Estate/Court File No.: 32-2403547

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED OF

IMPOPHARMA INC.

Applicant

BOOK OF AUTHORITIES OF THE APPLICANT
(Returnable on August 2, 2018)

July 30, 2018

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1993 CarswellOnt 183
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Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.i General principles
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings
Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.
The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also

sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

Table of Authorities

Cases considered:

Amirault Fish Co., Re, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — *referred to*

Associated Investors of Canada Ltd., Re, 67 C.B.R. (N.S.) 237, Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.*) 46 D.L.R. (4th) 669 (Q.B.), reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — *referred to*

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — *referred to*

Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — *referred to*

Empire-Universal Films Ltd. v. Rank, [1947] O.R. 775 [H.C.] — *referred to*

Feifer v. Frame Manufacturing Corp., Re, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — *referred to*

Fine's Flowers Ltd. v. Fine's Flowers (Creditors of) (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — *referred to*

Gaz Métropolitain v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — *referred to*

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.) — *referred to*

Inducon Development Corp. Re (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — *referred to*

International Donut Corp. v. 050863 N.B. Ltd. (1992), 127 N.B.R. (2d) 290, 319 A.P.R. 290 (Q.B.) — *considered*

Keppoch Development Ltd., Re (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) — *referred to*

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — *referred to*

McCordic v. Bosanquet (1974), 5 O.R. (2d) 53 (H.C.) — *referred to*

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 1 (Q.B.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) — *referred to*

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 (C.A.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.), affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.), leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — *referred to*

Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — *referred to*

Seven Mile Dam Contractors v. R. (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) — *referred to*

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — *referred to*

Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — *considered*

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — *referred to*

Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon*) 1 O.R. (3d) 321 (Gen. Div.) — *referred to*

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 (Q.B.), reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 85

s. 142

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

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43.

Judicature Act, The, R.S.O. 1937, c. 100.

Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into

German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that

the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured

creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 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.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .
>
> (emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

> Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, (sub nom. *Lane v. Willis; Lane v. Beach*) [1972] 1 W.L.R. 326 (C.A.) .
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> . . . . .
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> In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.*) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
>
> > The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
> >
> > > (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse

> of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the

various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

* As amended by the court.

End of Document

TAB 2

Ontario Supreme Court
Olympia & York Developments Ltd., Re
Date: 1995-09-01

Re bankruptcy of Olympia & York Developments Limited

Ontario Court of Justice (General Division) [Commercial List] Farley J.

Heard – April 18, 1995.

Judgment – September 1, 1995.

Patricia D.S. Jackson, for moving party, Bank of Nova Scotia.

Arnie Herschorn, for Institute for Advanced Talmudic Study.

Garth Low, for Martin Orbach, Lewis Gestetner, and HRF Fund Holdings Inc.

Theodore Kerzner, Q.C., for Yeshivah Yesodei Hatora.

David Stamp, for Credit Lyonnais.

William V. Sasso, for Olympia & York Creditors' Monitoring Committee.

Geoffrey B. Morawetz and Craig J. Hill, for Coopers & Lybrand OYDL Inc. (Administrator) and Coopers & Lybrand Limited (Trustee in Bankruptcy of Olympia & York Developments Limited).

(Docs. 31-204546T, 31-204573T and 31-204574T)

[1] September 1, 1995. FARLEY J.: – The Bank of Nova Scotia ("BNS") moved for an order pursuant to s. 181 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), annulling the bankruptcy of Olympia & York Developments Limited ("OYDL") created by a receiving order dated December 20, 1994 ("receiving order") in combination with two other orders of the same date (conjunctively the "December orders"), or, in the alternative, an order pursuant to s. 187(5) of BIA reviewing and rescinding the December orders. BNS was supported in this regard by various other parties (Martin Orbach, Lewis Gestetner, and HRF Fund Holdings Inc.; the Institute for Advanced Talmudic Study; and Yeshiva Yesodei Hatora), which, subsequent to the hearing but prior to the release of my decision, have entered into settlement agreements with the respondents Coopers & Lybrand OYDL Inc., the administrator ("administrator") pursuant to the OYDL *Companies Creditors' Arrangement Act* (R.S.C. 1985, c. C-36 – "CCAA") plan, and Coopers & Lybrand Limited, the trustee in bankruptcy of OYDL

("trustee"), pursuant to the receiving order. The OYDL Creditors' Monitoring Committee supported the position of the administrator and trustee.

[2] On May 20, 1992, petitions in bankruptcy were issued against OYDL by 976910 Ontario Inc., Credit Lyonnais, and the HongKong and Shanghai Banking Corporation Limited. The subject receiving order made against OYDL was advanced by the petitioners in accordance with the procedure set out in s. 10.7 of the OYDL CCAA plan, which was approved by the creditors of OYDL under the CCAA and sanctioned by the court on February 5, 1993. I granted the receiving order on December 20, 1994, together with two other orders, administrative in nature, which are individually referred to as the BIA admin order and the CCAA admin order.

[3] BNS submits that the December orders are contrary to BIA in that they:

(a) create a partial and entirely voidable bankruptcy of OYDL,

for the apparent purpose of avoiding significant adverse tax consequences associated with a "proper" bankruptcy of OYDL;

(b) vest only a portion of the assets of OYDL which BIA requires to be vested in the trustee;

(c) limit the powers and duties which BIA requires of a trustee in bankruptcy such as the trustee;

(d) require the administrator to act contrary to BIA; and

(e) allow for the use of certain sections of BIA in respect of certain preferences and settlements while at the same time limiting the trustee's power to review and challenge other potential preferences, settlements, and reviewable transactions which the trustee would examine under a "proper" bankruptcy of OYDL, but all in contemplation that the December orders would be annulled in the future (and hence, in the language of BIA, "ought never to have been made") when the utility of those portions of BIA sought to be relied on has been exhausted. BNS also complains that the December orders were made on an ex parte basis without the participation of those, such as BNS, whose rights would be affected by them. The administrator and trustee countered by saying that BNS is attempting to use this motion to obtain relief which would have the effect of shielding itself from an action being continued by

the trustee to set aside certain alleged preferential transactions which were for the benefit of BNS, to the prejudice of the other unsecured creditors of OYDL.

[4] The two sections of BIA which were specified by BNS were:

> **181.** (1) Where, in the opinion of the court, a receiving order ought not to have been made... the court may by order annul the bankruptcy.
>
> 187(5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

[5] In the proceedings under CCAA, the creditors of OYDL negotiated and voted on the OYDL CCAA Plan; 27 of 35 classes of creditors voted in favour, the remaining 8 voted against the plan. The claims of BNS with respect to the swap transactions (defined infra) were included in Class 33A, which class voted against the plan. The February 5, 1993, sanction order appointed the administrator as the administrator of OYDL; in s. 16(b) the order provided that, in exercising its power and authority pursuant to the plan, the administrator was the agent of OYDL and not the agent of the creditors of OYDL.

[6] On June 10, 1993, the administrator commenced an action ("preference action") which sought to set aside and declare void certain transactions between OYDL, Olympia & York CC Limited ("OYCC"), Baden Real Estate Corp., and BNS ("swap transactions") on the basis that:

(a) the swap transactions were entered into with the intention and effect of giving BNS an improper preference over the other creditors of OYDL and of defeating, hindering, delaying, prejudicing, or defrauding OYDL's creditors contrary to the Ontario *Fraudulent Conveyances Act*, the Ontario *Assignments and Preferences Act*, and BIA;

(b) they constituted settlements pursuant to BIA; and

(c) they were oppressive, unfairly prejudicial to, or unfairly disregarded the interests of OYDL, OYCC, and the security holders and creditors thereof, contrary to s. 248 of the Ontario *Business Corporations Act.*

In its statement of defence, BNS stated:

(a) Class 33A was specifically excluded from those classes of creditors which approved the plan and, accordingly, none of the terms of the plan apply to BNS in its capacity as a creditor in respect of the swap transaction; and

(b) the administrator, which was appointed by the sanction order and which derives all its authority from the sanction order in the plan, therefore has no standing to assert any of the claims set forth in the statement of claim in the preference action.

BNS then moved to dismiss the preference action on the foregoing basis.

[7] On December 20, 1994, counsel for the administrator representing OYDL and for each of the petitioning creditors attended upon me regarding the December orders. There had been some discussions two weeks earlier between counsel for the administrator and for BNS concerning the possibility of the receiving order motion and on December 19, 1994, counsel for the administrator advised counsel for BNS that the administrator intended to proceed within the next day with the bankruptcy of OYDL as contemplated in s. 10.7 of the plan. In the affidavit of Paul Currie, an employee of the administrator, it was set out that one of the principal reasons for seeking the December orders was the pending BNS motion. Another factor considered was the position of the federal and provincial Crowns under the CCAA plan.

