in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code.

51. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, the United Kingdom or elsewhere, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

52. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

SERVICE AND NOTICE

53. THIS COURT ORDERS that the Monitor shall, within ten (10) business days of the date of entry of this Order, send notice of this Order and the commencement of the within proceedings to the Applicants' known creditors, other than employees and creditors to which the Applicants owe less than $5,000, at their addresses as they appear on the Applicants' records, and shall promptly send a copy of this Order (a) to all parties filing a Notice of Appearance in respect of this Application, and (b) to any other interested Person requesting a copy of this Order, and the Monitor is relieved of its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process. The Monitor, on behalf of the Applicants, shall, in its discretion, be entitled to engage a third party mailing service in order to assist or complete the mailing. Any such service provider shall be considered an "Assistant" hereunder.

54. THIS COURT ORDERS that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, and any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

55. THIS COURT ORDERS that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor may post a copy of any or all such materials on its website at http://www.ey.com/ca/nortel.

GENERAL

56. THIS COURT ORDERS that any of the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

57. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

58. THIS COURT ORDERS that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

59. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 30 2009

PER / PAR:

SCHEDULE "A" – CROSS-BORDER PROTOCOL

Attached.

CROSS-BORDER INSOLVENCY PROTOCOL

This cross-border insolvency protocol (the "Protocol") shall govern the conduct of all parties in interest in the Insolvency Proceedings (as such term is defined herein).

The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") attached as Schedule "A" hereto, shall be incorporated by reference and form part of this Protocol. Where there is any discrepancy between the Protocol and the Guidelines, this Protocol shall prevail.

A. Background

1. Nortel Networks Inc. ("NNI") is the wholly owned U.S. subsidiary of Nortel Networks Limited ("NNL"), the principal Canadian operating subsidiary of Nortel Networks Corporation ("NNC"). NNC is a telecommunications company headquartered in Toronto, Ontario, Canada. NNI is incorporated under Delaware law and is headquartered in Richardson, Texas.

2. NNI and certain of its affiliates (collectively, the "U.S. Debtors"),[1] have commenced reorganization proceedings (the "U.S. Proceedings") under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Delaware (the "U.S. Court"), and such cases have been consolidated (for procedural purposes only) under Case No. 09-10138 (KG). The U.S. Debtors are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the U.S. Proceedings. On January 22, 2009,

[1] The Debtors in the U.S. Proceedings (as defined herein) are: NNI, Nortel Networks Capital Corporation, Nortel Altsystems Inc., Nortel Altsystems International Inc., XROS, Inc., Sonoma Systems, QTERA Corporation, CoreTek, Inc., Nortel Networks Applications Management Solutions Inc., Nortel Networks Optical Components Inc., Nortel Networks HPOCS Inc., Architel Systems (U.S.) Corporation, Nortel Networks International Inc., Northern Telecom International Inc. and Nortel Networks Cable Solutions Inc.

the Office of United States Trustee (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors Committee") in the U.S. Proceeding. An ad hoc committee of bondholders (the "Bondholders Committee") has also been organized.

3. On January 14, 2009, the U.S. Debtors' ultimate corporate parent NNC, NNI's direct corporate parent NNL (together with NNC and their affiliates, including the U.S. Debtors, "Nortel"), and certain of their Canadian affiliates (collectively, the "Canadian Debtors")[2] filed an application with the Ontario Superior Court of Justice (the "Canadian Court") under the Companies' Creditors Arrangement Act (Canada) (the "CCAA"), seeking relief from their creditors (collectively, the "Canadian Proceedings"). The Canadian Debtors have obtained an initial order of the Canadian Court (as amended and restated, the "Canadian Order"), under which, inter alia: (a) the Canadian Debtors have been determined to be entitled to relief under the CCAA; (b) Ernst & Young Inc. has been appointed as monitor (the "Monitor") of the Canadian Debtors, with the rights, powers, duties and limitations upon liabilities set forth in the CCAA and the Canadian Order; and (c) a stay of proceedings in respect of the Canadian Debtors has been granted.

4. The Monitor filed petitions and obtained an order in the U.S. Court granting recognition of the Canadian Proceedings under chapter 15 of the Bankruptcy Code (the "Chapter 15 Proceedings"). NNI also filed an application and obtained an order in the Canadian Court pursuant to section 18.6 of the CCAA recognizing the U.S. Proceedings as "foreign proceedings" in Canada and giving effect to the automatic stay thereunder in Canada. None of the U.S. Debtors or Canadian Debtors are applicants in both the U.S. Proceedings and Canadian Proceedings.

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[2] The Canadian Debtors include the following entities: NNC, NNL, Nortel Networks Technology Corporation, Nortel Networks Global Corporation and Nortel Networks International Corporation.

5. For convenience, (a) the U.S. Debtors and the Canadian Debtors shall be referred to herein collectively as the "Debtors," (b) the U.S. Proceedings and the Canadian Proceedings shall be referred to herein collectively as the "Insolvency Proceedings," and (c) the U.S. Court and the Canadian Court shall be referred to herein collectively as the "Courts", and each individually as a "Court."

B. Purpose and Goals

6. Though full and separate plenary proceedings are pending in the United States for the U.S. Debtors and in Canada for the Canadian Debtors, the implementation of administrative procedures and cross-border guidelines is both necessary and desirable to coordinate certain activities in the Insolvency Proceedings, protect the rights of parties thereto, ensure the maintenance of the Courts' respective independent jurisdiction and give effect to the doctrines of comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in the Insolvency Proceedings:

a. harmonize and coordinate activities in the Insolvency Proceedings before the Courts;

b. promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

c. honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada, respectively;

d. promote international cooperation and respect for comity among the Courts, the Debtors, the Creditors Committee, the Estate Representatives (which include the Chapter 11 Representatives and the Canadian Representatives as such terms are defined below) and other creditors and interested parties in the Insolvency Proceedings;

e. facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors' creditors and other interested parties, wherever located; and

f. implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

As the Insolvency Proceedings progress, the Courts may also jointly determine that other cross-border matters that may arise in the Insolvency Proceedings should be dealt with under and in accordance with the principles of this Protocol. Subject to the provisions of this Protocol, including, without limitation, those included in paragraph 15 hereof, where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts.

C. Comity and Independence of the Courts

7. The approval and implementation of this Protocol shall not divest nor diminish the U.S. Court's and the Canadian Court's respective independent jurisdiction over the subject matter of the U.S. Proceedings and the Canadian Proceedings, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Debtors nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States of America or Canada.

8. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the U.S. Proceedings and the hearing and determination of matters arising in the U.S. Proceedings. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceedings and the hearing and determination of matters arising in the Canadian Proceedings.

9. In accordance with the principles of comity and independence recognized herein, nothing contained herein shall be construed to:

a. increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief on an ex parte or "limited notice" basis to the extent permitted under applicable law;

b. require the U.S. Court to take any action that is inconsistent with its obligations under the laws of the United States;

c. require the Canadian Court to take any action that is inconsistent with its obligations under the laws of Canada;

d. require the Debtors, the Creditors Committee, the Estate Representatives or the U.S. Trustee to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law;

e. authorize any action that requires the specific approval of one or both of the Courts under the Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or

f. preclude the Debtors, the Creditors Committee, the Monitor, the U.S. Trustee, any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other relevant jurisdiction including, without limitation, the rights of parties in interest to appeal from the decisions taken by one or both of the Courts.

10. The Debtors, the Creditors Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the independent, non-delegable duties imposed upon them, if any, by the Bankruptcy Code, the CCAA, the Canadian Order and other applicable laws.

D. Cooperation

11. To assist in the efficient administration of the Insolvency Proceedings and in recognizing that the U.S. Debtors and Canadian Debtors may be creditors of the others'

estates, the Debtors and their respective Estate Representatives shall, where appropriate: (a) cooperate with each other in connection with actions taken in both the U.S. Court and the Canadian Court and (b) take any other appropriate steps to coordinate the administration of the Insolvency Proceedings for the benefit of the Debtors' respective estates.

12. To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Court and the Canadian Court each may coordinate activities and consider whether it is appropriate to defer to the judgment of the other Court. In furtherance of the foregoing:

a. The U.S. Court and the Canadian Court may communicate with one another, with or without counsel present, with respect to any procedural matter relating to the Insolvency Proceedings.

b. Where the issue of the proper jurisdiction of either Court to determine an issue is raised by an interested party in either of the Insolvency Proceedings with respect to a motion or application filed in either Court, the Court before which such motion or application was initially filed may contact the other Court to determine an appropriate process by which the issue of jurisdiction will be determined; which process shall be subject to submissions by the Debtors, the Creditors Committee, the Monitor, the Bondholders Committee (collectively the "Core Parties"), the U.S. Trustee and any interested party prior to a determination on the issue of jurisdiction being made by either Court.

c. The Courts may, but are not obligated to, coordinate activities in the Insolvency Proceedings such that the subject matter of any particular action, suit, request, application, contested matter or other proceeding is determined in a single Court.

d. The U.S. Court and the Canadian Court may conduct joint hearings (each a "Joint Hearing") with respect to any cross-border matter or the interpretation or implementation of this Protocol where both the U.S. Court and the Canadian Court consider such a Joint Hearing to be necessary or advisable, or as otherwise provided herein, to, among other things, facilitate or coordinate proper and efficient conduct of the Insolvency Proceedings or the resolution of any particular issue in the Insolvency Proceedings. With respect to any Joint Hearing, unless otherwise ordered, the following procedures will be followed:

(i) A telephone or video link shall be established so that both the U.S. Court and the Canadian Court shall be able to simultaneously hear and/or view the proceedings in the other Court.

(ii) Submissions or applications by any party that are or become the subject of a Joint Hearing (collectively, "Pleadings") shall be made or filed initially only to the Court in which such party is appearing and seeking relief. Promptly after the scheduling of any Joint Hearing, the party submitting such Pleadings to one Court shall file courtesy copies with the other Court. In any event, Pleadings seeking relief from both Courts shall be filed in advance of the Joint Hearing with both Courts.

(iii) Any party intending to rely on any written evidentiary materials in support of a submission to the U.S. Court or the Canadian Court in connection with any Joint Hearing (collectively, "Evidentiary Materials") shall file or otherwise submit such materials to both Courts in advance of the Joint Hearing. To the fullest extent possible, the Evidentiary Materials filed in each Court shall be identical and shall be consistent with the procedural and evidentiary rules and requirements of each Court.

(iv) If a party has not previously appeared in or attorned or does not wish to attorn to the jurisdiction of a Court, it shall be entitled to file Pleadings or Evidentiary Materials in connection with the Joint Hearing without, by the mere act of such filings, being deemed to have appeared in or attorned to the jurisdiction of such Court in which such material is filed, so long as such party does not request any affirmative relief from such Court.

(v) The Judge of the U.S. Court and the Justice of the Canadian Court who will preside over the Joint Hearing shall be entitled to communicate with each other in advance of any Joint Hearing, with or without counsel being present, (1) to establish guidelines for the orderly submission of Pleadings, Evidentiary Materials and other papers and for the rendering of decisions by the Courts; and (2) to address any related procedural, administrative or preliminary matters.

(vi) The Judge of the U.S. Court and the Justice of the Canadian Court, shall be entitled to communicate with each other during or after any joint hearing, with or without counsel present, for the purposes of (1) determining whether consistent rulings can be made by both Courts; (2) coordinating the terms upon of the Courts' respective rulings; and (3) addressing any other procedural or administrative matters.

13. Notwithstanding the terms of the paragraph 12 above, this Protocol recognizes that the U.S. Court and the Canadian Court are independent courts. Accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall be entitled at all times to exercise its independent jurisdiction and authority with respect to: (a) the conduct of the parties appearing in matters presented to such Court; and (b) matters presented to such Court, including, without limitation, the right to determine if matters are properly before such Court.

14. Where one Court has jurisdiction over a matter which requires the application of the law of the jurisdiction of the other Court, such Court may, without limitation, hear expert evidence of such law or, subject to paragraph 15 herein, seek the written advice and direction of the other Court which advice may in the discretion of the receiving Court, be made available to parties in interest.

15. Notwithstanding anything to the contrary herein contained, to the extent any motion is filed or relief is sought (collectively, "Requested Relief") in either Court relating to: (i) the proposed sale of assets for gross proceeds in excess of U.S. $30 million and where at least one U.S. Debtor and one Canadian Debtor are parties to the related sale agreement or that involves assets owned by at least one U.S. Debtor and one Canadian Debtor; (ii) any motion to allocate sale proceeds which are in the aggregate more than U.S. $30 million and where at least one U.S. Debtor and one Canadian Debtor are parties to the related sale agreement or that involves assets owned by at least one U.S. Debtor and one Canadian Debtor; (iii) matters relating to the advanced pricing agreement involving both the United States and Canadian taxing authorities; (iv) matters regarding transfer pricing methodology relating to an obligation for the transfer of goods and services between one or more U.S. Debtors and one or more Canadian

Debtors; (v) any matter relating to alleged fraudulent conveyance or preference claims in excess of U.S. $30 million and which may have a material impact on both one or more U.S. Debtors and one or more Canadian Debtors; (vi) matters relating to any proposal or approval of a disclosure statement, information circular, plan of reorganization or plan of compromise and arrangements in either the U.S. Proceedings or the Canadian Proceedings; (vii) any motion to appoint a Trustee or Examiner in the U.S. Proceedings, any motion to convert the U.S. Proceedings to a Chapter 7 proceeding, any motion to appoint a Receiver in the Canadian Proceedings, or any motion to convert the Canadian Proceedings to a bankruptcy or proposal proceeding under the Bankruptcy and Insolvency Act (Canada); (viii) any motion to substantively consolidate the Debtors' estates; (ix) matters impacting the material tax attributes of the U.S. Debtors, including the net operating losses of the U.S. Debtors in any prior fiscal year; (x) any motion to amend the terms of any of the Debtors' registered pension plans the effect of which would increase the liability of any Debtor thereunder; (xi) any motion to assume, ratify, reject, repudiate, modify or assign executory contracts having a material impact on the assets, operations, obligations, rights, property or business of both the U.S. and Canadian estates and accounting for annual gross revenue in excess of U.S. $30 million ("Material Contracts"); (xii) any motion seeking relief from the automatic stay in the U.S. Proceedings and/or the stay of proceedings in the Canadian Proceedings (1) involving any Material Contract or (2) to pursue actions having a material impact on the assets, operations, obligations, rights, property or business of at least one U.S. Debtor and one Canadian Debtor and involving damages in excess of U.S. $30 million; (xiii) any motion seeking to create or extend any program, plan, proposal or scheme relating to or authorizing payments to employees where the consideration relates to non-ordinary course incentive performance, retention, severance, termination or such like payments; and (xiv) any

motion regarding any program, plan proposal, scheme or similar course of action related to the wind-down of one or more of the Debtors' businesses;

Then the following procedures shall be followed:

a. unless otherwise consented to by the Core Parties, any and all documents, other than any Monitor's report related to the Requested Relief, shall be filed (as applicable) and served on the Core Parties on not less than seven days notice prior to the proposed hearing date for such Requested Relief in the Court of the forum country where the party seeking the Requested Relief intends the Requested Relief to be heard; *provided, however*, that to the extent the Requested Relief is necessary to avoid irreparable harm to the Debtors and/or the Debtors' bankruptcy estates, as may be determined by the Court of the forum country where the Requested Relief is being sought or such Court otherwise determines, such documents related to the Requested Relief shall be served on the Core Parties on such reasonable notice as such Court may determine;

b. upon notice of such Requested Relief being provided to the Core Parties, each of the Core Parties will have not less than two business days from receipt of such notice (or such shorter period as the Court of the forum country where the Requested Relief is being sought shall determine, as set forth in paragraph 15(a) herein) to request, in writing, that the filing party seek a Joint Hearing for the Requested Relief;

c. if the filing party agrees to seek a Joint Hearing, the Requested Relief shall be heard at a Joint Hearing conducted by the Courts in accordance with the procedures set forth in paragraph 12 herein; and

d. if the filing party does not agree to seek a Joint Hearing, the party seeking to have the Requested Relief heard at a Joint Hearing may file a notice of Joint Hearing dispute in both the Court of the forum country and the Court of the non-forum country and serve notice thereof on the remaining Core Parties, whereupon the respective Courts of the forum country and the non-forum country may consult with one another in accordance with paragraphs 6 and 12 hereof, in order to determine whether a Joint Hearing is necessary or may otherwise consult with the Core Parties prior to any party proceeding with the underlying Requested Relief in the original proposed forum country.

E. Recognition of Stays of Proceedings

16. The Canadian Court hereby recognizes the validity of the stay of proceedings and actions against the U.S. Debtors and their property under section 362 of the

Bankruptcy Code (the "U.S. Stay"). In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding: (i) the interpretation, extent, scope and applicability of the U.S. Stay and any orders of the U.S. Court modifying or granting relief from the U.S. Stay; and (ii) the enforcement of the U.S. Stay in Canada.

17. The U.S. Court hereby recognizes the validity of the stay of proceedings and actions against the Canadian Debtors and their property under the Canadian Order (the "Canadian Stay"). In implementing the terms of this paragraph, the U.S. Court may consult with the Canadian Court regarding: (i) the interpretation, extent, scope and applicability of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay; and (ii) the enforcement of the Canadian Stay in the United States.

18. Nothing contained herein shall affect or limit the Debtors' or other parties' rights to assert the applicability or nonapplicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located. Subject to paragraph 15, herein, motions brought respecting the application of the stay of proceedings with respect to assets or operations of the Canadian Debtors shall be heard and determined by the Canadian Court. Subject to paragraph 15 herein, motions brought respecting the application of the stay of proceedings with respect to assets or operations of the U.S. Debtors shall be heard and determined by the U.S. Court.

F. Rights to Appear and Be Heard

19. The Debtors, the Core Parties, and any other committee that may be appointed by the U.S. Trustee, and the professionals and advisors for each of the foregoing, shall have the right and standing: (i) to appear and to be heard in either the U.S. Court or Canadian Court in the U.S. Proceedings or Canadian Proceedings, respectively, to the same extent as creditors and other interested parties domiciled in the forum country, subject to any local rules or

regulations generally applicable to all parties appearing in the forum; and (ii) to file notices of appearance or other papers with the clerk of the U.S. Court or the Canadian Court in respect of the U.S. Proceedings or Canadian Proceedings, respectively; provided, however, that any appearance or filing may subject a creditor or interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, that an appearance by the Creditors Committee in the Canadian Proceedings shall not form a basis for personal jurisdiction in Canada over the members of the Creditors Committee. Notwithstanding the foregoing, and in accordance with the policies set forth above, including, inter alia, paragraph 12 above; (i) the Canadian Court shall have jurisdiction over the Chapter 11 Representatives (as defined below) solely with respect to the particular matters as to which the Chapter 11 Representatives appear before the Canadian Court; and (ii) the U.S. Court shall have jurisdiction over the Canadian Representatives (as defined below) solely with respect to the particular matters as to which the Canadian Representatives appear before the U.S. Court.

20. In connection with any matter in the Canadian Proceedings in which the Creditors Committee seeks to become involved and which would otherwise require the Creditors Committee to execute a confidentiality agreement, the Creditors Committee, its individual members and professionals shall not be required to execute confidentiality agreements but instead the Creditors Committee and its members shall be bound by the confidentiality provisions contained in the Creditors Committee bylaws, and the Creditors Committee's professionals shall be bound by the terms of the confidentiality agreement with the Debtors dated February 2, 2009.

G. Claims Protocol

21. The Debtors anticipate that it will be necessary to implement a specific claims protocol to address, among other things and without limitation, the timing, process,

jurisdiction and applicable governing law to be applied to the resolution of intercompany claims filed by the Debtors' creditors in the Canadian Proceedings and the U.S. Proceedings. In such event, and in recognition of the inherent complexities of the inter-company claims that may be asserted in the Insolvency Proceedings, the Debtors shall use commercially reasonable efforts to negotiate a specific claims protocol, in form and substance satisfactory to the Debtors, the Monitor, and the Creditors Committee, which protocol shall be submitted to the Canadian Court and the U.S. Court for approval. In the event that the Debtors fail to reach agreement among such parties, the Debtors shall file a motion in both the Canadian Court and the U.S. Court seeking approval of such claims protocol as the Debtors shall determine to be in the best interest of the Debtors and their creditors.

H. Retention and Compensation of Estate Representative and Professionals

22. The Monitor, its officers, directors, employees, counsel and agents, wherever located, (collectively the "Monitor Parties") and any other estate representatives appointed in the Canadian Proceedings (collectively, the "Canadian Representatives") shall (subject to paragraph 19) be subject to the sole and exclusive jurisdiction of the Canadian Court with respect to all matters, including: (a) the Canadian Representatives' tenure in office; (b) the retention and compensation of the Canadian Representatives; (c) the Canadian Representatives' liability, if any, to any person or entity, including the Canadian Debtors and any third parties, in connection with the Insolvency Proceedings; and (d) the hearing and determination of any other matters relating to the Canadian Representatives arising in the Canadian Proceedings under the CCAA or other applicable Canadian law. The Canadian Representatives shall not be required to seek approval of their retention in the U.S. Court for services rendered to the Debtors. Additionally, the Canadian Representatives: (a) shall be compensated for their services to the Canadian Debtors solely in accordance with the CCAA, the Canadian Order and other applicable

Canadian law or orders of the Canadian Court; and (b) shall not be required to seek approval of their compensation in the U.S Court.

23. The Monitor Parties shall be entitled to the same protections and immunities in the United States as those granted to them under the CCAA and the Canadian Order. In particular, except as otherwise provided in any subsequent order entered in the Canadian Proceedings, the Monitor Parties shall incur no liability or obligations as a result of the Canadian Order, the appointment of the Monitor, the carrying out of its duties or the provisions of the CCAA and the Canadian Order by the Monitor Parties, except any such liability arising from actions of the Monitor Parties constituting gross negligence or willful misconduct.

24. Any estate representative appointed in the U.S. Proceedings, including without limitation any examiners or trustees appointed in accordance with section 1104 of the Bankruptcy Code (collectively, the "Chapter 11 Representatives") shall (subject to paragraph 19) be subject to the sole and exclusive jurisdiction of the U.S. Court with respect to all matters, including: (a) the Chapter 11 Representatives' tenure in office; (b) the retention and compensation of the Chapter 11 Representatives; (c) the Chapter 11 Representatives' liability, if any, to any person or entity, including the U.S. Debtors and any third parties, in connection with the Insolvency Proceedings; and (d) the hearing and determination of any other matters relating to the Chapter 11 Representatives arising in the U.S. Proceedings under the Bankruptcy Code or other applicable laws of the United States. The Chapter 11 Representatives shall not be required to seek approval of their retention in the Canadian Court and (a) shall be compensated for their services to the U.S. Debtors solely in accordance with the Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek

approval of their compensation for services performed for the U.S. Debtors in the Canadian Court.

25. Any professionals (i) retained by and being compensated solely by, or (ii) being compensated solely by, the Canadian Debtors including in each case, without limitation, counsel and financial advisors (collectively, the "Canadian Professionals"), shall be subject to the sole and exclusive jurisdiction of the Canadian Court. Such Canadian Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the Canadian Court under the CCAA, the Canadian Order and any other applicable Canadian law or orders of the Canadian Court with respect to services performed on behalf of the Canadian Debtors; and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.

26. Any professionals (i) retained by, or (ii) being compensated by, the U.S. Debtors including in each case, without limitation, counsel and financial advisors (collectively, the "U.S. Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Such U.S. Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

27. Subject to paragraph 19 herein, any professional retained by the Creditors Committee, including in each case, without limitation, counsel and financial advisors (collectively, the "Committee Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Such Committee Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the

Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court or any other court.

I. Notice

28. Notice of any motion, application or other Pleading or paper (collectively the "Court Documents") filed in one or both of the Insolvency Proceedings involving or relating to matters addressed by this Protocol and notice of any related hearings or other proceedings shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following: (a) all creditors and interested parties, in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) of this sentence, counsel to the Debtors; the U.S. Trustee; the Monitor; the Creditors Committee; the Bondholders Committee and any other statutory committees appointed in the Insolvency Proceedings and such other parties as may be designated by either of the Courts from time to time. Notice in accordance with this paragraph shall be given by the party otherwise responsible for effecting notice in the jurisdiction where the underlying papers are filed or the proceedings are to occur. In addition to the foregoing, upon request, the U.S. Debtors or the Canadian Debtors shall provide the U.S. Court or the Canadian Court, as the case may be, with copies of any orders, decisions, opinions or similar papers issued by the other Court in the Insolvency Proceedings.

29. When any cross-border issues or matters addressed by this Protocol are to be addressed before a Court, notices shall be provided in the manner and to the parties referred to in paragraph 28 above.

J. Effectiveness; Modification

30. This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

31. This Protocol may not be supplemented, modified, terminated, or replaced in any manner except upon the approval of both the U.S. Court and the Canadian Court after notice and a hearing. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with the notice provisions set forth above.

K. Procedure for Resolving Disputes Under this Protocol

32. Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to the U.S. Court, the Canadian Court or both Courts upon notice in accordance with the notice provisions outlined in paragraph 28 above. In rendering a determination in any such dispute, the Court to which the issue is addressed: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either: (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to such other Court; or (iii) seek a Joint Hearing of both Courts in accordance with paragraph 12 above. Notwithstanding the foregoing, in making a determination under this paragraph, each Court shall give due consideration to the independence, comity and inherent jurisdiction of the other Court established under existing law.

33. In implementing the terms of this Protocol, the U.S. Court and the Canadian Court may, in their sole, respective discretion, provide advice or guidance to each other with respect to legal issues in accordance with the following procedures:

a. the U.S. Court or the Canadian Court, as applicable, may determine that such advice or guidance is appropriate under the circumstances;

b. the Court issuing such advice or guidance shall provide it to the non-issuing Court in writing;

c. copies of such written advice or guidance shall be served by the applicable Court in accordance with paragraph 28 hereof;

d. the Courts may jointly decide to invite the Debtors, the Creditors Committee, the Estate Representatives, the U.S. Trustee and any other affected or interested party to make submissions to the appropriate Court in response to or in connection with any written advice or guidance received from the other Court; and

e. for clarity, the provisions of this paragraph shall not be construed to restrict the ability of either Court to confer as provided in paragraph 12 above whenever it deems it appropriate to do so.

L. Preservation of Rights

34. Except as specifically provided herein, neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall: (a) prejudice or affect the powers, rights, claims and defenses of the Debtors and their estates, the Creditors Committee, the Estate Representatives, the U.S. Trustee or any of the Debtors' creditors under applicable law, including, without limitation, the Bankruptcy Code the CCAA, and the orders of the Courts; or (b) preclude or prejudice the rights of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of Canada or the United States.

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 CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, WITH RESPECT TO THE COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Applicants")

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

Court File No. 09-CL-7951

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

THIRDAMENDED AND RESTATED INITIAL ORDER

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TAB 13

Court File No. 07-CL-7120

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 1ST
	)	
JUSTICE MORAWETZ	)	DAY OF AUGUST, 2007

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 **HOLLINGER INC., 4322525 CANADA INC. AND SUGRA LIMITED** (the "**Applicants**")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the Affidavit of G. Wesley Voorheis sworn July 31, 2007 and the Exhibits thereto, on hearing the submissions of counsel for the Applicants and on reading the consent of Ernst & Young Inc. to act as the Monitor, and upon being advised that counsel for Sun-Times Media Group, Inc. ("**STMG**") and Davidson Kempner Partners have received very short notice of the commencement of this proceeding,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**") between, *inter alia*, the Applicants and one or more classes of their secured and/or unsecured creditors as they deem appropriate.

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their businesses (the "**Business**") and Property. The Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Advisors**") currently retained or employed by them, with liberty to retain such further Advisors as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, compensation, salaries, employee and pension benefits, vacation pay, retention or similar bonuses or payments, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies, arrangements and agreements;

(b) the fees and disbursements of any Advisors retained or engaged by the Applicants in respect of these proceedings or otherwise, at their standard rates and charges; and

(c) the fees and disbursements of the Inspector appointed pursuant to an Order dated October 14, 2004 and amended October 26, 2004 under the *Canada Business Corporations Act* (Canada) in Action No. 04-CL-5441 in the Ontario Superior Court of Justice, Commercial List (the "**Inspector Action**"), the Inspector's counsel and any other service providers previously retained by the Inspector, at their standard rates and charges.

6. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, and (iii) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada, any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

8. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

9. **THIS COURT ORDERS** that the Applicants shall have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $2,000,000 in any one transaction or $5,000,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) repudiate such of their arrangements or agreements of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counterparties, or failing such agreement, to deal with the consequences thereof in the Plan; and

(d) pursue all avenues of refinancing and offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a) and (b), above),

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

10. **THIS COURT ORDERS** that until and including August 30, 2007, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

11. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, trustee, collateral agent, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) exempt the Applicants from compliance with statutory or regulatory provisions

relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

12. **THIS COURT ORDERS** that during the Stay Period no exercise of rights by any Person, whether by way of enforcement or otherwise, and no proceeding, enforcement step or action of any kind shall be taken by any Person that could have the effect of or result in:

(a) a sale, transfer or disposal of the shares of Class B common stock of STMG owned by any of the Applicants, to a party that is not a subsidiary or affiliate of Hollinger Inc.; or

(b) the shares of Class B common stock of STMG being automatically converted into shares of Class A common stock of STMG,

including, without limitation, a transfer to or registration of the shares of Class B common stock of STMG in the name of such Person or its nominee(s).