The Ontario Court of Appeal in *Fine's Flowers Ltd. v. Fine's Flowers Ltd. (Creditors of)* (1993), 22 C.B.R. (3d) 1, has now ruled subsequent to the approval of the subject plan that the Crown is not bound by CCAA proceedings. Further, Mr. Currie indicated that "[a] bankruptcy under section 10.7 will enable the Administrator to effectively deal with the remaining assets of OYDL, creditors who are affected by the Plan and creditors who are not affected by the Plan." The receiving order was issued in the general form of Form 28 of Schedule 111 of BIA.

[8] The administrator was appointed in the CCAA proceedings and is charged with the responsibility of implementing the plan. In pursuing the BIA proceedings the administrator is required to follow the provisions of s. 10.7 of the CCAA plan. The provisions of the plan and of the December orders do not restrict the court from utilizing its discretion at the hearing of any motion to annul the receiving order.

[9] The administrator points out that, in addition to having claims under Class 33A (swap transactions), BNS is a substantial creditor of OYDL in the Class 28 unsecured creditors as to $540 million of unsecured claims. While creditors of Class 28 voted in favour of the plan and are bound by it, they are only bound by it, in my view, qua their condition of being a Class 28 creditor – and not in their condition, if such were the case, under a class which did not vote in favour of the plan.

[10] In accordance with the receiving order the provisions of BIA and s. 10.7 of the plan, it is the position of the administrator and trustee that the preference action was vested in the trustee. On January 30, 1995, the administrator issued its annual report to the creditors of OYDL; it stated, at pp. 17-8, that:

> A fundamental objective in making the [bankruptcy] filing was to ensure that OYDL and the Administrator could utilize the sections of the Plan available to continue the preference action. As you will recall the Plan provided for a section 10.7 "limited bankruptcy" of OYDL if defendants to preference actions sought to have preference actions dismissed on jurisdictional grounds. Certain creditors have sought this remedy and after considering the consequences of such action the Administrator decided to utilize section 10.7 of the Plan.
>
> **Effect of 10.7(L) Bankruptcy**
>
> Counsel has advised that the effect of 10.7(L) is as follows:
>
> * OYDL is in bankruptcy;
> * the vesting of assets to the Trustee is limited to the preference action; and
> * the Plan continues to be binding on OYDL.

[11] BNS asserts that the fact that the bankruptcy was so limited was not clear from the December orders or from the affidavit of Mr. Currie since the receiving order merely appoints Coopers & Lybrand Limited as the trustee in bankruptcy of the estate of OYDL (not a portion of the estate) and there is nothing contained therein to suggest that the apparent objective of this "limited" vesting of assets in the trustee was an attempt to avoid the potential negative tax consequences associated with the possible change in control of all of the assets of OYDL being vested in the trustee.

[12] Section 10.7(L) of the plan provides:

> (L) Notwithstanding the granting of a receiving order pursuant to this Section 10.7, the Plan as sanctioned shall continue to be binding upon all Creditors and shall be binding upon the trustee in bankruptcy of the Relevant Applicant and the Relevant Applicant. Such receiving order shall, accordingly, vest all Preference Claims in the trustee but shall not vest any other assets nor require any administration save as contemplated hereby or ordered by the Court. Without limiting the foregoing, the powers of the Administrator with respect to OYDL and its property shall not be diminished or modified by the terms of this Section 10.7 or any deemed vesting of title in a trustee in bankruptcy of OYDL. When all Recourses [proceedings taken to enforce Preference Claims] in respect of a Relevant Applicant have been completed, whether by withdrawal of the Recourses, settlement thereof, final judgment in respect thereof or otherwise, and any required administration of the bankrupt estate completed, *the Relevant Applicant shall, in the case of OYDL*, and may, in the case of the other Relevant Applicants, *apply for the annulment of the receiving order pursuant to Section 181 and Subsection 187(5) of*

the Bankruptcy Act, and the Administrator and the Creditors of the Relevant Applicant shall not oppose such annulment unless it adversely affects the exercise of a Recourse, any judgment rendered in respect of a Recourse or any settlement made between a Moving Party and a Respondent. (Emphasis added.)

[13] Section 10.7(M) of the plan provides:

> (M) The application for annulment provided for in Section 10.7(L) may be made earlier than therein contemplated with the consent of the relevant Moving Party and the trustee in bankruptcy of the Relevant Applicant on such terms as the relevant Moving Party may, in its discretion, agree to accept.

[14] It appears to me that the issue in this motion is whether the court should either annul the receiving order or rescind the December orders either because there was no jurisdiction in the court to have granted these orders on December 20, 1994, or that BNS, as supported by the other parties, has shown additional information as to why this court's discretion should be so exercised.

[15] If BIA does not allow for such a receiving order in the sense that the legislation does not permit a receiving order of the nature granted, then clearly I cannot impose my views of what is an appropriate regime to operate under regarding bankruptcy matters and disregard what is the express will of Parliament: see *R. v. McIntosh*, [1995] S.C.J. No. 16, at pp. 39-40. This, of course, should be contrasted with the aspect of the inherent jurisdiction of this court to deal with the vacuum which is required to be filled so as to give purpose and meaning to the legislation or to supplement what is permitted by the legislation so that there is a firm foundation on which to build, as opposed to a partial base of sand. In this regard see the views of Chadwick J. in his unreported decision *Re J.P. Capital Corp.*, released February 28, 1995 [reported at (1995), 31 C.B.R. (3d) 102 (Ont. Bktcy.)] (especially at p. 4 [p. 104 C.B.R.] where he comments on *Re A. & F. Baillargeon Express Inc.* (1993), 27 C.B.R. (3d) 36 (Que. S.C.); *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Inc.* (1971), 21 D.L.R. (3d) 75 (Man. Q.B.); in *Re Tlustie* (1923), 3 C.B.R. 654 (Ont. S.C.); *Re Loxtave Buildings of Canada Ltd.* (1943), 25 C.B.R. 22 (Sask. K.B.); *Re Cheerio Toys & Games Ltd.* (1971), 15 C.B.R. (N.S.) 77 (Ont. S.C.), affirmed [1972] 2 O.R. 845 (C.A.); *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.); *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.); *Re Lehndorff General Partner Ltd.* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.). It should, however, be recognized that in the present situation there is no such general enabling language present, as was the case in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div.) [Commercial List], where "takes such

other action as the court [deems] advisable" was in place. As Chadwick J. said at p. 143 of *Re N.T.W. Management Group Ltd.* (1994), 29 C.B.R. (3d) 139 (Ont. Bktcy.):

> Courts have recognized in dealing with the bankruptcy and insolvency legislation a technical or stringent interpretation should not be applied. The Act has to be flexible to deal with the numerous situations and variations which arise from time to time. To take a technical approach to the Act would in my view defeat the whole purpose of the legislation.

Clearly, it would be undesirable for the general working of the bankruptcy and insolvency regime (be it pursuant to BIA or CCAA or a combination thereof since there must be a meshing of these two pieces of legislation) for some party to escape the scrutiny (and if found wanting, the rectification) of a preference review merely through a technical device. However, it must be acknowledged that the prevailing legislation may not always be perfect so as to preclude such a result; it may be that a party may be able to take advantage of such an imperfection until such is cured by amendment.

[16] BNS submits that the December orders create a partial and entirely voidable bankruptcy in which only certain preference claims of OYDL and no other assets vest in the trustee, which limited vesting of assets would be contrary to s. 71(2) of BIA, which provides:

> 71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

"Property" for the purpose of BIA has been broadly defined in s. 2 as:

> **2.** In this Act,
>
> > ..."property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent in, arising out of or incident to property...

BNS then submits that s. 67(1) of BIA reinforces the aspect that a bankruptcy must involve *all* the bankrupt's property (but implicitly this must mean *all* property of *value* since it would be inappropriate to distribute "excess" liabilities).

> **67.** (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

but it shall comprise

(*c*) *all property* wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit. (Emphasis added.)

It must be recognized that one of the fundamental purposes of the bankruptcy legislation is the appropriate distribution of the bankrupt's property amongst its creditors. See L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3d ed., looseleaf (Scarborough, Ont.: Carswell, 1995). It would seem to me that "shall" should be read in the imperative sense and that "all property" cannot be modified to provide that it should be part of the property: see *Cheerios*, supra, at p. 81. That s. 46 of BIA provides for the appointment of an interim receiver over "any part" of the property of a debtor does not seem to me to imply that BIA also provides by implication that a trustee can be appointed over "part" of the bankrupt's estate. However, of course, it should be noted that the property does not include all assets which are legally but not beneficially held by the bankrupt. In this regard it would seem to me that where the bankrupt has entered into bona fide contractual arrangements as to certain of its assets, then these assets would by implication not form part of the property of the bankrupt in the Frankian jurisprudential sense that certain of the bundle of rights (and reciprocal obligations) of those assets which have been dealt with have been alienated; however, that would not thereby "disqualify" those remaining rights (and obligations) from forming part of the bankrupt's property. It would seem that it is clear that the preference action is an asset which is appropriately property capable of devolving upon the trustee; similarly, if the preference action is successful, then the security which the BNS claims in relation to the swap transactions will be void and thus there is the appropriate devolution to the trustee of this (inchoate) right to the property forming the security for the BNS swap transaction as of the receiving order.

[17] It seems to me that the receiving order would have the effect of having all property of the bankrupt devolve upon the trustee. However, as discussed immediately above, this would not include any aspect of assets which have been otherwise alienated in a bona fide fashion. It would appear that the concern of BNS as to whether or not all (appropriate) property has so

devolved upon the trustee lies as to para. 4 of the BIA admin order of December 20, 1994, which states:

> This Court Orders that, notwithstanding the granting of the Receiving Order pursuant to section 10.7 of the Plan, the Plan as sanction shall continue to be binding on the trustee in bankruptcy OYDL and OYDL.

Section 66(2) of BIA provides that "Nothing in this Act [BIA] shall be deemed to affect the operation of [CCAA]." It would seem to me that the sanctioned plan can be taken into account in the situation of determining what property is to devolve unto the trustee. As Blair J. said in his reasons in sanctioning the plan on February 5, 1993 (over two years ago) [reported as *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.), at p. 19]:

> From this perspective it could be said that the parties are merely
> being held to – or allowed to follow – their contractual arrangement. There is, indeed, authority to suggest that a Plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a Plan that could be lawfully incorporated into any contract: see *Re Canadian Vinyl Industries Inc.* (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.), at p. 18; L.W. Houlden & C.H. Morawetz, *Bankruptcy Law of Canada*, vol. 1 (Toronto: Carswell, 1984) pp. E-6 and E-7.

[18] Thus, if one takes into account the sanctioned plan (which, by implication, Blair J. determined was a bona fide contract), then it appears that the only property which was not burdened by the contractual relations of the plan was the preference action and the related asset to it. If there were other assets not so dealt with in the plan, then they would also have to be dealt with in the sense that they would devolve unto the trustee. If there are in fact other assets not so dealt with but which would have to be in accordance with this perspective, it may be entirely possible that the administrator and trustee may wish to revisit the question, especially if there would be severe adverse tax consequences. I note that CCAA need not be employed to revitalize a corporation but can also involve a liquidation scenario: See *Lehndorff*, supra, at p. 284 [B.L.R.], relying on *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.), at p. 318, reversed on other grounds (1988), 71 C.B.R. (N.S.) 71 (C.A.), and *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.), at pp. 187-188 (C.B.R.). In this regard I believe it fair and reasonable to categorize the Olympia & York CCAA plan as being more of the liquidation scenario as opposed to the revitalization one; those classes which did not vote in favour of the plan were allowed, in effect, to exercise and realize upon their security with the attendant "disappearance" of those

assets from the scene. No one has appealed the sanction order of February 5, 1993, which approved the plan which contains s. 10.7(L) and (M). Section 6(*b*) of CCAA provides that a court sanctioned plan under CCAA is binding upon a trustee in bankruptcy already in existence; a fortiori, it would seem that the rights and obligations of a subsequently appointed trustee would be subject to a pre-existing sanctioned CCAA plan.

[19] I do not see this type of situation, namely, an open bona fide arrangement which has been approved in accordance with the provisions of CCAA, as being contrary to public policy, as was the concern in *Re Knechtel Furniture Ltd.* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.), where the "private" arrangement was designed to keep certain assets out of the hands of creditors (with no quid pro quo). Similarly, there does not appear to be any material risk of abuse, as would be the case where an undischarged bankrupt tried to deal with his property despite having no status (see *McNamara v. Pagecorp Inc.* (1989), 76 C.B.R. (N.S.) 97 (Ont. C.A.)), since in the present case the administrator appointed pursuant to the plan sanctioned by the court would be dealing with matters in accordance with that plan and would always be under the general supervisory jurisdiction of the court.

[20] It would seem to me that implicit in s. 16(3) of BIA requiring the trustee to take "possession of... all property of the bankrupt" is the concept, as discussed above, that if the property which is capable of devolving upon the trustee in that it has not otherwise been appropriately alienated. The same philosophy would also deal with the concerns of BNS as to s. 158(*a*). It would also appear contrary to the general philosophy of the bankruptcy legislation to require an actual taking of possession of certain assets when that action would subject the trustee in the estate to greater liability than there would be value in the asset (e.g., the possession of leased premises with attendant exposure to occupation rent or the possession of hazardous property with the exposure to environmental liability). It would also appear that the plan which was sanctioned has otherwise dealt with the other potential preference settlements and related matters.

[21] It does not seem to me that BNS has made out a case that the obtaining of the December orders was an abusive process if the preference action is truly the only asset which comprises the property of OYDL when one looks at what is capable of devolving upon the trustee. It is not, of course, improper to use BIA for specific purposes aside from the division of the bankrupt's assets amongst creditors, including being able to employ remedies

which would not be available outside the bankruptcy: see *Re Maple City Ford Sales (1986) Ltd.* (1992), 14 C.B.R. (3d) 188 (Ont. Bktcy.); *Re Four Twenty-Seven Investments Ltd.; Re 495487 Ontario Ltd.* (1985), 55 C.B.R. (N.S.) 183 (Ont. S.C.), affirmed (1985), 58 C.B.R. (N.S.) 266 (Ont. C.A.); *Re 676915 Ontario Ltd.* (1989), 76 C.B.R. (N.S.) 164 (Ont. S.C.); *Gasthof Schnitzel House Ltd. v. Sanderson* (1978), 27 C.B.R. (N.S.) 75 (B.C. S.C.).

[22] I would observe that I do not feel that s. 30(1) of BIA advances the cause of the administrator and trustee since that section clearly contemplates that a trustee in bankruptcy would have had devolved onto him the rights of the bankrupt tenant vis-à-vis the lease. That section only allows the trustee to otherwise deal with that property. It would seem to me that *Stead Lumber Company v. Lewis (No. 2)* (1957), 37 C.B.R. 24 (Nfld. T.D.); *Re Erin Features #1 Ltd.* (1991), 8 C.B.R. (3d) 205 (B.C. S.C.); *Re Bakermaster Foods Ltd.* (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.), should be viewed in the same light vis-à-vis the trustee's ability to disclaim or abandon "improvident contracts."

[23] I would also note as to the status of BNS to bring this motion

that the obiter views of Houlden J. in *Re Develox Industries Ltd.* (1970), 14 C.B.R. (N.S.) 132 (Ont. S.C.), at p. 133, were not exhaustive when he said:

> In view of the disposition which I propose to make of this application, I do not have to give a definite answer to this question. However, it would seem to me that the application to rescind or annul a receiving order should be by the debtor, the petitioning creditor or the trustee. In my view, to permit any creditor to bring such an application would be an abuse to the process of the court. For the purpose of this application I will assume that the landlord has the necessary status to ask that the receiving order be annulled or rescinded.

It would not seem that he was attempting to be definitive in all circumstances, but rather that he was giving rather valuable guidance as to the question in a general sense. Thus, it would appear that where there are unusual circumstances this general rule would not and should not be applied rigidly and unthinkingly. It would seem to me that a lack of jurisdiction proposal by a creditor would be an unusual circumstance worthy of giving that creditor status. However, I would also be of the view that motions of this nature would be truly infrequent and that if creditors were to inappropriately bring such a motion, they should be made an example for others by severe costs awards or other suitable sanction.

[24] The motion of BNS is dismissed. BNS is to pay the administrator and trustee jointly $10,000 costs. This is not a severe costs award.

Motion dismissed.

TAB 3

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N°: 500-11-051881-171

DATE : Le 2 février 2017

SOUS LA PRÉSIDENCE DE : L'HONORABLE MARTIN CASTONGUAY, J.C.S.

DANS L'AFFAIRE DE LA LOI SUR LES SOCIÉTÉS PAR ACTIONS ET DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES.