13. **THIS COURT ORDERS** that nothing herein shall be deemed to be in breach of any law, regulation, rule, or order, or deemed to cause, create or enable economic or voting dilution, whether actual or potential, of the shares of Class B common stock of STMG or the shares of Class A common stock of STMG (the "**STMG Shares**"), or a dilution or reduction, whether actual or potential, of the voting rights attached to any of the STMG Shares, which are held directly or indirectly by Hollinger or an Applicant or a dilution or reduction, whether actual or potential of the voting rights attached to any of the STMG Shares or the diminution of any legal rights, whether actual or potential, currently attached to the STMG Shares, or a default or change of control under any agreements, indentures or other instruments.

NO INTERFERENCE WITH RIGHTS

14. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

15. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including, without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

16. **THIS COURT ORDERS** that, notwithstanding anything else contained herein, no creditor of the Applicants shall be under any obligation after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

17. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

18. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers from all claims, costs, charges and expenses relating to the failure of the Applicants, after the date hereof, to make payments of the nature referred to in subparagraphs 5(a), 7(a), 7(b) and 7(c) of this Order which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers of the Applicants except to the extent that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct.

19. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000.00, as security for the indemnity provided in paragraph 17 of this Order. The Directors' Charge shall have the priority set out in paragraphs 31 and 33 herein.

20. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 17 of this Order.

APPOINTMENT OF MONITOR

21. **THIS COURT ORDERS** that Ernst & Young Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the Applicants' conduct of the Business, with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Advisors shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

22. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business and such other matters as may be relevant to the proceedings herein;

(c) advise the Applicants in their preparation of the Applicants' cash flow statements;

(d) advise the Applicants in their development of the Plan and any amendments to the Plan;

(e) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(f) have full and complete access to the books, records, management, employees and advisors of the Applicants and to the Business and the Property to the extent required to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

23. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

24. **THIS COURT ORDERS** that nothing contained herein shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession of such Property.

25. **THIS COURT ORDERS** that the Monitor shall not be required or compelled to provide any information obtained by it in performing its role as Inspector pursuant to the Orders of the Honourable Justice Campbell in the Inspector Action as a result of its appointment herein as Monitor including, without limitation, by way of testimony in any proceeding in any court in Canada or the United States of America brought by or against any person or entity related to or affiliated in any way with the business of the Applicants.

26. **THIS COURT ORDERS** that the Monitor shall protect the confidentiality of such information not forming part of the public record in the Inspector Action, shall be subject to the direction of the Court supervising the Inspector Action with respect to any ongoing role as Inspector of the Applicant and that in the event of any uncertainty or conflict concerning the ongoing role of the Inspector, the Inspector shall apply to the Court supervising the Inspector Action, and to the Court supervising this proceeding where necessary, for advice and directions.

27. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

28. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis and, in addition, the Applicants are hereby authorized to pay to (i) the Monitor and its counsel, and (ii) Canadian and U.S. counsel to the Applicants, retainers in the amounts of CDN$150,000.00 and $300,000.00, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

30. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

31. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and the Applicants' counsel and financial advisor shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $1,900,000.00, to be allocated among the beneficiaries of such charge as they may determine amongst themselves, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and all such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 31 and 33 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

32. **THIS COURT ORDERS** that the priorities of the Directors' Charge and the Administration Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $1,900,000.00); and

Second – Directors' Charge (to the maximum amount of $500,000.00).

33. **THIS COURT ORDERS** that the filing, registration or perfection of the Directors' Charge and the Administration Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

34. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

35. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of the Charges, or further Order of this Court.

36. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Applicants pursuant to this Order and the granting of the Charges do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

SERVICE AND NOTICE

37. **THIS COURT ORDERS** that the Applicants shall, within ten (10) business days of the date of entry of this Order, send a notice of the issuance of this Order to its known creditors, other than employees and creditors to which the Applicants owe less than $1,000.00, at their addresses as they appear on the Applicants' records, and shall promptly send a copy of this Order (a) to all parties filing a Notice of Appearance in respect of this Application, and (b) to any other interested Person requesting a copy of this Order, and the Monitor is relieved of

its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process.

38. **THIS COURT ORDERS** that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

39. **THIS COURT ORDERS** that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor may post a copy of any or all such materials on its website at: www.ey.com/ca/restructuring.

GENERAL

40. **THIS COURT ORDERS** that the Applicants or the Monitor may, from time to time, apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

41. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

EFFECT, RECOGNITION, ASSISTANCE

42. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States of America, the states and other subdivisions of the United States of America, including, without

limitation, the U.S. Bankruptcy Court, and other nations and states to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order and any other Order in this proceeding. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to Hollinger Inc. and/or the Monitor in any foreign proceeding and to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order and any other Order in this proceeding, including without limitation recognizing the Applicants' CCAA proceeding as a foreign main proceeding under applicable law.

43. **THIS COURT ORDER** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and this proceeding and for assistance in carrying out the terms of this Order and any other Order granted by this Court and to recognize or give effect to or otherwise further the Restructuring.

44. **THIS COURT ORDERS** that, for the purposes of seeking the aid and recognition of any court or any judicial, regulatory or administrative body outside of Canada and in particular in the U.S. Bankruptcy Court in respect of proceedings commenced under Chapter 15 of the *U.S. Bankruptcy Code* and any ancillary relief in respect thereto, Hollinger Inc. shall be appointed as and is hereby authorized and directed to act as the foreign representative of the Applicants and to seek such aid in recognition.

DIRECTIONS, FURTHER RELIEF AND VARIATION

45. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the Order sought or upon such other notice, if any, as this Court may order.

EFFECTIVE TIME

46. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 0 1 2007

PER/PAR:

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT
WITH RESPECT TO HOLLINGER INC., 4322525 CANADA INC. AND SUGRA LIMITED

Court File No. 07-CL-7120

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding Commenced at Toronto

INITIAL ORDER
DATED AUGUST 1, 2007

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Solicitors for the Applicants

TAB 14

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 14TH
	)	
JUSTICE MORAWETZ	)	DAY OF JANUARY, 2009

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (the "Applicants")

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

THIRD AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of John Doolittle sworn January 14, 2009 (the "Doolittle Affidavit") and the Exhibits thereto, the affidavit of John Doolittle sworn June 22, 2009 (the "June Affidavit") and the Exhibits thereto, the report dated January 14, 2009 of Ernst & Young Inc. ("E&Y"), the proposed monitor, and on hearing the submissions of counsel for the Applicants, counsel for the boards of directors of Nortel Networks Corporation and Nortel Networks Limited, counsel for E&Y, counsel for Export Development Canada ("EDC"), Flextronics

Telecom Systems Ltd., no one else appearing on this Application and on reading the consent of E&Y to act as the Monitor,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that each of the Applicants is a "debtor company" to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that each of the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan") between, *inter alia*, such Applicant and one or more classes of its secured and/or unsecured creditors as it deems appropriate.

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that each of the Applicants shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further Order of this Court, each of the Applicants shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property. Each of the Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, brokers, accountants, legal counsel, financial advisors and such other persons (collectively "Assistants") currently retained or employed by such Applicant, with liberty to retain such further Assistants as such Applicant deems reasonably necessary or desirable for the Business or to carry out the terms of this Order or for the purposes of the Plan.

5. THIS COURT ORDERS that the Applicants shall be entitled to continue to utilize the central cash management system currently in place as described in the Doolittle Affidavit or replace it with another substantially similar central cash management system (the "Cash Management System") and that any present or future bank or banks providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System; shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System; and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. THIS COURT ORDERS that each of the Applicants, either on its own behalf or on behalf of another Applicant, shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries and employee benefits (including, but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle Affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) compensation to employees in respect of any payments made to employees prior to the date of this Order by way of the issuance of cheques or electronic transfers, which are subsequently dishonoured due to the commencement of proceedings under the CCAA;

(c) all outstanding and future amounts owing to or in respect of individuals working as independent contractors in connection with the Business;

(d) the fees and disbursements of any Assistants retained or employed in accordance with paragraph 4 hereof;

(e) subject to the consent of the Monitor, amounts owing by one of more of the Applicants in respect of its Customer Programs (as defined in the Doolittle Affidavit);

(f) subject to consent of the Monitor, amounts owing by one or more of the Applicants to any other Nortel Company (as defined in the Doolittle Affidavit) in order to settle their inter-company accounts and make inter-company loans in the ordinary course of business, including as a result of the Nortel Companies' Transfer Pricing Model (as defined in the Doolittle Affidavit); and

(g) subject to the consent of the Monitor, amounts owing to the Applicants' carriers and warehousemen.

7. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, each of the Applicants shall be entitled but not required to pay all reasonable expenses incurred by it in carrying on the Business in the ordinary course on and after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance) and maintenance and security services;

(b) payment for goods or services actually supplied to the Applicants on or after the date of this Order;

(c) with the written approval of the Monitor, the posting of additional cash collateral into existing cash collateral accounts (collectively, and together with the cash collateral posted as at February 10, 2009, the "LC Cash Collateral") held by either or both of ABN AMRO Bank N.V., Canada Branch ("ABN") and Royal Bank of Canada

("RBC") as additional and continuing security for existing, renewed and new letters of credit, letters of guarantee, surety bonds, and similar instruments (collectively, "LCs") issued (whether before or after January 14, 2009) for the account of or requested by the Applicants or any of them to third parties pursuant to the existing letter of credit agreements between the Applicants and ABN and RBC and any amendments thereto made with the written approval of the Monitor, and for any foreign exchange losses incurred by ABN and its correspondent banks, if any, under LCs issued in currencies other than Canadian dollars, U.S. dollars, British pounds sterling and Euros, on the following basis:

(i) the posting of such additional cash collateral is for the purposes of paragraph 10 hereof specifically permitted herein and authorized hereby and shall not and will not constitute a fraudulent preference, fraudulent conveyance, oppressive conduct, settlement or other challengeable, voidable or reviewable transaction under any applicable law;

(ii) the aggregate of all cash collateral that may be posted (inclusive of the cash collateral posted as at February 10, 2009) in respect of LCs issued in Canadian dollars, U.S. dollars, British pounds sterling and Euros shall not exceed the amount of U.S.$40 million (converting Canadian dollars at the Bank of Canada's Noon spot exchange rate for any day), provided that the LC Banks shall have no liability in the event that cash collateral is posted in an amount that exceeds such maximum and the validity of their claims with respect to any or all of the LC Cash Collateral shall not be limited, lessened or otherwise impaired in any way as a result of such excess; and

(iii) cash collateral may be posted in respect of LCs issued by ABN in any other currencies in such amounts as are required by the provisions of the applicable letter of credit agreement, including any amendments thereto made with the written approval of the Monitor as security for ABN's exposure to foreign exchange losses;

(d) if the same is not guaranteed by EDC, payment of any indebtedness of the Applicants to the LC Banks (as defined in paragraph 10A hereof) when due under the LC Agreements (as defined in paragraph 10A hereof) by way of set-off and transfer of LC Cash Collateral posted as at January 14, 2009 or posted thereafter pursuant to the LC Agreements and subparagraph (c) above;

(e) without limiting (d), payment of costs and expenses of the LC Banks in connection with the amendment and enforcement of rights under the LC Agreements and any related guarantee bonds issued by EDC if so provided for under an applicable LC Agreement, whether incurred before or after February 10, 2009, including by way of set-off and transfer of LC Cash Collateral;

(f) the posting of cash collateral in favour of Export Development Canada ("EDC") (collectively, the "EDC Cash Collateral") pursuant to the second amended and restated short-term support agreement between Nortel Networks Limited ("NNL") and EDC dated April 24, 2009, as amended by the amending agreement between NNL and EDC dated June 18, 2009, and the cash collateral agreement between NNL and EDC dated June 18, 2009 and any further amendments to the foregoing made with the written approval of the Monitor (collectively, the "EDC Support Agreements"), on the basis that the EDC Support Agreements are hereby ratified and approved and the posting of such cash collateral is for the purposes of paragraph 10 hereof specifically permitted herein and authorized hereby and shall not and will not constitute a fraudulent preference, fraudulent conveyance, oppressive conduct, settlement or other challengeable, voidable or reviewable transaction under any applicable law;

(g) payment of any indebtedness of NNL to EDC under the EDC Support Agreements by way of set-off or transfer of EDC Cash Collateral posted as at June 29, 2009 or posted thereafter pursuant to the EDC Support Agreements and subparagraph (f) above; and

(h) without limiting (g), payment of costs and expenses of EDC provided for under the EDC Support Agreements by way of set-off or transfer of EDC Cash Collateral, to the extent provided for in the EDC Support Agreements.

7A. THIS COURT ORDERS that no provision of this Order shall require EDC to provide its approval for any proposed amendments to any of the LC Agreements pursuant to any agreement between EDC and any of the LC Banks.

8. THIS COURT ORDERS that the each of the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by such Applicant in connection with the sale of goods and services by such Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province or Territory thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by such Applicant.

9. THIS COURT ORDERS that until such time as an Applicant delivers a notice in writing to repudiate a real property lease in accordance with paragraph 11(c) of this Order (a "Notice of Repudiation"), each Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated by such Applicant and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, monthly on the first day of each month,

in advance (but not in arrears). On the date of the first of such payment, any arrears relating to the period commencing from and including the date of this Order shall also be paid. Upon delivery of a Notice of Repudiation, such Applicant shall pay all Rent due for the notice period stipulated in paragraph 11(c) of this Order, to the extent that Rent for such period has not already been paid.

10. THIS COURT ORDERS that, except as specifically permitted herein, each of the Applicants is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by such Applicant to any of its creditors as of this date unless such payments have been approved by the Monitor; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of business unless such obligation has been approved by the Monitor.

10A. THIS COURT ORDERS that, notwithstanding paragraph 10 hereof,

(a) the existing letter of credit agreements between the Applicants and ABN, RBC and Citibank, N.A. acting through its Canadian branch ("Citibank") and any amendments thereto made after January 14, 2009 with the written approval of the Monitor, together with any agreements entered into by the Applicants or any of them with any other lenders with the written approval of the Monitor providing letter of credit facilities or similar facilities to the Applicants or any of them (including those which may be the subject of EDC guarantee bonds issued pursuant to the EDC Support Facility) (collectively, the "LC Agreements"), and the issuance or renewal of LC's pursuant thereto by ABN, RBC, Citibank and any other lenders (collectively, the "LC Banks"), together with any payments made by the Applicants or EDC with respect thereto; and

(b) the EDC Support Agreements and any amendments thereto made after June 18, 2009 with the written consent of the Monitor, together with any payments made by NNL with respect thereto,

are specifically permitted herein and authorized hereby and shall not and will not constitute fraudulent preferences, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law

10B. THIS COURT ORDERS that, notwithstanding any other provision in this Order, no LC Bank shall be required to issue a letter of credit to the Applicants or any of them and EDC shall not be required to provide any Secured Support to the Applicants or any of them.