DÉVELOPPEMENT LACHINE EST INC.
Société en liquidation / Débitrice

-et-

RAYMOND CHABOT ADMINISTRATEUR PROVISOIRE INC.
Liquidateur / Requérante

-et-

RAYMOND CHABOT INC.
Contrôleur

-et-

VILLE DE MONTRÉAL

-et-

CONSEIL D'ARRONDISSEMENT DE LACHINE
Mises en causes

JC00C9

MOTIFS RÉVISÉS DU JUGEMENT RENDU ORALEMENT LE 13 JANVIER 2017[1]

[1] Depuis le 14 septembre 2014, la débitrice Développement Lachine Est inc. (ci-après « DLE ») est sous le coup d'une ordonnance visant sa liquidation, tout comme un certain nombre de compagnies qui lui sont liées et faisant partie de ce que le Tribunal désignera comme le Groupe Catania.

[2] DLE demande maintenant à la Cour que lui soit accordée la protection découlant de l'application de la *Loi sur les arrangements avec les créanciers des compagnies* (la *Loi*)[2].

[3] Outre cette protection et certaines mesures ancillaires propres à l'application de la *Loi*, elle demande le prononcé d'une ordonnance de sauvegarde visant à empêcher Ville de Montréal (ci-après « la Ville ») et l'arrondissement de Lachine (ci-après « l'arrondissement ») d'adopter une résolution visant à annuler une première résolution portant le numéro CA16 19 0117[3] autorisant le maire et le secrétaire de l'arrondissement à signer un protocole d'entente relatif aux travaux d'infrastructure quant à une propriété détenue par DLE et que les parties ont identifiée sous le vocable Jenkins.

[4] Après un exposé sommaire des faits, la présente décision sera livrée en deux (2) étapes. La première traitant de l'applicabilité de la *Loi* à la situation de DLE, ainsi qu'aux demandes ancillaires. La seconde traitera du volet injonctif recherché contre la Ville et l'arrondissement.

LES FAITS

[5] DLE est actuellement propriétaire de deux (2) lots contigus dans l'arrondissement de Lachine connus respectivement comme étant les propriétés Jenkins et Mittal. En voici les dates d'acquisition et principales caractéristiques.

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[1] Le Tribunal ne fut informé que le 30 janvier 2017 que Ville de Montréal désirait une retranscription des motifs du jugement le tout résultant d'un malentendu puisque le Tribunal s'attendait à une lettre formelle des avocats ne sachant pas s'il y aurait ou non des procédures en Appel de sa décision.

[2] L.R.C. (1985), ch. C-36.

[3] Pièce R-14.

Jenkins :	Le 20 décembre 2013 et d'une superficie d'environ 615 000 pieds carrés.
Mittal :	Le 20 janvier 2012 et d'une superficie d'environ 850 000 pieds carrés celui-ci donnant sur le canal Lachine et qui abritait jusqu'à sa démolition par DLE une bâtisse de quelque 500 000 pieds carrés.

[6] Par ailleurs, une troisième propriété identifiée comme Cintube fait l'objet d'une demande en passation de titre introduite par DLE.

[7] Quoi qu'il en soit, ces terrains constituent la base d'un important développement domiciliaire connu sous le nom de Vilanova, lequel une fois complété comptera quelque 560 unités d'habitation d'une valeur de 200 millions de dollars.

[8] Dans le cadre de ce projet DLE a présenté le 18 septembre 2013 à l'arrondissement un plan d'ensemble[4] présentant comme son nom le dit, l'ensemble du projet quant à ses propriétés.

[9] Ce projet d'ensemble était essentiel à l'obtention du permis de démolition de la bâtisse se trouvant sur Mittal lequel fut émis par la Ville et l'arrondissement le 27 juin 2013[5].

[10] Cette première étape confirme l'intérêt de la Ville et de l'arrondissement pour l'ensemble du projet.

[11] Notons que si la bâtisse érigée sur Mittal fut démolie, le terrain comme tel n'a pas encore été réhabilité.

[12] La situation est différente quant à Jenkins. En effet, apparait au registre foncier, un avis attestant de la décontamination de ce terrain, celle-ci ayant été exécutée par Sol-Roc sous la supervision de la firme d'ingénieurs Dessau, et ce avant même son acquisition par DLE.

[13] Dès lors, le développement de Jenkins pouvait être envisagé.

[14] Monsieur Fortin de DLE de même que Monsieur Michel Séguin, directeur de l'urbanisme auprès de l'arrondissement ont témoigné quant aux diverses démarches tant de DLE que de l'arrondissement pour aboutir à la résolution du 11 avril 2016 portant le numéro CA16 19 0117.

[15] Il n'est pas opportun pour la présente décision de décrire dans le détail l'évolution du dossier pour en venir à cette étape. Signalons toutefois que Monsieur

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[4] Pièce R-22.
[5] Pièce R-23.

Séguin se félicitait d'avoir réussi ce tour de force en deux ans alors que la norme pour un projet de cette envergure est plutôt de trois (3) ans et plus.

[16] La résolution CA16 19 01117 permet la signature de ce que les parties ont qualifié de protocole d'entente[6] entre DLE et la Ville de Montréal, permettant le début des travaux d'infrastructure de même que le transfert à la Ville d'une partie du terrain que ce soit pour les rues, les trottoirs ou encore les parcs.

[17] La dernière étape avant la signature de cette entente est l'obtention d'un permis du ministère du Développement durable de l'Environnement et de la lutte contre les changements climatiques (ci-après « le ministère »).

[18] Pour l'obtention de ce permis DLE devait fournir ses plans et devis de même qu'une résolution de la Ville pour autoriser le greffier de la Ville à émettre une attestation de non-objection par celle-ci à la délivrance par le ministère d'un certificat d'autorisation des travaux d'infrastructure.

[19] Ces deux documents dont l'attestation de non-objection datée du 13 juin 2016[7] furent transmis au ministère au début septembre 2016.

[20] À une époque contemporaine et comme c'est la coutume selon Monsieur Séguin l'arrondissement a commandé une analyse sommaire des sols à l'endroit où serait situé au moins un parc.

[21] Contre toute attente, cette analyse a permis de constater la présence de contaminants.

[22] Des analyses plus poussées à l'automne 2016 menées par DLE ont révélé que la contamination est relativement élevée et touche quelque 40 000 mètres carrés de Jenkins.

[23] Dès lors DLE s'active et retient les services de Sanexen Services Environnementaux inc. (ci-après « Sanexen) aux fins de préparer un plan de réhabilitation de Jenkins, un échéancier de même qu'une offre de service.

[24] Le 24 novembre 2016, Sanexen soumettait à DLE un rapport préliminaire des travaux de réhabilitation partielle et caractérisation environnementale sommaire des sols[8].

[25] Évidemment, la ville et le ministère sont informés de ces démarches.

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[6] Pièce R-13.
[7] Pièce R-25.
[8] Pièce R-17.

[26] Le ministère selon Fortin assure sa collaboration à DLE en informant celle-ci qu'elle pourrait traiter et approuver le plan de réhabilitation dans un délai de 4 à 6 semaines soit beaucoup plus rapidement qu'en temps normal.

[27] Toujours selon Fortin et le Liquidateur Monsieur Gagnon les coûts de réhabilitation se situent dans une fourchette de 6,5 à 7 millions de dollars. Selon ce dernier, c'est d'ailleurs cette situation qui provoque l'état d'insolvabilité de DLE[9].

[28] En effet, le terrain Jenkins acquis pour la somme de 17 000 000 $ puisque supposément réhabilité n'a plus aucune valeur pour un développement domiciliaire tant qu'il n'est pas décontaminé.

[29] DLE, n'obtient pas la même collaboration de l'arrondissement et de la Ville que celui offert par le ministère.

[30] En effet, le 15 décembre 2016 sous la plume de Monsieur Séguin, l'arrondissement informe DLE de ce qui suit :

> « Dans ces circonstances, sur la base du nouvel état de faits révélé par le rapport Sanexen que vous nous avez transmis, nous vous informons que notre service recommandera au conseil d'arrondissement, lors de sa prochaine séance le 16 janvier 2017, d'adopter une résolution annulant la résolution CA16 19 0117 autorisant le maire d'arrondissement et la secrétaire d'arrondissement à signer le protocole concernant les travaux relatifs aux infrastructures et aux équipements municipaux.[10] »

[31] Une rencontre se tiendra par la suite impliquant Messieurs Fortin de DLE, Gagnon le nouveau liquidateur de la firme Raymond Chabot, Séguin et son supérieur, Savard, le directeur de l'arrondissement.

[32] Les témoignages de Messieurs Fortin et Séguin concordent quant à la position de l'arrondissement. Voici ce qui en ressort :

- La décision de la Ville est fondée sur la présence de contamination.
- Une fois décontaminé DLE pourra toujours représenter son projet sans toutefois aucune assurance qu'il sera retenu par l'arrondissement dépendant de l'orientation d'un nouveau conseil municipal à l'occasion d'élections à venir.
- Le même projet ou tout autre, ne pourrait être approuvé par l'arrondissement avant le printemps 2018.

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[9] Rapport du contrôleur proposé du 9 janvier 2017, p. 4 pour les coûts de décontamination, p. 9 insolvabilité de DLE.

[10] Pièce R-21, p.2, dernier paragraphe.

[33] En effet, si l'arrondissement considérait un nouveau projet, le temps requis pour que l'ensemble des départements concernés de la Ville, l'approuve est relativement long tel qu'établi par l'ensemble des échéanciers modifiés pour le projet actuel[11].

[34] En effet, selon la preuve, bien qu'un projet immobilier soit du ressort du département de l'urbanisme d'un arrondissement, l'autorisation de celui-ci nécessite l'implication et approbation de plusieurs départements de la Ville centre, tel le service de l'ingénierie, des incendies, etc..

[35] Par ailleurs, selon la preuve, la décontamination nécessiterait environ trois (3) mois de travaux.

[36] En terminant les faits, il est utile de préciser que DLE n'agit pas comme constructeur des immeubles résidentiels mais plutôt promoteur. À cet égard DLE ou le liquidateur a accepté des offres d'achat de constructeurs pour la presque totalité de l'aire construisible de Jenkins.

[37] Bref, la situation de DLE en rapport avec l'arrondissement et la Ville est dans l'impasse, ceux-ci n'entendant pas modifier leur position, d'où la présente demande.

APPLICABILITÉ DE LA LOI À DLE

[38] D'emblée, précisons que les critères financiers pour l'application de la *Loi* sont rencontrés par DLE, tel qu'en fait foi le rapport du 9 janvier 2017 du contrôleur proposé.

[39] La situation juridique de DLE qui est sous le coup d'une ordonnance de liquidation n'empêche pas celle-ci de recourir à la *Loi* et ce pour deux raisons.

[40] La première est que le jugement rectifié[12] ordonnant la liquidation permettait spécifiquement, en cas d'insolvabilité, à DLE de demander la protection de la *Loi*. Voici l'extrait pertinent :

> « [46] **ORDONNE** que dans l'éventualité où le Liquidateur conclu que les Requérantes sont – ou l'une d'entre elles est – insolvable, il peut s'adresser au tribunal afin d'obtenir une ordonnance mettant fin à sa nomination à titre de liquidateur dans la présente instance ou permettant la conversion de la présente instance en une instance sous la *Loi sur les arrangements avec les créanciers des compagnies, L.R.C. (1985), ch. C-36* (la « **LACC** ») ou de la *Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3* (la « **LFI** »).

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[11] Pièce R-12.

[12] Le jugement ordonnant la liquidation se trouve dans le dossier numéro 500-11-047375-148. En effet, les autorités réglementaires canadiennes (surintendant) exigent un nouveau numéro de dossier quand une entreprise soit en liquidation ou sous la protection de la Loi de la faillite et insolvabilité veut obtenir la protection d'une autre Loi.

[41] La deuxième repose sur les pouvoirs inhérents du Tribunal.

[42] À cet égard, notons que l'article 50(1) de la *Loi sur la Faillite et l'Insolvabilité* (ci-après « LFI »)[13] permet à un liquidateur de faire une proposition à ses créanciers.

[43] Le législateur, a de façon évidente, arrimé les dispositions de la LFI à celles de la *Loi*, et les tribunaux canadiens ont consacré à plusieurs reprises le fait que certains pouvoirs présents dans l'une de ces lois, pouvaient être importés dans l'autre Loi, et ce en vertu des pouvoirs inhérents du Tribunal, les objectifs de ces deux (2) lois étant sensiblement les mêmes[14].

[44] Dans cette veine, le Tribunal estime que si un liquidateur peut faire une proposition en vertu de la LFI, il peut tout aussi bien rechercher la protection de la *Loi*.

[45] Bref, pour ces deux raisons, le Tribunal conclut que DLE peut se prévaloir de la *Loi*.

[46] Par ailleurs, outre la suspension des procédures et la nomination d'un contrôleur DLE a trois (3) demandes particulières soit un financement temporaire de 1 126 000,00 $ provenant d'une compagnie liée au Groupe Catania ainsi qu'une charge d'administration de 350 000,00 $ lesquelles prendraient rang avant le créancier hypothécaire Romspen et une charge dite d'indemnisation pour le contrôleur.

[47] Le Tribunal fera droit à ces demandes, d'autant plus qu'à la suite de négociations entre DLE et Romspen, il a été convenu que la charge garantissant le financement temporaire prendrait rang, après le créancier hypothécaire de premier rang Romspen.

[48] Quant à la charge d'administration couvrant les frais des professionnels ainsi que du contrôleur de même que la demande d'indemnisation en faveur du contrôleur, celle-ci est d'autant plus d'actualité que DLE n'a plus d'administrateur et que dans les faits c'est le liquidateur/contrôleur qui engage certains frais avec les conséquences que cela entraîne.

[49] Ainsi, le Tribunal signera en date d'aujourd'hui l'ordonnance initiale standard laquelle sera ajustée pour tenir compte des demandes ancillaires que le Tribunal a accueillies.

[50] Reste la demande d'ordonnance de sauvegarde.

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[13] L.R.C. (1985) ch. B-3.

[14] Voir à ce sujet les affaires Groupe Bikini Village Inc. de la Cour supérieure du Québec 2015 QCCS 1317 de même que (Re) Kitchen Frame Limited 2012 ONSC 234 (C.S. ONT.) de la Cour supérieure de l'Ontario.

[51] Le Tribunal reproduit la demande de DLE à cet égard contenue à sa demande pour l'émission d'une ordonnance initiale :

> « 99. Considérant ce qui précède, la Requérante demande à cette Cour, dans le cadre de l'ordonnance à être rendue (PIÈCE R-2A), d'émettre une ordonnance de sauvegarde empêchant l'arrondissement Lachine d'annuler la Résolution permettant à la Ville de signer le Protocole, et ainsi de permettre à DLE de poursuivre et compléter le Projet Lachine-Est. »

[52] La Ville s'oppose fermement à cette demande invoquant entre autres n'avoir consenti que sur la prémisse que le terrain Jenkins était décontaminé et que dès lors, elle est en droit d'émettre une résolution pour annuler la résolution CA16 19 0117.

[53] La Ville invoque également l'article 513 C.p.C. lequel se lit comme suit :

> « 513. Une injonction ne peut en aucun cas être prononcée pour empêcher des procédures judiciaires, ni pour faire obstacle à l'exercice d'une fonction au sein d'une personne morale de droit public ou de droit privé, si ce n'est dans les cas prévus à l'article 329 du Code civil. »

[54] Il est acquis que la demande de DLE est de nature injonctive.

[55] Pour déterminer si l'article 513 C.p.c. peut recevoir application en l'instance, le Tribunal doit qualifier la relation existant entre l'arrondissement, la Ville et DLE. En est-ce une contractuelle ou s'agit-il de l'exercice d'un pouvoir lui permettant de légiférer ou réglementer.

[56] Pour appuyer sa prétention qu'il s'agit d'une relation contractuelle entre la Ville et DLE, celle-ci fait état de l'avancement de l'ensemble du dossier ainsi que certains arrêts de la Cour d'appel consacrant le fait que dans le cadre d'un développement immobilier la relation existante entre le promoteur et la Ville devient contractuelle vu les échanges de terrain et la construction par le promoteur, d'infrastructures bénéficiant à la Ville[15].

[57] Dans l'arrêt de la Cour suprême *Pacific National Investments* c. *Ville de Victoria*[16] traitant du pouvoir implicite des villes de la Colombie-Britannique de s'engager à ne pas modifier pendant un certain nombre d'années un règlement de zonage dans le cadre d'un développement immobilier voici comment s'exprimait le juge Bastarache pour lui-même et ses collègues Binnie et Major dissidents :

> « Ainsi, le texte même de l'accord-cadre appuie la conclusion du juge de première instance que la Ville comprenait que l'investissement de la PNI reposait sur la conviction que le zonage serait maintenu pendant une période raisonnable. Il serait contraire au bon sens commercial et à toutes les

[15] Voir l'arrêt *Ville de Repentigny* c. *Lès Habitations de la Rive-Nord Inc. et al* SOQUIN AZ-500 86 252.
[16] *Pacific National Investments Ltd.* c. *Victoria (Ville)* 2000 2 R.C.S., p. 966, par. 84.