RESTRUCTURING

11. THIS COURT ORDERS that each of the Applicants shall, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding CDN$10,000,000 in any one transaction or CDN$50,000,000 in the aggregate, subject to paragraph (c), if applicable;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate and to deal with the consequences thereof in the Plan or on further order of the Court;

(c) in accordance with paragraphs 12 and 13, vacate, abandon or quit the whole but not part of any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days notice in writing to the relevant landlord on such terms as may be agreed upon between the Applicant and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan;

(d) repudiate such of its arrangements or agreements of any nature whatsoever, including, without limitation, any of its deferred compensation, or bonus plans, change of control plans, stock options or restructured stock unit plans and shareholder rights plans whether oral or written, as such Applicant may deem appropriate on such terms as may be agreed upon between such Applicant or any one of them and such counter-

parties, or failing such agreement, to deal with the consequences thereof in the Plan; and

(e) pursue all avenues of refinancing and offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a), above);

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "Restructuring").

12. THIS COURT ORDERS that each of the Applicants shall provide each of the relevant landlords with notice of such Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes such Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and such Applicant, or by further Order of this Court upon application by such Applicant on at least two (2) days notice to such landlord and any such secured creditors. If such Applicant repudiates the lease governing such leased premises in accordance with paragraph 11(c) of this Order, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in paragraph 11(c) of this Order), and the repudiation of the lease shall be without prejudice to such Applicant's claim to the fixtures in dispute.

13. THIS COURT ORDERS that if a Notice of Repudiation is delivered, then (a) during the notice period prior to the effective time of the repudiation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the effective time of the repudiation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased

premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. THIS COURT ORDERS that until and including February 13, 2009 or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced, or continued against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the affected Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the affected Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the affected Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicants or with third parties on behalf of the Applicants, or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, employment agency services, insurance, transportation services, utility, leasing or other services to the Business or to any of the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the applicable Applicant and that such Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by such Applicant, in accordance with normal payment practices of such Applicant, as applicable, or such other practices as may be agreed upon by the supplier or service provider and the affected Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. THIS COURT ORDERS that, notwithstanding anything else contained herein, no creditor of the Applicants shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such

obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS AND OFFICERS

20. THIS COURT ORDERS that each of the Applicants shall indemnify its directors and officers from all claims, costs, charges and expenses relating to the failure of such Applicant, after the date hereof, to make payments of the nature referred to in subparagraphs 6(a), 6(b), 8(a), 8(b) and 8(c) of this Order or for the Applicants' failure to make payments in respect of employer health tax or workers' compensation which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers except to the extent that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct.

21. THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of CDN$90 million, as security for the indemnities provided in paragraph 20 of this Order as well as the fees and disbursements of their legal counsel. The Directors' Charge shall have the priority set out in paragraphs 42 and 44 herein.

22. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) each of the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

23. THIS COURT ORDERS that each of NNC's and NNL's directors shall be entitled to receive remuneration in cash on a current basis at current compensation levels (less an overall U.S.$25,000 reduction) notwithstanding the terms of, or elections made under, the Directors' Compensation Plan.

APPOINTMENT OF MONITOR

24. THIS COURT ORDERS that E&Y is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the Applicants' conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and that each of the Applicants and its officers, directors, and Assistants shall advise the Monitor of all material steps taken by such Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

25. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) provide the consents contemplated herein;

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and any other reporting to the Court or otherwise;

(e) advise the Applicants in their development of the Plan or Plans and any amendments to such Plan or Plans;

(f) assist the Applicants, to the extent required by the Applicants, with the Restructuring;

(g) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan or Plans;

(h) have full and complete access to the books, records and management, employees and advisors of the Applicants and to the Business and the Property to the extent required to perform its duties arising under this Order;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order including, without limitation, one or more entities related to or affiliated with the Monitor;

(j) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan or Plans;

(k) assist the Applicants with respect to any insolvency proceedings commenced by or with respect to any other Nortel Company (as defined in the Doolittle Affidavit) in any foreign jurisdiction (collectively, "Foreign Proceedings") and report to this Court, as it deems appropriate, on the Foreign Proceedings with respect to matters relating to the Applicants;

(l) apply as the foreign representative of the Applicants, for recognition of these proceedings as "Foreign Main Proceedings", pursuant to Chapter 15 of the United States Bankruptcy Code, 11 U.S.C. §101 (the "U.S. Bankruptcy Code") or similar legislation in any other jurisdiction; and

(m) perform such other duties as are required by this Order or by this Court from time to time.

26. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

27. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the

Canadian Environmental Protection Act, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

28. THIS COURT ORDERS that that the Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

29. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment and the fulfilment of its duties or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Applicants and counsel to directors shall be paid their reasonable fees and disbursements incurred both before and after the making of the Order, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. Each of the Applicants is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and counsel to directors on a weekly basis and, in addition, each of the Applicants is hereby authorized to pay to: (a) the Monitor and its Canadian and U.S. counsel a retainer in the aggregate amount of CDN$750,000; and (b) counsel to the Applicants a retainer

in the amount of CDN$750,000 (collectively, the "Retainers") to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

31. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. THIS COURT ORDERS that the Monitor, counsel to the Monitor, if any, and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $5,000,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 42 and 44 hereof.

EDC

33. Intentionally Deleted.

INTERCOMPANY LOANS

34. THIS COURT ORDERS to the extent that an Applicant receives a post-filing inter-company loan or other transfer (including goods and services) from a Chapter 11 Entity (as defined in the Doolittle Affidavit) (including as a result of the Applicants' cash management system or otherwise) (each such Applicant, a "Beneficiary Applicant"), and such post-filing inter-company loan or other transfer is made (each an "Advance") by a Chapter 11 Entity (together with NNL for the purposes of paragraph 34A below, a "Protected Entity"), then, subject to the limitations set forth in this paragraph:

(a) the Protected Entity shall have a proven and valid claim against such Beneficiary Applicant for the amount of such Advance (each, an "Inter-company Reimbursement Claim"), which Inter-company Reimbursement Claim shall bear interest at a rate agreed between the applicable Beneficiary Applicant and Protected Entity from time to time for the period in accordance with past practice; and

(b) all of the Property of the Beneficiary Applicant, is hereby charged by a mortgage, lien and security interest (such mortgage, lien and security interest, "Inter-company Charge") in favour of each of the Protected Entities as security for payment of the Inter-company Reimbursement Claim (including principal, interest and expenses) by the applicable Beneficiary Applicant to the corresponding Protected Entity.

34A. THIS COURT ORDERS that the Inter-Company Charge shall also secure any Advances made by NNL to Nortel Networks Technology Corporation ("NNTC") on or after January 14, 2009 and that NNL shall be a "Protected Entity" and NNTC shall be a "Beneficiary Applicant" in respect of such Advances.

35. THIS COURT ORDERS that the Inter-company Charge shall also secure any amounts owed by any of the Applicants to any Chapter 11 Entity at the date of filing under the Existing NNI Revolver (as defined in the Doolittle Affidavit) and all rights that such Chapter 11 Entity has with respect thereto are preserved.

36. THIS COURT ORDERS the Inter-company Charge shall be junior, subject and subordinate only to the other Charges (defined below), and any other future charges against such Beneficiary Applicant that, by the Court order creating them, are expressly stated to be senior to the Inter-company Charges entered after notice and a hearing.

37. THIS COURT ORDERS that pending further order of this Court, an Inter-company Charge shall be a "silent" charge and the Protected Entity shall forbear from exercising, and shall not be entitled to exercise, any right or remedy relating to any Inter-company Reimbursement Claim held by such party, including, without limitation, as to seeking relief from the stay granted hereunder, or seeking any sale, foreclosure, realization upon repossession or liquidation of any Property of a Beneficiary Applicant, or taking any position with respect to any disposition of the Property, the business operations, or the reorganization of a Beneficiary Applicant. An Inter-company Charge automatically, and without further action of any person or entity of any kind, shall be released or otherwise terminated to the extent that Property subject to such Inter-company Charge is sold or otherwise disposed of in accordance with the terms of this Order or further order of this Court after notice and a hearing, with respect to the effect of an Inter-company Charge on any sale of Property by any Beneficiary Applicant.

38. THIS COURT ORDERS that the Beneficiary Applicants may sell Property, in accordance with the terms of this Order or further order of this Court after notice and a hearing, in each case free and clear of any Inter-company Charge, with such Inter-company Charge attaching to the proceeds of sale in the same priority and subject to the same limitations and restrictions as existed in respect of the Property sold.

INTERIM GROUP SUPPLIER PROTOCOL AGREEMENT

39. THIS COURT ORDERS that the Applicants be and are hereby authorized to enter into a group supplier protocol agreement (the "Interim GSPA") substantially in the form attached as Exhibit "C" to the Doolittle Affidavit which agreement shall be effective upon the appointment of the Administrators in the United Kingdom, and the Applicants are hereby authorized to perform each of their obligations, if any, under the Interim GSPA. The obligations of the Applicants under the Interim GSPA shall be secured by the Inter-Company Charge.

NNI LOAN

40. THIS COURT ORDERS that the amended and restated loan agreement entered into between NNL, as borrower, NNTC and the other Applicants as guarantors, and Nortel Networks Inc. ("NNI") as lender (the "NNI Loan Agreement"), substantially in the form attached as Exhibit "B" to the Affidavit of John Doolittle sworn March 27, 2009 providing for a revolving loan facility of up to U.S.$200 million is hereby approved and each of the Applicants is hereby directed to execute and to comply with its obligations under the NNI Loan Agreement.

41. THIS COURT ORDERS that as security for NNL's and NNTC's obligations under the NNI Loan Agreement, NNI shall be entitled to the benefit of and is hereby granted charges (the "Carling Facility Charges") by each of NNL and NNTC, NNL's wholly owned subsidiary, on all of the fee simple interest of NNTC and leasehold interest of NNL respectively in the Carling Facility (as defined in the Doolittle Affidavit) and that no equal or higher charge shall be granted by the Court order unless consented to by NNI as authorized by the United States Bankruptcy Court for the District of Delaware. The Carling Facility Charges shall have the priority set out in paragraphs 42 and 44, hereof. For greater certainty, NNI shall not be required to have exhausted

its remedies under the Carling Facility Charges prior to realizing on or being entitled to proceeds from the NNI Loan Charge.

41A. THIS COURT ORDERS that in addition to the Carling Facility Charges, NNI shall be entitled to the benefit of and is hereby granted a charge on the Property (the "NNI Loan Charge") as security for the Applicants obligations under the NNI Loan Agreement. The NNI Loan Charge shall have the priority set out in paragraphs 42 and 44 hereof.

41B. THIS COURT ORDERS that pending further order of this Court, NNI shall forbear from exercising, and shall not be entitled to exercise, any right or remedy relating to the Applicants' obligations under the NNI Loan Agreement, including, without limitation, as to seeking relief from the stay granted hereunder, or seeking any sale, foreclosure, realization upon repossession or liquidation of any Property of an Applicant, or taking any position with respect to any disposition of the Property, the business operations, or the reorganization of an Applicant. The NNI Loan Charge automatically, and without further action of any person or entity of any kind, shall be released or otherwise terminated to the extent that Property subject to such NNI Loan Charge is sold or otherwise disposed of in accordance with the terms of this Order or further order of this Court after notice and a hearing, with respect to the effect of an NNI Loan Charge on any sale of Property by any Applicant.

41C. THIS COURT ORDERS that the Applicants may sell Property, in accordance with the terms of this Order or further order of this Court after notice and a hearing, in each case free and clear of the NNI Loan Charge, with the NNI Loan Charge attaching to the proceeds of sale in the same priority and subject to the same limitations and restrictions as existed in respect of the Property sold.

EXCESS FUNDING CHARGE

41D. THIS COURT ORDERS that as security for NNL's obligation to repay to NNI the Contingent Payment (as defined in the Interim Funding Agreement, as defined in the June Affidavit) along with interest, if any, NNI shall be entitled to the benefit of and is hereby granted a charge on the Property (the "Excess Funding Charge"). The Excess Funding Charge shall have the priority set out in paragraphs 42 and 44 hereof.

SHORTFALL CHARGE

41E. THIS COURT ORDERS that as security for any obligation of NNL to make the Shortfall Payments (as defined in the Interim Funding Agreement, as defined in the June Affidavit), Nortel Networks UK Limited shall be entitled to the benefit of and is hereby granted a charge on the Property (the "Shortfall Charge"). The Shortfall Charge shall have the priority set out in paragraphs 42 and 44 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

42. THIS COURT ORDERS that the priorities of the Administration Charge, the Goldman Charge, the Carling Facility Charges, the Excess Funding Charge, the Directors' Charge, the NNI Loan Charge, the Inter-company Charge and the Shortfall Charge on all Property:

First -

(a) the Administration Charge;

(b) the Goldman Charge (as defined in the Nortel-LGE Joint Venture Sale Process Order of this Court made on June 1, 2009), ranking *pari passu* with the Administration Charge but only with respect to the assets which are the subject of the Goldman Charge

Second – the Carling Facility Charges;

Third – the Excess Funding Charge

Fourth – the Directors' Charge;

Fifth – the NNI Loan Charge; and

Sixth -

(a) the Inter-Company Charge;

(b) the Shortfall Charge,

which Inter-company Charge and Shortfall Charge shall rank *pari passu* with one another.

43. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge, the Goldman Charge, the Carling Facility Charges, Excess Funding Charge, the Directors' Charge, the NNI Loan Charge, the Inter-company Charge and the Shortfall Charge (collectively, the "Charges") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect. Notwithstanding anything herein, the Charges shall not attach to the Retainers.

44. THIS COURT ORDERS that each of the Charges (all as constituted and defined herein), shall subject to this paragraph 44 and to paragraph 46 herein constitute a charge on the Property secured thereunder, and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. For greater certainty,

(a) the Charges shall attach to the LC Cash Collateral junior in priority to any rights or Encumbrances in favour of LC Banks in respect of LC Cash Collateral and only to the extent of the rights of the Applicants to the return of any LC Cash Collateral from the LC Banks following the exercise of the rights of the LC Banks as against any such LC Cash Collateral pursuant to the LC Agreements or section 18.1 of the CCAA, and

(b) the Charges shall attach to the EDC Cash Collateral junior in priority to any rights or Encumbrances in favour of EDC in respect of EDC Cash Collateral and only to the extent of the rights of NNL to the return of any EDC Cash Collateral from EDC following the exercise of the rights of EDC as against any such EDC Cash Collateral pursuant to the EDC Support Agreements or section 18.1 of the CCAA

notwithstanding anything to the contrary contained in this Order.

45. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges charging such Property,

unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of such Charges, or by further Order of this Court.

46. THIS COURT ORDERS that none of the Charges, the LC Agreements and the EDC Support Agreements shall be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") thereunder, the rights of the LC Banks under LC Agreements and the rights of EDC under the EDC Support shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges, the entering into of the LC Agreements and the issuance or renewal of LC's thereunder and the entering into of the EDC Support Agreements and the provision of Secured Support, as defined and contemplated thereunder, shall not create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;

(b) none of the Chargees, the LC Banks and EDC shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from, the creation of the Charges, the entering into of the LC Agreements or the issuance or renewal of LC's thereunder or the entering into of the EDC Support Agreements and the provision of Secured Support; and

(c) the payments made by the Applicants pursuant to this Order and the granting of the Charges and the entering into of the LC Agreements and the EDC Support Agreements do not and will not constitute fraudulent preferences, fraudulent

conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

47. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

FLEXTRONICS AMENDING AGREEMENT

48. THIS COURT ORDERS that the Flextronics Amending Agreement in the form attached as Exhibit "B" to the Doolittle Affidavit be and is hereby approved and NNL is hereby authorized and directed to comply with its obligations thereunder.

CROSS-BORDER PROTOCOL

49. THIS COURT ORDERS that the cross-border protocol, as amended, in the form attached as Schedule "A" hereto be and is hereby approved and shall become effective upon its approval by the United States Bankruptcy Court for the District of Delaware and the parties to these proceedings and any other Person shall be governed by it and shall comply with the same.

FOREIGN PROCEEDINGS

50. THIS COURT ORDERS that the Monitor is hereby authorized and directed to apply for recognition of these proceedings as "Foreign Main Proceedings" in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code.

51. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, the United Kingdom or elsewhere, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

52. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

SERVICE AND NOTICE

53. THIS COURT ORDERS that the Monitor shall, within ten (10) business days of the date of entry of this Order, send notice of this Order and the commencement of the within proceedings to the Applicants' known creditors, other than employees and creditors to which the Applicants owe less than $5,000, at their addresses as they appear on the Applicants' records, and shall promptly send a copy of this Order (a) to all parties filing a Notice of Appearance in respect of this Application, and (b) to any other interested Person requesting a copy of this Order, and the Monitor is relieved of its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process. The Monitor, on behalf of the Applicants, shall, in its discretion, be entitled to engage a third party mailing service in order to assist or complete the mailing. Any such service provider shall be considered an "Assistant" hereunder.

54. THIS COURT ORDERS that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, and any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

55. THIS COURT ORDERS that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor may post a copy of any or all such materials on its website at http://www.ey.com/ca/nortel.

GENERAL

56. THIS COURT ORDERS that any of the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

57. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

58. THIS COURT ORDERS that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

59. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 30 2009

PER / PAR:

SCHEDULE "A" – CROSS-BORDER PROTOCOL

Attached.

CROSS-BORDER INSOLVENCY PROTOCOL

This cross-border insolvency protocol (the "Protocol") shall govern the conduct of all parties in interest in the Insolvency Proceedings (as such term is defined herein).

The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") attached as Schedule "A" hereto, shall be incorporated by reference and form part of this Protocol. Where there is any discrepancy between the Protocol and the Guidelines, this Protocol shall prevail.

A. Background

1. Nortel Networks Inc. ("NNI") is the wholly owned U.S. subsidiary of Nortel Networks Limited ("NNL"), the principal Canadian operating subsidiary of Nortel Networks Corporation ("NNC"). NNC is a telecommunications company headquartered in Toronto, Ontario, Canada. NNI is incorporated under Delaware law and is headquartered in Richardson, Texas.

2. NNI and certain of its affiliates (collectively, the "U.S. Debtors"),[1] have commenced reorganization proceedings (the "U.S. Proceedings") under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Delaware (the "U.S. Court"), and such cases have been consolidated (for procedural purposes only) under Case No. 09-10138 (KG). The U.S. Debtors are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the U.S. Proceedings. On January 22, 2009,

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[1] The Debtors in the U.S. Proceedings (as defined herein) are: NNI, Nortel Networks Capital Corporation, Nortel Altsystems Inc., Nortel Altsystems International Inc., XROS, Inc., Sonoma Systems, QTERA Corporation, CoreTek, Inc., Nortel Networks Applications Management Solutions Inc., Nortel Networks Optical Components Inc., Nortel Networks HPOCS Inc., Architel Systems (U.S.) Corporation, Nortel Networks International Inc., Northern Telecom International Inc. and Nortel Networks Cable Solutions Inc.

the Office of United States Trustee (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors Committee") in the U.S. Proceeding. An ad hoc committee of bondholders (the "Bondholders Committee") has also been organized.

3. On January 14, 2009, the U.S. Debtors' ultimate corporate parent NNC, NNI's direct corporate parent NNL (together with NNC and their affiliates, including the U.S. Debtors, "Nortel"), and certain of their Canadian affiliates (collectively, the "Canadian Debtors")[2] filed an application with the Ontario Superior Court of Justice (the "Canadian Court") under the Companies' Creditors Arrangement Act (Canada) (the "CCAA"), seeking relief from their creditors (collectively, the "Canadian Proceedings"). The Canadian Debtors have obtained an initial order of the Canadian Court (as amended and restated, the "Canadian Order"), under which, inter alia: (a) the Canadian Debtors have been determined to be entitled to relief under the CCAA; (b) Ernst & Young Inc. has been appointed as monitor (the "Monitor") of the Canadian Debtors, with the rights, powers, duties and limitations upon liabilities set forth in the CCAA and the Canadian Order; and (c) a stay of proceedings in respect of the Canadian Debtors has been granted.

4. The Monitor filed petitions and obtained an order in the U.S. Court granting recognition of the Canadian Proceedings under chapter 15 of the Bankruptcy Code (the "Chapter 15 Proceedings"). NNI also filed an application and obtained an order in the Canadian Court pursuant to section 18.6 of the CCAA recognizing the U.S. Proceedings as "foreign proceedings" in Canada and giving effect to the automatic stay thereunder in Canada. None of the U.S. Debtors or Canadian Debtors are applicants in both the U.S. Proceedings and Canadian Proceedings.

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[2] The Canadian Debtors include the following entities: NNC, NNL, Nortel Networks Technology Corporation, Nortel Networks Global Corporation and Nortel Networks International Corporation.

5. For convenience, (a) the U.S. Debtors and the Canadian Debtors shall be referred to herein collectively as the "Debtors," (b) the U.S. Proceedings and the Canadian Proceedings shall be referred to herein collectively as the "Insolvency Proceedings," and (c) the U.S. Court and the Canadian Court shall be referred to herein collectively as the "Courts", and each individually as a "Court."

B. Purpose and Goals

6. Though full and separate plenary proceedings are pending in the United States for the U.S. Debtors and in Canada for the Canadian Debtors, the implementation of administrative procedures and cross-border guidelines is both necessary and desirable to coordinate certain activities in the Insolvency Proceedings, protect the rights of parties thereto, ensure the maintenance of the Courts' respective independent jurisdiction and give effect to the doctrines of comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in the Insolvency Proceedings:

a. harmonize and coordinate activities in the Insolvency Proceedings before the Courts;

b. promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

c. honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada, respectively;

d. promote international cooperation and respect for comity among the Courts, the Debtors, the Creditors Committee, the Estate Representatives (which include the Chapter 11 Representatives and the Canadian Representatives as such terms are defined below) and other creditors and interested parties in the Insolvency Proceedings;

e. facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors' creditors and other interested parties, wherever located; and

f. implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

As the Insolvency Proceedings progress, the Courts may also jointly determine that other cross-border matters that may arise in the Insolvency Proceedings should be dealt with under and in accordance with the principles of this Protocol. Subject to the provisions of this Protocol, including, without limitation, those included in paragraph 15 hereof, where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts.

C. Comity and Independence of the Courts

7. The approval and implementation of this Protocol shall not divest nor diminish the U.S. Court's and the Canadian Court's respective independent jurisdiction over the subject matter of the U.S. Proceedings and the Canadian Proceedings, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Debtors nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States of America or Canada.

8. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the U.S. Proceedings and the hearing and determination of matters arising in the U.S. Proceedings. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceedings and the hearing and determination of matters arising in the Canadian Proceedings.

9. In accordance with the principles of comity and independence recognized herein, nothing contained herein shall be construed to:

a. increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief on an ex parte or "limited notice" basis to the extent permitted under applicable law;

b. require the U.S. Court to take any action that is inconsistent with its obligations under the laws of the United States;

c. require the Canadian Court to take any action that is inconsistent with its obligations under the laws of Canada;

d. require the Debtors, the Creditors Committee, the Estate Representatives or the U.S. Trustee to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law;

e. authorize any action that requires the specific approval of one or both of the Courts under the Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or

f. preclude the Debtors, the Creditors Committee, the Monitor, the U.S. Trustee, any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other relevant jurisdiction including, without limitation, the rights of parties in interest to appeal from the decisions taken by one or both of the Courts.

10. The Debtors, the Creditors Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the independent, non-delegable duties imposed upon them, if any, by the Bankruptcy Code, the CCAA, the Canadian Order and other applicable laws.

D. Cooperation

11. To assist in the efficient administration of the Insolvency Proceedings and in recognizing that the U.S. Debtors and Canadian Debtors may be creditors of the others'

estates, the Debtors and their respective Estate Representatives shall, where appropriate: (a) cooperate with each other in connection with actions taken in both the U.S. Court and the Canadian Court and (b) take any other appropriate steps to coordinate the administration of the Insolvency Proceedings for the benefit of the Debtors' respective estates.

12. To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Court and the Canadian Court each may coordinate activities and consider whether it is appropriate to defer to the judgment of the other Court. In furtherance of the foregoing:

a. The U.S. Court and the Canadian Court may communicate with one another, with or without counsel present, with respect to any procedural matter relating to the Insolvency Proceedings.

b. Where the issue of the proper jurisdiction of either Court to determine an issue is raised by an interested party in either of the Insolvency Proceedings with respect to a motion or application filed in either Court, the Court before which such motion or application was initially filed may contact the other Court to determine an appropriate process by which the issue of jurisdiction will be determined; which process shall be subject to submissions by the Debtors, the Creditors Committee, the Monitor, the Bondholders Committee (collectively the "Core Parties"), the U.S. Trustee and any interested party prior to a determination on the issue of jurisdiction being made by either Court.

c. The Courts may, but are not obligated to, coordinate activities in the Insolvency Proceedings such that the subject matter of any particular action, suit, request, application, contested matter or other proceeding is determined in a single Court.

d. The U.S. Court and the Canadian Court may conduct joint hearings (each a "Joint Hearing") with respect to any cross-border matter or the interpretation or implementation of this Protocol where both the U.S. Court and the Canadian Court consider such a Joint Hearing to be necessary or advisable, or as otherwise provided herein, to, among other things, facilitate or coordinate proper and efficient conduct of the Insolvency Proceedings or the resolution of any particular issue in the Insolvency Proceedings. With respect to any Joint Hearing, unless otherwise ordered, the following procedures will be followed:

(i) A telephone or video link shall be established so that both the U.S. Court and the Canadian Court shall be able to simultaneously hear and/or view the proceedings in the other Court.

(ii) Submissions or applications by any party that are or become the subject of a Joint Hearing (collectively, "Pleadings") shall be made or filed initially only to the Court in which such party is appearing and seeking relief. Promptly after the scheduling of any Joint Hearing, the party submitting such Pleadings to one Court shall file courtesy copies with the other Court. In any event, Pleadings seeking relief from both Courts shall be filed in advance of the Joint Hearing with both Courts.

(iii) Any party intending to rely on any written evidentiary materials in support of a submission to the U.S. Court or the Canadian Court in connection with any Joint Hearing (collectively, "Evidentiary Materials") shall file or otherwise submit such materials to both Courts in advance of the Joint Hearing. To the fullest extent possible, the Evidentiary Materials filed in each Court shall be identical and shall be consistent with the procedural and evidentiary rules and requirements of each Court.

(iv) If a party has not previously appeared in or attorned or does not wish to attorn to the jurisdiction of a Court, it shall be entitled to file Pleadings or Evidentiary Materials in connection with the Joint Hearing without, by the mere act of such filings, being deemed to have appeared in or attorned to the jurisdiction of such Court in which such material is filed, so long as such party does not request any affirmative relief from such Court.

(v) The Judge of the U.S. Court and the Justice of the Canadian Court who will preside over the Joint Hearing shall be entitled to communicate with each other in advance of any Joint Hearing, with or without counsel being present, (1) to establish guidelines for the orderly submission of Pleadings, Evidentiary Materials and other papers and for the rendering of decisions by the Courts; and (2) to address any related procedural, administrative or preliminary matters.

(vi) The Judge of the U.S. Court and the Justice of the Canadian Court, shall be entitled to communicate with each other during or after any joint hearing, with or without counsel present, for the purposes of (1) determining whether consistent rulings can be made by both Courts; (2) coordinating the terms upon of the Courts' respective rulings; and (3) addressing any other procedural or administrative matters.

13. Notwithstanding the terms of the paragraph 12 above, this Protocol recognizes that the U.S. Court and the Canadian Court are independent courts. Accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall be entitled at all times to exercise its independent jurisdiction and authority with respect to: (a) the conduct of the parties appearing in matters presented to such Court; and (b) matters presented to such Court, including, without limitation, the right to determine if matters are properly before such Court.

14. Where one Court has jurisdiction over a matter which requires the application of the law of the jurisdiction of the other Court, such Court may, without limitation, hear expert evidence of such law or, subject to paragraph 15 herein, seek the written advice and direction of the other Court which advice may in the discretion of the receiving Court, be made available to parties in interest.