> obligations d'équité de conclure que la condition préalable relative au zonage devait être remplie sans toutefois être protégée d'aucune façon contre la rétractation unilatérale. »

[58] Ainsi, bien que dans le cadre d'une dissidence, la Cour suprême établit que contrairement à ce qu'avance la Ville, le Tribunal doit considérer le principe du bon sens commercial dans les relations qu'ont entretenues DLE et la Ville.

[59] Bref, à la lumière de ces enseignements et vu l'échange de terrains dans le cadre d'un projet de développement immobilier, le Tribunal conclut que la Ville n'agit pas dans un cadre législatif ou réglementaire mais plutôt dans un cadre strictement contractuel.

[60] *Le Code civil du* Québec prévoit qu'une obligation de bonne foi doit régir les parties. Or, la Ville s'apprête à jeter par terre un édifice que les parties, incluant son propre département d'urbanisme, auront mis plus de deux (2) ans à construire et ce, au prix d'efforts considérables.

[61] La seule raison invoquée par la Ville à ce stade est la présence de contaminants. Or, la preuve démontre que ce problème pourrait être résolu en trois (3) mois.

[62] Le bon sens commercial évoqué par le juge Bastarache est mis à mal par la Ville, qui est prête à sacrifier pendant quelques années des millions de dollars de taxes foncières pour un problème qui pourrait être résolu en trois (3) mois.

[63] Cela étant revenons à ce qui est demandé par DLE. Celle-ci désire une ordonnance de sauvegarde sans plus, sans terme et ce, dans le cadre d'une ordonnance initiale en vertu de la *Loi*.

[64] Rien dans la *Loi* n'empêche le Tribunal de prononcer une ordonnance de type injonctive, bien au contraire ce genre d'ordonnances de faire ou de ne pas faire, sont foison dans la *Loi*.

[65] Le Tribunal bien qu'il accepte de se pencher sur l'ordonnance demandée doit s'assurer que les critères requis propres à ce genre de demande sont rencontrés surtout que la Ville n'est pas un créancier comme tel de DLF mais plutôt un cocontractant à un contrat innommé. Voyons-les.

APPARENCE DE DROIT

[66] Ayant conclu que la relation entre DLE et la Ville en est une de nature contractuelle, il est clair que DLE possède une apparence de droit. Cela étant et en raison de certains arguments évoqués par la Ville du bout des lèvres lors de l'audition mais qui n'avaient pas été évoqués dans la lettre du 15 décembre 2016, cette

apparence de droit n'est pas sans faille en raison de certains manquements contractuels notamment la modification unilatérale par DLE des plans et devis.

[67] Même si elle est en demi-teinte l'apparence de droit est bien présente.

L'URGENCE

[68] Tel que précisé à la lettre de Monsieur Séguin datée du 15 décembre 2016, la date butoir pour recommander au conseil d'arrondissement de mettre fin à l'aventure commune est le 16 janvier 2017 soit dans quatre (4) jours. L'urgence est claire.

PRÉJUDICE IRRÉPARABLE

[69] DLE ne pourra obtenir le financement permettant la décontamination que si le projet demeure sur ses rails.

[70] Si la Ville devait mettre fin à l'aventure cela équivaudrait à la déconfiture non seulement de DLE mais également des pertes pour nombre de parties intéressées notamment ses fournisseurs mais également et possiblement les quelque 102 acheteurs ayant déposé des acomptes sur leur future résidence et ce, en raison de l'effet domino entre DLE, les constructeurs et ces mêmes acheteurs.

[71] Le Tribunal conclut que DLE et les parties intéressées subiraient un préjudice irréparable.

BALANCE DES INCONVÉNIENTS

[72] La balance des inconvénients penche nettement en faveur de DLE. En fait, le Tribunal ne voit aucune espèce d'inconvénient pour la Ville au prononcé d'une ordonnance de sauvegarde afin que l'étendue des pouvoirs et responsabilités de la Ville soit débattue dans le cadre d'un interlocutoire.

[73] Ce qui amène le Tribunal à un dernier point. La Cour d'appel tout récemment dans l'arrêt *Limouzin* c. *Side City Studios inc.*[17] a rappelé l'essence même d'une ordonnance de sauvegarde, celle-ci ne doit pas équivaloir à un jugement au fond, la procédure doit être soumise à une gestion serrée et finalement doit être limitée dans le temps.

[74] Ainsi, le Tribunal prononcera une ordonnance de sauvegarde d'une durée de 30 jours soit en parallèle à la durée d'une ordonnance initiale tel que prévu par la *Loi*.

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[17] 2016 QCCA 1810.

[75] Pendant cette période DLE aura une période de 10 jours pour déposer une demande distincte précisant la nature exacte et l'étendue de ses demandes à l'encontre de la Ville.

[76] Par la suite, les parties disposeront de 10 jours pour s'entendre sur un échéancier prévoyant l'audition au fond de la demande de nature injonctive et ce, au plus tard à la fin avril 2017.

[77] DLE a démontré l'urgence de la situation. Ainsi, la présente décision sera exécutoire nonobstant appel.

[78] En raison de certains amendements apportés à la demande de DEL pendant le court délibéré dont a joui le Tribunal, la présente décision et son dispositif seront déclinés en deux temps.

[79] Ainsi, le Tribunal signera l'ordonnance initiale standard contenant les mesures ancillaires discutées aux présents motifs.

[80] Quant à l'ordonnance de sauvegarde, son dispositif apparaitra du procès-verbal.

POUR CES MOTIFS, LE TRIBUNAL :

[81] **ACCUEILLE** la requête en vue d'une ordonnance initiale et signera en conséquence le modèle standard d'ordonnance initiale.

[82] **ORDONNE** à Ville de Montréal et l'arrondissement de Lachine de ne poser aucun geste visant à faire annuler la résolution portant le numéro CA16 19 0117, la présente ordonnance étant limitée à 30 jours.

[83] **ORDONNE** à Développement Lachine Est de déposer une d'ici dix (10) jours une demande distincte visant à cerner et identifier clairement ses demandes envers Ville de Montréal et l'arrondissement de Lachine.

[84] **ORDONNE** à Développement Lachine Est et Ville de Montréal de déposer devant le Tribunal à l'expiration de l'ordonnance initiale soit dans 30 jours un échéancier prévoyant une audition sur le fond quant aux demandes de DLE au plus tard d'ici la fin avril 2017 le tout afin que le Tribunal puisse en assurer la gestion.

Martin Castonguay, j.c.s.

Me Guy P. Martel et Me Arad Mojtahedi
STIKEMAN ELLIOTT S.E.N.C.R.L. s.r.l.
AVOCATS DU LIQUIDATEUR / REQUÉRANTE RAYMOND CHABOT ADMINISTRATEUR PROVISOIRE INC.

Me Luc Béliveau
FASKEN MARTINEAU DUMOULIN S.E.M.C.R.L. s.r.l.
AVOCATS DU CONTRÔLEUR RAYMOND CHABOT INC.

Me Raphaël Lescop
IRVING MITCHELL KALICHMAN S.E.N.C.R.L. s.r.l.
AVOCATS DE VILLE DE MONTRÉAL, ET DE ARRONDISSEMENT DE LACHINE

Me Isabelle Poirier
DE GRANDPRÉ JOLI-CŒUR S.E.N.C.R.L.
AVOCATS DE ROMSPEN INVESTMENT CORPORATION

Me Ouassim Tadlaoui
BORDEN LADNER GERVAIS S.E.N.C.R.L. s.r.l.
AVOCATS DE AVIVA INSURANCE COMPANY OF CANADA

Me Stéphanie Chartrey
DUFOUR MOTTET AVOCATS
AVOCATS DE VILLE DE LONGUEUIL

Me Chrystal Ashby
NORTON ROSE FULBRIGHT CANADA S.E.M.C.R.L. s.r.l.
AVOCATS DE 3539491 CANADA INC. ET TFC CINTREURS ET FABRIQUANTS DE TUBES DU CANADA INC.

Me Alex Lévesque
MORRONE AVOCATS INC.
AVOCATS DE 7076401 INC.

Date d'audience : 10-11 janvier 2017

TAB 4

CITATION: Danier Leather Inc. (Re), 2016 ONSC 1044
COURT FILE NO.: 31-CL-2084381
DATE: 20160210

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.

BEFORE: Penny J.

COUNSEL: *Jay Swartz* and *Natalie Renner* for Danier

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

Linda Galessiere for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

[3] Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

[4] Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

[5] In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

[6] As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

[7] Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow

negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

[8] Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

[9] The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

[10] On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

[11] The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

[12] The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

[13] The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

[14] Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

[15] Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

[16] Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

[17] The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

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

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

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

(4) Is there a better viable alternative?

Re Brainhunter, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60 at para 24; *Re Indalex Ltd.*, [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

[32] There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

[33] Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

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

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

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

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

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

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

[35] In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

[36] The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

[37] The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

[38] The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

[40] Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

[41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp.*, [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.,* [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List], where a 4% break fee was approved.

[43] The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

[44] In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

[45] I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

[46] Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

[47] Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Re Sino-Forest Corp., 2012 ONSC 2063 at paras. 46-47 [Commercial List]; *Re Colossus Minerals Inc.,supra.*

[48] The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

[49] The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SISP. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

[72] Danier developed a key employee retention plan (the "KERP") that applies to all of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.,* Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Re Grant Forest Products Inc., [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

[77] While *Re Grant Forest Products Inc.* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

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

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

Date: February 10, 2016

TAB 5

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11 — Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?

Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?

Michelle Grant and Tevia R M Jeffries [*]

I. — Introduction

The *Companies' Creditors Arrangement Act (CCAA)* [2] was enacted in 1933 with the primary goal of facilitating the restructuring of large insolvent corporations, to enable their continued operation and avoid the social and economic costs of liquidating assets. While the *CCAA* does not have an express purpose clause, decided cases have articulated its purpose in the following ways: [3]

> a) to permit an insolvent company to avoid or be discharged from bankruptcy by making a compromise or arrangement with its creditors;
>
> b) to preserve the insolvent company as a viable operation and to reorganize its affairs to the benefit, not only of the debtor, but of the creditors and other stakeholders;
>
> c) to maintain the *status quo* for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain the approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the company's creditors and other stakeholders;
>
> d) to protect the interests of creditors and to permit an orderly administration of the debtor company's affairs;
>
> e) to protect an insolvent company from proceedings by creditors that would prevent it from carrying out the terms of a compromise or arrangement;
>
> f) to permit equal treatment of creditors of the same type;
>
> g) to permit a broad balancing of stakeholder interests in the insolvent corporation; and
>
> h) in appropriate circumstances, to effect a sale, winding-up or liquidation of a debtor company and its assets.

Over the past few years, it has become widely accepted that courts have the jurisdiction to grant *CCAA* relief to enable a company to effect a sale of its assets, wind-up or liquidate. [4] The amendments to the *CCAA* that came into force on 18 September 2009 codified the authority of courts to approve asset sales before a plan of arrangement is put before the creditor body. [5] As jurisprudence regarding liquidating *CCAA* proceedings has developed, courts have held that a debtor company is not required "to utter some magical incantation that it intends to propose a plan of arrangement, as a prerequisite for relief under the *CCAA*." [6] Instead, courts have held that the purpose of the *CCAA* may be met

where a restructuring is effected by way of a liquidation, which can take one of many forms as discussed in subsection 3 of Section II below.

Given that liquidating *CCAA* proceedings are a viable restructuring option, this article will present a practical perspective on the factors that insolvency practitioners should consider when recommending that an insolvent company seek *CCAA* relief to liquidate assets as opposed to other restructuring or liquidation options. Liquidating *CCAA* proceedings and court-appointed receiverships under the *Bankruptcy and Insolvency Act (BIA)*,[7] are the two primary court-supervised processes used to effect liquidations and will therefore be the focus of the analysis. Section II will set out some background, historical trends and definitions as context for the analysis herein. Section III will then examine the key factors that should be considered. Section IV will discuss how these key factors impact a court's decision regarding whether to grant *CCAA* relief where a debtor company intends from the beginning to liquidate its assets. Section V concludes.

II. — Context of Analysis

1. — Insolvency Practitioners' Viewpoints

Insolvency practitioners come to this analysis with different lenses. A trustee will be acting as monitor, receiver, trustee and/ or financial advisor. The trustee will consider, *inter alia*, (a) the insolvent company's financial performance, historical and projected, (b) what practical steps the company can take to make its operations more viable, (c) the market in which the company is operating, including the competitive landscape, and (d) the company's capital structure.

A lawyer, while cognizant of the business issues, will focus on (a) what legal rights the company or its creditors may have and how these may be compromised, whether through consensual settlement or court order, to effect the practical restructuring goals, and (b) what his/her experience and existing case law suggests regarding (i) the various issues likely to arise throughout the restructuring, and (ii) the types of actions that will obtain judicial approval. Both the trustee and the lawyer will be drawing on practical experience from former cases in which they have been involved.

Liquidation is generally considered the last resort after all other options have been exhausted, including refinancing and a sale of the business outside of a court process. If a debtor company's financial and legal advisors are recommending the pursuit of a liquidating *CCAA*, all other options have been considered from both the financial and legal perspective and it has been determined that this is the best approach for the debtor, taking into account the interests of the entire community of the debtor's stakeholders.

If a creditor's insolvency practitioners are advising it that supporting a liquidating *CCAA* will provide the best possible outcome for the creditor, all other options have also been considered, including a receivership. In advising a secured creditor, however, insolvency practitioners will generally take a narrower view, considering the secured creditor's rights and interests in making a recommendation, and not necessarily considering the broader stakeholder community.

It is from these viewpoints that the authors will analyze the factors that impact the choice of proceeding discussed in Section III of this article.

2. — The Rise of Liquidating CCAA Proceedings

Liquidating *CCAA* proceedings are a relatively new phenomenon. While the *CCAA* has been around for 80 years, the statute was generally ignored until the 1980s.[8] At that time, it was used mainly to facilitate private workouts. From the late 1990s to the early 2000s, the use of the *CCAA* evolved to facilitate more notable restructurings and some liquidations. One example is the liquidating *CCAA* of the Canadian Red Cross Society ("Red Cross"), in which $8 billion in tort claims were asserted against the Red Cross by individuals who suffered harm from diseases contracted as a result of receiving contaminated blood.[9] What is significant about the Red Cross *CCAA* is that at no point in the process was it contemplated that the debtor company would continue operating its blood supply program.[10] Instead, early in the

process, before a plan was put before the Red Cross' creditors, the operations of the Red Cross' blood donation program were sold to Canadian Blood Services. [11]

Since the Red Cross *CCAA* proceeding, there have been many more cases involving liquidation under the *CCAA*. [12] During this same time period, the use of receiverships fell out of favour among insolvency professionals due in large part to increasing uncertainty regarding liability of a receiver as a successor employer. [13] The main factors that impacted the accelerated growth of liquidating *CCAA* proceedings are summarized below:

> a) the jurisdictional provisions in Part II of the *CCAA* enabled insolvency professionals to develop and implement creative solutions for debtors and secured creditors;
>
> b) the insolvency landscape shifted towards permitting debtor companies to remain in possession and maintain an operating business, rather than liquidating assets for an immediate pay out to creditors;
>
> c) the flexible priority regime in a *CCAA* proceeding relative to alternative liquidation proceedings offered strategic advantages to debtors and creditors;
>
> d) parties were able to make use of the courts' additional explicit powers in a *CCAA* proceeding to affect third-party rights, including the authority to compel assignment of most contracts or require "critical suppliers" to continue to supply on credit terms;
>
> e) because practitioners view *CCAA* as an analog to Chapter 11 of Title 11 of the United States *Bankruptcy Code*, [14] *CCAA* was favoured in cases with cross-border issues; and
>
> f) receivers' potential liability for successor employer and other (*e.g.*, environmental) obligations gave receivers pause about accepting appointments or caused them to require the appointing creditors to commit to indemnifying them for any such liabilities that arise, which such creditors are reluctant to do. [15]

3. — Blurred Lines Between CCAA and Receivership

In the past 10 years, the lines between "liquidation" and "restructuring" have been blurred considerably. [16] Many workouts and restructurings have sale elements and often a sale of the business is itself a redeployment of assets rather than liquidation. [17] To provide some context for the analysis below, what is meant by "liquidation" and "restructuring" should be explained.

i. — What is liquidation?

According to the Oxford English Dictionary the definition of "liquidation" is: 1) the process of liquidating a business: *the company went into liquidation*, the conversion of assets into cash (*i.e.*, by selling them), the clearing of adebt;2) *informal* the killing of someone, typically by violent means. [18] It may or may not go without saying, but this article will focus on the first definition ...