15. Notwithstanding anything to the contrary herein contained, to the extent any motion is filed or relief is sought (collectively, "Requested Relief") in either Court relating to: (i) the proposed sale of assets for gross proceeds in excess of U.S. $30 million and where at least one U.S. Debtor and one Canadian Debtor are parties to the related sale agreement or that involves assets owned by at least one U.S. Debtor and one Canadian Debtor; (ii) any motion to allocate sale proceeds which are in the aggregate more than U.S. $30 million and where at least one U.S. Debtor and one Canadian Debtor are parties to the related sale agreement or that involves assets owned by at least one U.S. Debtor and one Canadian Debtor; (iii) matters relating to the advanced pricing agreement involving both the United States and Canadian taxing authorities; (iv) matters regarding transfer pricing methodology relating to an obligation for the transfer of goods and services between one or more U.S. Debtors and one or more Canadian

Debtors; (v) any matter relating to alleged fraudulent conveyance or preference claims in excess of U.S. $30 million and which may have a material impact on both one or more U.S. Debtors and one or more Canadian Debtors; (vi) matters relating to any proposal or approval of a disclosure statement, information circular, plan of reorganization or plan of compromise and arrangements in either the U.S. Proceedings or the Canadian Proceedings; (vii) any motion to appoint a Trustee or Examiner in the U.S. Proceedings, any motion to convert the U.S. Proceedings to a Chapter 7 proceeding, any motion to appoint a Receiver in the Canadian Proceedings, or any motion to convert the Canadian Proceedings to a bankruptcy or proposal proceeding under the Bankruptcy and Insolvency Act (Canada); (viii) any motion to substantively consolidate the Debtors' estates; (ix) matters impacting the material tax attributes of the U.S. Debtors, including the net operating losses of the U.S. Debtors in any prior fiscal year; (x) any motion to amend the terms of any of the Debtors' registered pension plans the effect of which would increase the liability of any Debtor thereunder; (xi) any motion to assume, ratify, reject, repudiate, modify or assign executory contracts having a material impact on the assets, operations, obligations, rights, property or business of both the U.S. and Canadian estates and accounting for annual gross revenue in excess of U.S. $30 million ("Material Contracts"); (xii) any motion seeking relief from the automatic stay in the U.S. Proceedings and/or the stay of proceedings in the Canadian Proceedings (1) involving any Material Contract or (2) to pursue actions having a material impact on the assets, operations, obligations, rights, property or business of at least one U.S. Debtor and one Canadian Debtor and involving damages in excess of U.S. $30 million; (xiii) any motion seeking to create or extend any program, plan, proposal or scheme relating to or authorizing payments to employees where the consideration relates to non-ordinary course incentive performance, retention, severance, termination or such like payments; and (xiv) any

motion regarding any program, plan proposal, scheme or similar course of action related to the wind-down of one or more of the Debtors' businesses;

Then the following procedures shall be followed:

a. unless otherwise consented to by the Core Parties, any and all documents, other than any Monitor's report related to the Requested Relief, shall be filed (as applicable) and served on the Core Parties on not less than seven days notice prior to the proposed hearing date for such Requested Relief in the Court of the forum country where the party seeking the Requested Relief intends the Requested Relief to be heard; *provided, however*, that to the extent the Requested Relief is necessary to avoid irreparable harm to the Debtors and/or the Debtors' bankruptcy estates, as may be determined by the Court of the forum country where the Requested Relief is being sought or such Court otherwise determines, such documents related to the Requested Relief shall be served on the Core Parties on such reasonable notice as such Court may determine;

b. upon notice of such Requested Relief being provided to the Core Parties, each of the Core Parties will have not less than two business days from receipt of such notice (or such shorter period as the Court of the forum country where the Requested Relief is being sought shall determine, as set forth in paragraph 15(a) herein) to request, in writing, that the filing party seek a Joint Hearing for the Requested Relief;

c. if the filing party agrees to seek a Joint Hearing, the Requested Relief shall be heard at a Joint Hearing conducted by the Courts in accordance with the procedures set forth in paragraph 12 herein; and

d. if the filing party does not agree to seek a Joint Hearing, the party seeking to have the Requested Relief heard at a Joint Hearing may file a notice of Joint Hearing dispute in both the Court of the forum country and the Court of the non-forum country and serve notice thereof on the remaining Core Parties, whereupon the respective Courts of the forum country and the non-forum country may consult with one another in accordance with paragraphs 6 and 12 hereof, in order to determine whether a Joint Hearing is necessary or may otherwise consult with the Core Parties prior to any party proceeding with the underlying Requested Relief in the original proposed forum country.

E. <u>Recognition of Stays of Proceedings</u>

16. The Canadian Court hereby recognizes the validity of the stay of proceedings and actions against the U.S. Debtors and their property under section 362 of the

Bankruptcy Code (the "U.S. Stay"). In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding: (i) the interpretation, extent, scope and applicability of the U.S. Stay and any orders of the U.S. Court modifying or granting relief from the U.S. Stay; and (ii) the enforcement of the U.S. Stay in Canada.

17. The U.S. Court hereby recognizes the validity of the stay of proceedings and actions against the Canadian Debtors and their property under the Canadian Order (the "Canadian Stay"). In implementing the terms of this paragraph, the U.S. Court may consult with the Canadian Court regarding: (i) the interpretation, extent, scope and applicability of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay; and (ii) the enforcement of the Canadian Stay in the United States.

18. Nothing contained herein shall affect or limit the Debtors' or other parties' rights to assert the applicability or nonapplicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located. Subject to paragraph 15, herein, motions brought respecting the application of the stay of proceedings with respect to assets or operations of the Canadian Debtors shall be heard and determined by the Canadian Court. Subject to paragraph 15 herein, motions brought respecting the application of the stay of proceedings with respect to assets or operations of the U.S. Debtors shall be heard and determined by the U.S. Court.

F. Rights to Appear and Be Heard

19. The Debtors, the Core Parties, and any other committee that may be appointed by the U.S. Trustee, and the professionals and advisors for each of the foregoing, shall have the right and standing: (i) to appear and to be heard in either the U.S. Court or Canadian Court in the U.S. Proceedings or Canadian Proceedings, respectively, to the same extent as creditors and other interested parties domiciled in the forum country, subject to any local rules or

regulations generally applicable to all parties appearing in the forum; and (ii) to file notices of appearance or other papers with the clerk of the U.S. Court or the Canadian Court in respect of the U.S. Proceedings or Canadian Proceedings, respectively; provided, however, that any appearance or filing may subject a creditor or interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, that an appearance by the Creditors Committee in the Canadian Proceedings shall not form a basis for personal jurisdiction in Canada over the members of the Creditors Committee. Notwithstanding the foregoing, and in accordance with the policies set forth above, including, inter alia, paragraph 12 above; (i) the Canadian Court shall have jurisdiction over the Chapter 11 Representatives (as defined below) solely with respect to the particular matters as to which the Chapter 11 Representatives appear before the Canadian Court; and (ii) the U.S. Court shall have jurisdiction over the Canadian Representatives (as defined below) solely with respect to the particular matters as to which the Canadian Representatives appear before the U.S. Court.

20. In connection with any matter in the Canadian Proceedings in which the Creditors Committee seeks to become involved and which would otherwise require the Creditors Committee to execute a confidentiality agreement, the Creditors Committee, its individual members and professionals shall not be required to execute confidentiality agreements but instead the Creditors Committee and its members shall be bound by the confidentiality provisions contained in the Creditors Committee bylaws, and the Creditors Committee's professionals shall be bound by the terms of the confidentiality agreement with the Debtors dated February 2, 2009.

G. Claims Protocol

21. The Debtors anticipate that it will be necessary to implement a specific claims protocol to address, among other things and without limitation, the timing, process,

jurisdiction and applicable governing law to be applied to the resolution of intercompany claims filed by the Debtors' creditors in the Canadian Proceedings and the U.S. Proceedings. In such event, and in recognition of the inherent complexities of the inter-company claims that may be asserted in the Insolvency Proceedings, the Debtors shall use commercially reasonable efforts to negotiate a specific claims protocol, in form and substance satisfactory to the Debtors, the Monitor, and the Creditors Committee, which protocol shall be submitted to the Canadian Court and the U.S. Court for approval. In the event that the Debtors fail to reach agreement among such parties, the Debtors shall file a motion in both the Canadian Court and the U.S. Court seeking approval of such claims protocol as the Debtors shall determine to be in the best interest of the Debtors and their creditors.

H. Retention and Compensation of Estate Representative and Professionals

22. The Monitor, its officers, directors, employees, counsel and agents, wherever located, (collectively the "Monitor Parties") and any other estate representatives appointed in the Canadian Proceedings (collectively, the "Canadian Representatives") shall (subject to paragraph 19) be subject to the sole and exclusive jurisdiction of the Canadian Court with respect to all matters, including: (a) the Canadian Representatives' tenure in office; (b) the retention and compensation of the Canadian Representatives; (c) the Canadian Representatives' liability, if any, to any person or entity, including the Canadian Debtors and any third parties, in connection with the Insolvency Proceedings; and (d) the hearing and determination of any other matters relating to the Canadian Representatives arising in the Canadian Proceedings under the CCAA or other applicable Canadian law. The Canadian Representatives shall not be required to seek approval of their retention in the U.S. Court for services rendered to the Debtors. Additionally, the Canadian Representatives: (a) shall be compensated for their services to the Canadian Debtors solely in accordance with the CCAA, the Canadian Order and other applicable

Canadian law or orders of the Canadian Court; and (b) shall not be required to seek approval of their compensation in the U.S Court.

23. The Monitor Parties shall be entitled to the same protections and immunities in the United States as those granted to them under the CCAA and the Canadian Order. In particular, except as otherwise provided in any subsequent order entered in the Canadian Proceedings, the Monitor Parties shall incur no liability or obligations as a result of the Canadian Order, the appointment of the Monitor, the carrying out of its duties or the provisions of the CCAA and the Canadian Order by the Monitor Parties, except any such liability arising from actions of the Monitor Parties constituting gross negligence or willful misconduct.

24. Any estate representative appointed in the U.S. Proceedings, including without limitation any examiners or trustees appointed in accordance with section 1104 of the Bankruptcy Code (collectively, the "Chapter 11 Representatives") shall (subject to paragraph 19) be subject to the sole and exclusive jurisdiction of the U.S. Court with respect to all matters, including: (a) the Chapter 11 Representatives' tenure in office; (b) the retention and compensation of the Chapter 11 Representatives; (c) the Chapter 11 Representatives' liability, if any, to any person or entity, including the U.S. Debtors and any third parties, in connection with the Insolvency Proceedings; and (d) the hearing and determination of any other matters relating to the Chapter 11 Representatives arising in the U.S. Proceedings under the Bankruptcy Code or other applicable laws of the United States. The Chapter 11 Representatives shall not be required to seek approval of their retention in the Canadian Court and (a) shall be compensated for their services to the U.S. Debtors solely in accordance with the Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek

approval of their compensation for services performed for the U.S. Debtors in the Canadian Court.

25. Any professionals (i) retained by and being compensated solely by, or (ii) being compensated solely by, the Canadian Debtors including in each case, without limitation, counsel and financial advisors (collectively, the "Canadian Professionals"), shall be subject to the sole and exclusive jurisdiction of the Canadian Court. Such Canadian Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the Canadian Court under the CCAA, the Canadian Order and any other applicable Canadian law or orders of the Canadian Court with respect to services performed on behalf of the Canadian Debtors; and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.

26. Any professionals (i) retained by, or (ii) being compensated by, the U.S. Debtors including in each case, without limitation, counsel and financial advisors (collectively, the "U.S. Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Such U.S. Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

27. Subject to paragraph 19 herein, any professional retained by the Creditors Committee, including in each case, without limitation, counsel and financial advisors (collectively, the "Committee Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Such Committee Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the

Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court or any other court.

I. Notice

28. Notice of any motion, application or other Pleading or paper (collectively the "Court Documents") filed in one or both of the Insolvency Proceedings involving or relating to matters addressed by this Protocol and notice of any related hearings or other proceedings shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following: (a) all creditors and interested parties, in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) of this sentence, counsel to the Debtors; the U.S. Trustee; the Monitor; the Creditors Committee; the Bondholders Committee and any other statutory committees appointed in the Insolvency Proceedings and such other parties as may be designated by either of the Courts from time to time. Notice in accordance with this paragraph shall be given by the party otherwise responsible for effecting notice in the jurisdiction where the underlying papers are filed or the proceedings are to occur. In addition to the foregoing, upon request, the U.S. Debtors or the Canadian Debtors shall provide the U.S. Court or the Canadian Court, as the case may be, with copies of any orders, decisions, opinions or similar papers issued by the other Court in the Insolvency Proceedings.

29. When any cross-border issues or matters addressed by this Protocol are to be addressed before a Court, notices shall be provided in the manner and to the parties referred to in paragraph 28 above.

J. **Effectiveness; Modification**

30. This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

31. This Protocol may not be supplemented, modified, terminated, or replaced in any manner except upon the approval of both the U.S. Court and the Canadian Court after notice and a hearing. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with the notice provisions set forth above.

K. **Procedure for Resolving Disputes Under this Protocol**

32. Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to the U.S. Court, the Canadian Court or both Courts upon notice in accordance with the notice provisions outlined in paragraph 28 above. In rendering a determination in any such dispute, the Court to which the issue is addressed: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either: (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to such other Court; or (iii) seek a Joint Hearing of both Courts in accordance with paragraph 12 above. Notwithstanding the foregoing, in making a determination under this paragraph, each Court shall give due consideration to the independence, comity and inherent jurisdiction of the other Court established under existing law.

33. In implementing the terms of this Protocol, the U.S. Court and the Canadian Court may, in their sole, respective discretion, provide advice or guidance to each other with respect to legal issues in accordance with the following procedures:

a. the U.S. Court or the Canadian Court, as applicable, may determine that such advice or guidance is appropriate under the circumstances;

b. the Court issuing such advice or guidance shall provide it to the non-issuing Court in writing;

c. copies of such written advice or guidance shall be served by the applicable Court in accordance with paragraph 28 hereof;

d. the Courts may jointly decide to invite the Debtors, the Creditors Committee, the Estate Representatives, the U.S. Trustee and any other affected or interested party to make submissions to the appropriate Court in response to or in connection with any written advice or guidance received from the other Court; and

e. for clarity, the provisions of this paragraph shall not be construed to restrict the ability of either Court to confer as provided in paragraph 12 above whenever it deems it appropriate to do so.

L. Preservation of Rights

34. Except as specifically provided herein, neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall: (a) prejudice or affect the powers, rights, claims and defenses of the Debtors and their estates, the Creditors Committee, the Estate Representatives, the U.S. Trustee or any of the Debtors' creditors under applicable law, including, without limitation, the Bankruptcy Code the CCAA, and the orders of the Courts; or (b) preclude or prejudice the rights of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of Canada or the United States.

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 CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, WITH RESPECT TO THE COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Applicants")

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

Court File No. 09-CL-7951

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

THIRDAMENDED AND RESTATED INITIAL ORDER

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TAB 15

I hereby certify this to be a true copy of the original Order dated March 24, 2000 for Clerk of the Court

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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT (ALBERTA)* S.A. 1981, c. B-15, as amended, Section 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION and CANADIAN AIRLINES INTERNATIONAL LTD.

BEFORE THE HONOURABLE	)	At the Courthouse, in the City of Calgary,
CHIEF JUSTICE W.K. MOORE	)	in the Province of Alberta, on Friday,
IN CHAMBERS	)	the 24th day of March, 2000.

ORDER

UPON the ex parte application of CANADIAN AIRLINES CORPORATION and CANADIAN AIRLINES INTERNATIONAL LTD. (the "Petitioners") for advice and directions and related relief in connection with a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 between the Petitioners and certain of their creditors;

AND UPON READING the Petition and the Affidavit of Douglas A. Carty sworn on March 24, 2000, and the Exhibits thereto, all filed herein;

AND UPON HEARING the submissions of counsel for the Petitioners counsel for the proposed Monitor, counsel for Air Canada and counsel for the Senior Secured Noteholders;

IT IS HEREBY ORDERED THAT:

1. The Petitioners are companies to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 applies.

2. The Petitioners shall file with this Court within thirty (30) days of the date of this Order a Plan of Arrangement between the Petitioners and one or more classes of their secured and unsecured creditors and aircraft operating lessors (the "Plan").

3. The Petitioners shall, subject to the directions of this Court, provide notice to, and call meetings of, their affected secured and unsecured creditors, for the purpose of considering and voting on the Plan.

STAY OF PROCEEDINGS

4. Until the 30th day from the date of this Order or such later date as this Court may by subsequent order direct (the "Stay Termination Date"), the Petitioners shall remain in possession and control of their assets, property and undertaking and shall continue to carry on their business in the normal course.

5. Until the Stay Termination Date or further order of this Court and subject to the other provisions of this Order:

(a) Any and all proceedings, including without limitation extra-judicial proceedings, enforcement processes, or other remedies, taken or that may be taken by any of the Petitioners' creditors, customers, suppliers, lessors (including, without limitation, lessors of real property and aircraft), tenants, co-tenants, governments or any nation, province, state or municipality or any other entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government in Canada or elsewhere and any corporation or other entity owned or controlled by or which is the agent of any of the foregoing, limited partners, co-venturers, partners or by any other person (reference to "person" in this Order includes, without limitation, corporations, firms, partnerships, trade unions, employee associations, syndicates and any person, party or entity whatsoever) against or in respect of the Petitioners or any of the Petitioners' property, assets and undertaking, wheresoever located, whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise, as the case may be, and whether pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "BIA"), the *Winding-Up and*

Restructuring Act, R.S.C. 1985, c.W-9 or otherwise, shall be stayed and suspended;

and further and without limiting the generality of the foregoing:

(b) All further proceedings in any action, suit or proceeding against the Petitioners, their assets, property and undertaking, shall be stayed and restrained;

(c) No suit, action, arbitration or other proceeding shall be proceeded with or commenced by creditors, suppliers or any other parties whatsoever against the Petitioners, their assets, property and undertaking;

(d) All persons are enjoined and restrained from realizing upon or enforcing by court proceedings, private seizure or otherwise any security of any nature or description held by that person on the property, assets and undertaking of the Petitioners or from otherwise seizing or retaining possession of any property, assets and undertaking of the Petitioners;

(e) Subject to section 18.1 of the CCAA, no person shall exercise any right of set-off with respect to any accounts with the Petitioners, or any combination of accounts in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation of the Petitioners and, without limitation to the foregoing, all persons holding funds or other property whatsoever received from the Petitioners, whether in the nature of a deposit, trust, security, credit or otherwise, are hereby directed to maintain such funds or other property in the same state as they exist as of the date hereof and hold the same, pending further order of this Court or the written consent of the Petitioners as to the disposition of such funds or other property, provided that the parties to the International Air Transport Association ("IATA") sponsored Bank Settlement Plans and Airline Reporting Corporation and other channels for payment of passenger revenue may continue to set off amounts in the calculation of remittances in the ordinary course, and provided further that the Royal Bank of Canada may set off amounts owed under the operating line of credit for Canadian

(f) All persons, including, without limitation, all employees and union officials or representatives, are enjoined and restrained from implementing, enforcing or imposing any form of job action, decision, ruling or award resulting from any process, grievance or arbitration pursuant to the provisions of any collective agreement with the Petitioners or pursuant to the *Canada Labour Code* or other similar legislation, provided that such employees or other persons are entitled to initiate, continue or pursue grievances, arbitrations or similar proceedings short of enforcement;

(g) All persons, being parties to agreements with the Petitioners relating to the sale or lease of aircraft, parts or other equipment or personalty of any description whatsoever (including without limitation computer software and hardware, office equipment, ground equipment and aircraft maintenance equipment), are hereby restrained from interfering with or taking possession or control of any such aircraft, parts, equipment or personalty in the possession or control of the Petitioners;

(h) All persons, including without limitation, employees, insurance agents, brokers, advisors, registrants or salespersons, having access to information or documents relating to the business of the Petitioners are restrained from removing or using any such information or documents from the property of the Petitioners, except as necessary for the ordinary course of business of the Petitioners, or from terminating any existing agreements or arrangements, written or oral, concerning the transmission, use, processing or distribution of such information or documentation;

(i) All persons being parties to agreements or arrangements for the pooling or consignment of aircraft engines and parts, whether IATA pooling agreements, individual pooling or consignment agreements or otherwise, are hereby restrained from terminating, suspending, modifying, cancelling or otherwise interfering with such pooling or consignment agreements or arrangements and the Petitioners' rights thereunder, notwithstanding any provisions in such agreements or

arrangements to the contrary, provided that the Petitioners shall otherwise abide by such agreements or arrangements in respect of pooling requests made after the date of this Order, including making payment in accordance with the payment terms thereof;

(j) Subject to section 11.1 of the CCAA, all persons being party to fuel consortia agreements or agreements or arrangements for hedging the price of, or forward purchasing, fuel are hereby restrained from terminating, suspending, modifying, canceling or otherwise interfering with such hedging agreements or arrangements, notwithstanding any provisions in such agreements or arrangements to the contrary, provided that the Petitioners shall otherwise abide by such agreements or arrangements after the date of this Order, including making payment in accordance with the payment terms thereof;

(k) All persons are enjoined and restrained from disturbing or otherwise interfering with the use, occupation or possession by the Petitioners, of any premises leased, subleased or occupied by the Petitioners and landlords of premises leased or subleased by the Petitioners are hereby specifically restrained from exercising any right to terminate any lease or sublease to which the Petitioners are a party, whether by notice of termination or otherwise, accelerate or otherwise increase rent due under a lease with the Petitioners whether by reason of default, initiation of these proceedings or similar events, interfere with the quiet possession of real property by the Petitioners, exercise any right of distraint, take possession of any premises leased to the Petitioners (unless those premises have been abandoned by the Petitioners), interfere with the removal of inventory, chattels and equipment from premises leased by the Petitioners or hinder in any way the use and enjoyment of the property by the Petitioners provided that the Petitioners pay occupation rent, but not arrears, for the period commencing at the date of this Order, at the contractual rent stipulated for such premises.

(l) All persons having rights under the terms of any contracts, agreements, leases, licences or other arrangements whatsoever with the Petitioners, whether written or

oral, whether the Petitioners are acting as principal or nominee, for the supply, use or purchase of goods, services or otherwise, are enjoined and restrained, unless otherwise agreed in writing by the Petitioners, from accelerating, terminating, suspending, modifying, canceling, assigning or otherwise interfering with such supply or use of goods and services and with such contracts, agreements, licenses, leases or other arrangements and must continue to perform and observe the terms and conditions contained in such contracts, agreements, licenses, leases or other agreements, notwithstanding any provisions contained in such agreements to the contrary, provided that, for those parties not affected by the moratorium under the Plan, the Petitioners shall pay the prices or charges incurred under such agreements (excluding any premium or increased price resulting from these proceedings or the financial condition of the Petitioners), for goods, services or other consideration provided after the date of this Order, when the same become due in accordance with existing payment terms (or in accordance with such payment terms as may be otherwise agreed by the Petitioners from time to time);

(m) All persons, and without restricting the generality of the foregoing, all authorities (including without limitation all airport authorities, NAV Canada and other air navigation service providers), AMR Corporation, The Sabre Group Holdings, Inc. and their subsidiaries and affiliates, provisioners, utilities (including without limitation suppliers of oil, gas, water, heat, electricity, telephone, telefax service, internet services, and suppliers of similar services or equipment), travel agents, tour operators, general sales agents, landlords, lessors, suppliers of goods and services (including computer software and hardware, aircraft parts, aircraft maintenance, information technology and support and telecommunications technology and support, ground handling services, ground handling equipment and maintenance, fuel, catering, office supplies and equipment, accounting, reservations, employee uniforms, crew accommodations, ground transportation and meals and commissary), pursuant to any agreement or arrangement, written or oral, to the Petitioners are enjoined and restrained from terminating, discontinuing, cutting off or interfering in any way with all such supply and service to the Petitioners without the written consent of the Petitioners, provided

that the Petitioners shall pay the prices or charges incurred under such agreements or arrangements (excluding any premium or increased price resulting from these proceedings or the financial condition of the Petitioners), for all such supply and service provided after the date of this Order;

(n) All persons party to any contracts of insurance or indemnity are enjoined and restrained from terminating, suspending, modifying, determining or canceling such contracts, notwithstanding any provisions contained in such policies to the contrary, without the prior written consent of the Petitioners provided that the Petitioner or Petitioners concerned pay all premiums or other amounts for the period commencing at the date of this Order pursuant to such contracts;

(o) All credit card issuers are enjoined and restrained from canceling or otherwise terminating any agreements with respect to credit cards and from stopping, withholding, redirecting or otherwise interfering with in any way any payments to any of the Petitioners, provided that the Petitioners shall make all payments, if any, and perform all other acts required of them in accordance with such agreements after the date of this Order, when the same become due;

(p) All persons involved in the collection and distribution of monies in connection with passenger and air cargo operations (including without limitation travel agents, tour operators, general sales agents, air carriers, persons involved with the IATA and all persons who are members of or associated with IATA) are enjoined and restrained from suspending any of the Petitioners from membership in IATA or any other air carrier or travel organization or from stopping, withholding, redirecting or otherwise interfering with in any way any payments payable to any of the Petitioners whether pursuant to Bank Settlement Plans, Airline Reporting Corporation arrangements or otherwise, provided that the Petitioners shall make all payments required of them in accordance with the terms of such plans, arrangements and agreements, after the date of this Order, when the same become due;

(q) All airline carriers and all persons who are members of IATA or who are parties to Bank Settlement Plans, Airline Reporting Corporation or other similar arrangements and all airline carriers, travel agents, tour operators, general sales agents and other persons who are parties to codeshare, frequent flyer, interline, marketing, advertising, alliance, partner, charter, corporate sales, customer, agency, cargo handling, currency hedging and similar agreements are enjoined and restrained from terminating, repudiating, taking default action under, or otherwise interfering with any and all Multilateral Interline Traffic Agreements, codeshare, frequent flyer, interline, marketing, advertising, alliance, partner, charter, corporate sales, customer, agency, cargo handling, currency hedging or similar agreements to which any of the Petitioners are parties, or from stopping, withholding, redirecting or otherwise interfering with in any way any payments to any of the Petitioners whether through the IATA Clearing House or otherwise and honouring codeshare arrangements, frequent flyer programs, interline, marketing, advertising, alliance, partner, charter, corporate sales, customer, agency, cargo handling, currency hedging and other similar agreements with the Petitioners, notwithstanding any provisions to the contrary, provided that the Petitioners shall make all payments required in accordance with such agreements when the same become due after the date of this Order.

6. Notwithstanding paragraph 5 of this Order, nothing in this Order shall affect any aircraft leases or other agreements between a Petitioner and Air Canada Capital Ltd. and any aircraft so leased shall be deemed to be unaffected by this proceeding.

EFFECT OF ORDER

7. From 12:01 o'clock a.m. (Calgary time) on the date of this Order, to the time of the granting of this Order, any act or action taken or notice given by any of the Petitioners' creditors or other persons, in furtherance of their rights to commence or continue realization or take or enforce any other step or remedy, will be deemed not to have been taken or given as the case may be, subject to the right of such persons to further apply to this Court in respect of such step, act, action or notice given and provided that the foregoing shall not apply to prevent any creditor who, during such period, effected any

registrations with respect to security granted prior to the date of this Order or who obtained third party consents in relation thereto.

BIA

8. In the event that the Petitioners become bankrupt or a receiver within the meaning of section 243(2) of the BIA is appointed in respect of the Petitioners, the period between the date of this Order and the date on which the stay of proceedings provided for under the terms of this Order or further Order of this Court is ended shall not be counted in determining the 30 day period referred to in section 81.1(a) of the BIA.

OBLIGATIONS

9. During the period of the stay imposed by this Order and subject to the other provisions of this Order, no creditor of, or other person who has dealt or may deal with, the Petitioners shall be under any obligation after the date of this Order to enter into new agreements or obligations except that:

(a) any person who has provided policies of insurance or indemnity at the request of the Petitioners shall be required to continue or to renew such policies of insurance or indemnities following the date of this Order provided that the Petitioners make payment of the premiums on the usual commercial terms (as if these proceedings had not been commenced) and otherwise comply with the provisions of such policies; and

(b) any person (including without limitation AMR Corporation, The Sabre Group Holdings, Inc. and their subsidiaries and affiliates) who has supplied goods and/or services to the Petitioners essential to the air carrier operations of the Petitioners shall be required to continue or to renew any contracts or agreements or otherwise continue the arrangement for the provision of such supply or service, provided that the Petitioners comply with the usual or common commercial terms charged by such person to others for the same or similar supplies or services and, in any event, terms no more onerous than that entered into before these proceedings had been commenced for such supplies and services.

ROYAL BANK OF CANADA

10. The Petitioners are hereby authorized and empowered to borrow, repay and reborrow from Royal Bank of Canada (the "CCAA Lender") by way of cash advances, issuances of letters of credit, or other means, such amounts from time to time as the Petitioners may consider necessary or desirable up to an aggregate principal amount outstanding at any time of $145,000,000.00, substantially on the terms and conditions set forth in the credit agreement between the Petitioner Canadian Airlines International Ltd. ("CAIL") and the CCAA Lender, made as of April 27, 1994, as amended, (the "Credit Agreement") referred to in the Affidavit of Douglas A. Carty sworn on March 24, 2000, and are hereby authorized and directed to perform all their obligations thereunder and under the documents delivered pursuant thereto.

11. The Petitioners shall not grant, and no further approval of the Court will be given to the granting of, security interests, liens, mortgages, charges or other encumbrances over any of the property, assets or undertaking of CAIL that rank in priority to, or pari passu with, the security held by the CCAA Lender, unless the Petitioners obtain the prior written consent of the CCAA Lender.

12. The Petitioners shall continue to pay all interest, fees, recoverable expenses and other similar amounts owing to the CCAA Lender under the Credit Agreement, or owing to the CCAA Lender with respect to the operation of the bank accounts of the Petitioners or the provision of other banking services, and the CCAA Lender may debit such amounts from the Petitioners' bank accounts from time to time.

13. The claims of the CCAA Lender under the Credit Agreement and the documents delivered pursuant thereto shall not be compromised or arranged pursuant to or otherwise be subject to the plan of arrangement to be filed in these proceedings, but until otherwise ordered the exercise of any remedies of the CCAA Lender against the Petitioners arising under the Credit Agreement and the documents delivered pursuant thereto shall be subject to the stay otherwise provided for pursuant to this Order except for:

(a) The CCAA Lender's right to refuse to make advances to CAIL at any time without prior notice;

(b) the CCAA Lender's rights to debit bank accounts as contemplated by paragraph 12 of this Order, or in the ordinary course of providing banking services to the Petitioners; and

(c) the CCAA Lender's exercise of any right to demand payment, accelerate or give other notices under the Credit Agreement and the documents delivered pursuant thereto.

CARRYING ON BUSINESS

14. During the period of the stay imposed by this Order and except as otherwise provided in this Order or as this Court may in the future authorize or direct, the Petitioners shall carry on their business in the ordinary course, and:

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

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

(c) May terminate, suspend or cancel such contracts, agreements, leases or conditional sale agreements (including realty, aircraft and other equipment), licenses or other arrangements either in accordance with the terms of such arrangements or otherwise as the Petitioners deem advisable and, where there are penalties or financial obligations arising upon termination suspension or cancellation or where such termination, suspension or cancellation is not in accordance with such contract or other arrangements, the Petitioners shall make provision for any consequences thereof in the Plan;

(d) Shall not, other than in accordance with existing agreements binding on the Petitioners and in the ordinary course of business or pursuant to the other provisions of this Order, sell, dispose of, convey, transfer, release, discharge,

assign, mortgage, pledge, encumber, alter or permit to be removed from their possession any of their assets in any way whatsoever, provided that nothing herein shall restrict the Petitioners from the conduct of their business in the ordinary course or from the sale to Air Canada of CAIL's rights in connection with its Vancouver-Narita route for an aggregate sum of $16 million, or from the sale or lease or other disposition of assets pursuant to existing agreements or in the ordinary course of business provided that the proceeds of the disposition of assets do not exceed $5 million in aggregate and provided that any disposition shall, unless otherwise agreed, be subject to the terms of any security affecting such assets;

(e) Shall continue to operate, maintain, inspect, service, repair and overhaul all aircraft, engines and parts, whether for themselves or for third parties, and all of the equipment and facilities in the possession of the Petitioners, in the ordinary course of their business and in accordance with accepted airline industry standards and practice;

(f) Shall not declare, pay or set aside any dividends or other distributions with respect to issued shares;

(g) Shall not issue or offer any additional shares or any options, warrants or rights to purchase any shares of the Petitioners;

(h) Shall not enter into any new material contract, commitment, agreement or transaction or incur any debts, commitments or obligations, other than in the ordinary course of business or as otherwise provided in this Order;

(i) Shall not make any payments to any of their creditors (secured, unsecured or otherwise), including any payment for interest, fees or similar charges, in respect of any debts, liabilities or other obligations whatsoever incurred up to the date of this Order, except that the Petitioners during the period of stay are hereby authorized at their discretion to make payment of certain obligations, whether incurred before or after the date of this Order, as follows:

(i) all wages, benefits, vacation pay, severance pay and other amounts due or accruing due to employees of the Petitioners and all source deductions and contributions in connection with such employees;

(ii) all accounts of legal, accounting, and all other advisors and consultants advising the Petitioners in connection with the preparation of the Plan, or generally to advise the Petitioners in connection with possible restructuring, refinancing, or recapitalization;

(iii) all ticket refunds, travel agent commissions, interline, codeshare, frequent flyer and similar obligations with other airlines;

(iv) all amounts due by the Petitioners under any credit card arrangement (including, without limitation, American Express, MasterCard, Diner's Club and Visa);

(v) all insurance premiums and financing arrangements for insurance premiums;

(vi) amounts payable under Bank Settlement Plans, Airline Reporting Corporation and similar arrangements;

(vii) all accounts of or for the Monitor and its advisors and consultants;

(viii) all claims of Canadian and foreign governments in respect of the Petitioners, including without limitation, sales tax, goods and services tax, transportation tax, and customs and excise tax;

(ix) payments of principal and interest, interest only, lease payments, costs, fees, expenses or charges to creditors and lessors in accordance with the Plan as outlined in the Affidavit of Douglas A. Carty or as later modified or amended;

(x) all amounts owing to real estate lessors;

(xi) all amounts reasonably necessary for the preservation of the property or undertaking of the Petitioners;

(xii) all amounts owing for goods and services supplied to the Petitioners;

(xiii) amounts normally paid or transferred between the Petitioners and between the Petitioners and their respective subsidiaries in the ordinary course of business or existing practice; and

(xiv) any other amounts provided for by the provisions of the Plan or by the terms of this Order.

For greater certainty, the Petitioners are entitled to make payment of such obligations incurred before the date of this Order where the arrangements continue on usual or customary commercial terms but are not obligated to make payment where such other persons seek to impose more stringent terms than previously imposed on Canadian or on others generally.

15. The Petitioners are authorized to maintain or continue to maintain the existing segregated trust accounts or trusts in respect of source deductions in connection with wages paid or payable including unemployment insurance premiums, income tax withholdings and Canada Pension contributions and in respect of GST.

16. The Petitioners are at liberty to retain and employ and make payment to such agents, servants, solicitors and other advisors and consultants as they deem reasonably necessary or desirable in the ordinary course of their business and for the purpose of carrying out the terms of this Order and for the implementation of the Plan.

MONITOR

17. PricewaterhouseCoopers Inc. (the "Monitor" or "PwC") is hereby appointed as an officer of this Court to monitor the business and affairs of the Petitioners with the powers and obligations and for the purposes hereafter set forth until further Order of this Court and the Petitioners, their shareholders, officers, directors, employees, servants, agents and representatives and all other persons, firms or corporations having notice of this Order

shall cooperate fully with the Monitor in the exercise of its power and discharge of its obligations. Without limiting the generality of the foregoing, the foregoing parties shall provide the Monitor with such access to the Petitioners' books, documents, contracts, papers, records, assets and premises as the Monitor requires to exercise its powers and perform its obligations under this Order.

18. The Monitor shall, until further Order of this Court:

(a) assist the Petitioners in the development and implementation of the Plan;

(b) assist the Petitioners in negotiations with creditors and with the holding and administering of any creditors' and/or shareholders' meeting for voting on the Plan;

(c) inquire into and report to creditors, at or prior to any meetings to consider the Plan, upon the financial condition, projected cash-flow and prospects of the Petitioners including, without limitation:

(i) provide creditors in a timely fashion with the details of any sale of the property of the Petitioners which in the opinion of the Monitor is significant, to the extent that information is made available to the Monitor; and

(ii) notify the creditors if the Monitor ascertains that there has been a material adverse change in the Petitioners projected cash flow or financial circumstances;

(d) be at liberty to engage legal counsel, in the event the Monitor requires independent legal advice and engage such other advisors or agents as the Monitor deems advisable or necessary respecting the exercise of its powers or performance of its obligations under this Order;

(e) be at liberty to retain and utilize the services of entities related to the Monitor as may be necessary to perform its duties hereunder;

(f) report to this Court as the Monitor deems appropriate or as this Court directs, in respect of the Plan, or any such matters relevant to these proceedings; and

(g) perform such other duties as are required by this Order or further Order of this Court.

19. The Monitor is authorized to provide all interested parties, including but not limited to the affected creditors, with its report or assessment of the Plan. The Monitor shall incur no liability as a result of any report and assessment that it may make pursuant to this Order.

20. The Monitor shall provide any creditor of the Petitioners with information provided by the Petitioners in response to reasonable requests for information made in writing by such creditor addressed to the Monitor, upon giving prior written notice of such request and the proposed response to the Petitioners. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by any of the Petitioners is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court.

21. The Monitor is not empowered to take possession of the property of the Petitioners or to manage any of their businesses or affairs and shall not, by fulfilling its obligations hereunder, be deemed to have taken and maintained possession or control of such property, or any part thereof, and shall not occupy any premises except in such circumstances as the Monitor deems necessary.

22. The Monitor shall not be liable for any act, omission, obligation or purchase of the Petitioners or any act or omission as a result of the Monitor's appointment or the fulfillment of its duties in the carrying out of the provisions of this Order, save and except for gross negligence or willful 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 solicitor and his own client costs of the Monitor in connection with any such action or

proceeding. The related entities referred to in such paragraph 18(e) of this Order shall also be entitled to the protections, benefits and privileges of this paragraph, *mutatis mutandis*.

23. The appointment of the Monitor shall not constitute the Monitor to be an employer or a successor employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and safety or any other statute, regulation or rule of law or equity for any purpose whatsoever and, further, the Monitor shall be deemed not to be an owner or in possession, control, or management of the Property of the Petitioners whether pursuant to any legislation enacted for the protection of the environment, the regulations thereunder or any other statute, regulation or rule of law or equity under any federal, provincial or other jurisdiction for any purpose whatsoever.

FEES OF MONITOR AND PETITIONERS' COUNSEL

24. The Monitor, Canadian counsel to the Monitor and Canadian counsel to the Petitioners and United States counsel to the Petitioners and the Monitor shall be paid their reasonable fees and disbursements (in the case of the Monitor, on the basis of a chartered accountant and its own client and, in the case of such counsel on a solicitor and his own client basis) by the Petitioners and such fees shall be part of the costs of these proceedings. The Petitioners are hereby authorized and directed to pay the accounts of the Monitor, Canadian counsel for the Monitor, Canadian counsel for the Petitioner, Bennett Jones, and United States counsel for the Petitioner and the Monitor, Skadden Arps Slate, Meagher and Flom (Illinois) and Gelber, Gelber Ingersoll, Klevansky & Faris, on a bi-weekly basis, and, in addition, the Petitioners are hereby authorized to pay each of the Monitor and Canadian counsel to the Petitioners retainers in the amount of $250,000 and to pay Skadden Arps Slate, Meagher and Flom (Illinois) and Gelber, Gelber Ingersoll, Klevansky & Faris retainers in the total amount of $300,000(U.S.), each to be held by the recipient as security for payment of their fees and disbursements outstanding from time to time.

25. The fees and disbursements of the Monitor, including the fees and disbursements of Canadian counsel to the Monitor, shall be subject to the passing of accounts by this Court.

26. The Monitor, Canadian counsel to the Monitor, Canadian counsel to the Petitioners and United States counsel to the Petitioners and the Monitor, as security for their professional fees and disbursements incurred in respect of these proceedings, the Plan and the restructuring both before and after the making of this Order, shall be entitled to the benefit of and are hereby granted a charge against the Property in priority to any liens, charge, mortgages, encumbrances and security interests, legal or equitable, in favour of the Petitioners, creditors or any Person.

NOTICES UNDER CCAA

27. Notwithstanding section 11(5) of the CCAA and any other provision of this Order, the Petitioners and the Monitor shall, within ten (10) business days of the date of entry of this Order, send a copy of this Order to those creditors with claims in excess of $50,000 other than trade creditors, employees or others not adversely affected by the Plan and interested parties directly affected by the Plan and to all parties filing a Notice of Appearance in respect of this application and, if requested by them, to any other creditor or potential creditor of the Petitioners. The Petitioners and the Monitor are relieved of their obligations to give notice to any other person other than as provided herein.

SERVICE

28. Service of the Petition for this Order and of the Affidavit of Douglas A. Carty are hereby dispensed with.

29. The Petitioners are at liberty to serve this Order and, subject to further order of this Court, any other orders in these proceedings, all other proceedings, the Plan, any notices of meetings and all other notices and to deliver the information circular, proofs of claim, proxies and disallowances of claims by forwarding true copies thereof by personal delivery to the address in this judicial district shown on the notice or notices of appearance filed and served on the Petitioners or, in the absence of a notice of

appearance, by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Petitioners' creditors or other persons at their addresses as last shown on the records of the Petitioners and any such service or notice shall be deemed good and sufficient service. For the purpose of calculating the period of notice, apart from personal service effected according to the Rules of Court, 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 business day after mailing in Canada and the United States or on the seventh business day otherwise.

RECOGNITION

30. 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.

31. This Court seeks and requests the aid, recognition and comity of any court, tribunal, administrative body or similar authority, within any province or territory of Canada and whether constituted under the laws of Canada or any province or territory, and of any court, tribunal, administrative body or other authority whatsoever in any jurisdiction outside of Canada having effect on the Petitioners, including, without restricting the generality of the foregoing, any court, tribunal, administrative body or other authority in Argentina, Aruba, Australia, Belgium, Brazil, Chile, Costa Rica, Cuba, Czech Republic, Dominican Republic, El Salvador, Fiji, Finland, Germany, Guatemala, Hong Kong, India, Italy, Japan, Korea, Malaysia, Mexico, the Netherlands, New Zealand, Nicaragua, Panama, Peoples Republic of China, Peru, Philippines, Portugal, Puerto Rico, Russian Federation, St. Lucia, Sweden, Taiwan, Thailand, Turks and Caicos Islands , United Kingdom, the United States of America and the Virgin Islands, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

32. The Monitor shall be authorized as foreign representative of the petitioners or either of them to make application to the United States Bankruptcy Court for relief pursuant to

section 304 of title 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330, as amended.

APPLICATIONS

33. Notwithstanding any other provision of this Order, any party is at liberty to make application to this Court to vary or rescind this Order or for advice and directions or other relief as may be required from time to time, on seven (7) days notice to the Petitioners and the Monitor and to any other party which has filed a notice of appearance in these proceedings or which is known to be interested in or affected by the application, or on such shorter period of notice as may be necessary due to urgency, as directed by this Court.

"W. K. Moore"

C.J.C.Q.B.A.

ENTERED this 24th day of March, 2000.

COURT SEAL

CLERK OF THE COURT

Action No: 0001- 05071

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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT (ALBERTA)* S.A. 1981, c. B-15, as amended, Section 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION and CANADIAN AIRLINES INTERNATIONAL LTD.

ORDER

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Our File No: 1697-426

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., FORT ENERGY CORP., FENERGY CORP., 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 ARGUMENT OF THE PETITIONERS

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