In general there are three forms that the liquidation of a business can take. The first form is the liquidation of a company as a going concern. The second form is the liquidation of a company *en bloc*, but not as a going concern, *i.e.*, the company has ceased operations. The third form is the liquidation of a company by selling its assets in a piecemeal fashion. The value derived from the liquidation and the impact to its stakeholders will differ dramatically depending on the liquidation option chosen by (or forced upon) the company. [19]

Before liquidating *CCAA* came intovogue, the liquidationofan insolvent company was typically driven by its creditors. Liquidation was generally effected through one of the following processes:

a) a receivership — driven by the secured creditor(s) of the company;

b) a bankruptcy — where there are no secured creditors or the secured creditor is fully secured and funds are available for distribution to unsecured creditors; or

c) a combination of the two options above.

ii. — What is restructuring?

"Restructuring" involves a reorganization of a company's operational and financial affairs, which then enables the company to continue as a going concern. [20] When court supervision or a binding compromise of creditor claims is required, such a reorganization can occur under the *CCAA* or the BIA, depending on the size and complexity of the insolvent company's business operations. [21] The term "restructuring" is not defined in the *CCAA* and, therefore, the shape a restructuring may be permitted to take is subject to judicial interpretation. [22] The traditional view of restructuring under the *CCAA* contemplates a debtor's proposing a plan of compromise or arrangement to its creditor body for approval.

The current view of restructuring under the *CCAA* has expanded beyond the traditional view, recognizing that the continuation of the business by the existing management and shareholder group may not be feasible, or supportable by the creditor group. Instead, the business may continue with new management and/or a new shareholder group.

As liquidating *CCAA* proceedings have gained in popularity, the prevailing view appears to be that a going-concern sale of a company in *CCAA* is not a traditional liquidation but is instead a restructuring of a different colour. As stated in *Re Consumers Packaging Inc*, "[t]he sale of [a debtor's] operation as a going concern ... allows the preservation of [the debtor's] business (albeit under new ownership), and is therefore consistent with the purpose of the *CCAA*." [23]

iii. — Debtor-driven versus creditor-driven regime

Although the lines have blurred such that at least one type of liquidation is viewed as almost a subset of restructuring, practical differences remain between liquidation under the *CCAA* or by way of a *BIA* receivership. In a liquidating *CCAA*, the debtor company remains in possession and control of its assets and business. While the secured creditor may have significant influence or consent rights in the liquidation process, it is still a "debtor-driven" process. The debtor is generally the party applying for *CCAA* relief at the initial hearing. When major events occur in the restructuring, the debtor generally appears before the court to seek any additional relief required. Importantly, it is the debtor that seeks court approval of a sale transaction once it has been negotiated.

Conversely, a receivership is a "creditor-driven" process. It is the secured creditor that commences the proceeding before the court and seeks appointment of the receiver. Depending on the circumstances and subject to court approval, the receivership order sought by the creditor may provide the receiver with broad or narrow powers. The receiver's ultimate goal is to realize on the debtor's assets for the benefit of all creditors. That said, the receiver may retain existing management on behalf of the debtor to assist in the realization process.

Under both liquidation processes, the appointment of a court officer ensures that the interests of the various stakeholder groups are considered and balanced and communicated to the court.

iv. — Priority of creditor claims

Another difference between receivership and the *CCAA* has to do with the priority of creditor claims. There are fewer priority rules in *CCAA* compared to liquidating under the *BIA*. Both statutes differentiate generally between secured and unsecured creditors. The BIA, however, contains a number of provisions that change the priority of certain types of claims, only some of which are mirrored or otherwise enforced in *CCAA*.

For example, as part of the 2009 amendments, certain aspects of the *Wage Earner Protection Program Act*[24] were integrated into both the *BIA* and the *CCAA*, giving priority status to certain unpaid employee and pension obligations. These obligations are secured claims in a receivership and become *de facto* secured claims in a *CCAA*.[25] That said, the amendments did not address the issue of employee eligibility for payments under *WEPPA*, which is currently limited to certain employees or former employees of a company that is in receivership or bankrupt.[26] These current and former employees can therefore potentially recover more under *WEPPA* in bankruptcy than in *CCAA*.

Another example is environmental remediation costs, which are granted secured status in both a receivership and in the *CCAA* as against the real property affected by the damage as well as any contiguous real property.[27]

Thirty-day good claims, by which an unpaid supplier who sells and delivers goods for use in the debtor's business within 30 days of the filing date has a right of repossession, are granted secured status in a receivership, but are not secured claims in a *CCAA* liquidation.[28]

Additionally, agricultural goods claims, by which a farmer, fisher, or aquaculturalist has security in all the inventory of the debtor in respect of goods supplied within 15 days of the filing date, are secured claims in receivership but not in a *CCAA* liquidation.[29] In *CCAA*, both 30-day goods claims and agricultural goods claims remain general unsecured claims. A secured creditor may therefore retain a more senior position in respect of the debtor's assets in *CCAA*, even though the *CCAA* process is more "debtor-driven".

III. — Key Factors that Impact the Choice of Proceeding

There is no doubt that liquidating *CCAA* proceedings are here to stay. The question then becomes, if there is a choice of proceeding, why would a company, or its creditors, seek to liquidate within a *CCAA* proceeding as opposed to liquidating in an alternative proceeding?

At the stage where the professionals of an insolvent company or a secured creditor are determining the need for a court-supervised process, the following key factors should be considered in making a determination:

a) whether the company's underlying business is viable;

b) what efforts the insolvent company and/or the secured creditor has undertaken prior to the filing in respect of refinancing its business or securing funding for the insolvency proceedings;

c) what the secured creditor's relationship is with the debtor and what its views are with respect to restructuring options;

d) what the potential impacts are to other stakeholders or third-party rights that may need to be compromised;

e) what the administrative costs of the different options might be when compared with the possible outcomes;

f) what risks are inherent in the restructuring (including the risks arising from being in possession) and how they affect the debtor, the secured creditor, and/or the professionals; and

g) whether there are any cross-border considerations.

1. — Viability

i. — Business viability

Whether and how the insolvent company's business can be made viable is possibly the most important element of an analysis of what option is most appropriate. The *CCAA* is meant to be remedial in nature and not preventative. [30] As Mr Justice Farley formerly of the Ontario Court of Justice commented, the *CCAA* should not be the "last gasp of a dying company". [31] Applying this concept to a liquidating *CCAA*, making the business viable (or more viable) and therefore attractive (or more attractive) to potential purchasers to effect a going-concern liquidation should not be considered a "last gasp".

In consultation with its professionals, and often with input from its secured creditor(s) or other major stakeholders, an insolvent company must have formulated a plan to make the business viable. Some indication of the form of this plan must be articulated to the court when requesting relief under the Act. The steps that the company might take to make the underlying business more viable include, *inter alia*:

a) implementing performance improvements;

b) reducing headcount;

c) relocating and/or consolidating some or all of its operations;

d) divesting underperforming or non-core assets;

e) seeking concessions and renegotiating existing contracts or leases; and

f) disclaiming unprofitable or unnecessary contracts.

Where a secured creditor, often with the advice of insolvency professionals, is considering consenting to the commencement of *CCAA* proceedings in respect of a debtor and/or applying to the court to appoint a receiver, it will examine what it believes to be the necessary steps for the debtor company to take to make its business viable, and will consider whether those steps may be or are best accomplished through *CCAA* or receivership.

While business viability is crucial, it is not the only type of viability that is considered in determining whether a receivership or liquidating *CCAA* is preferable.

ii. — Plan viability

While a company is not required to put forward a plan of arrangement to its creditors at the outset of *CCAA* proceedings, the possibility of a plan, often referred to as a "germ of a plan", is required. [32] Even after a full assessment of the company and its business has been conducted, it is difficult to assess at the outset whether or not a restructuring itself will be successful. There are many factors that will impact the probability of success, including: (a) the composition of the insolvent company's creditor body (classification of creditors); (b) how creditors' claims will be compromised (affected creditors); (c) likely creditor recovery under the *CCAA* compared to alternatives, such as receivership or *BIA* liquidation; (d) stakeholder support for the continuation of the business; and (e) dealings with creditors before and during the proceedings.

For a company to be successful in an application for an initial order and a continued stay of proceedings under the *CCAA*, there must be some likelihood that a viable business will emerge from *CCAA*. [33]

2. — Efforts Undertaken Prior to the Filing

In looking at what type of proceeding will be best suited to the circumstances, it is relevant to examine what efforts have been made by the insolvent company and what these efforts indicate about the company's value in the marketplace and creditor support for court-supervised options. The result of pre-filing efforts will give parties a good idea of whether a

CCAA application will be contested, the strength of any objections and whether there will be a competing application for appointment of a receiver.

In the face of opposition to an application for *CCAA* relief or, even more contentious, in the face of opposing applications by an insolvent company and its creditors, a judge will consider the facts that led up to these applications, and what the facts indicate about plan or restructuring viability, the impact to third parties, and creditor support. The efforts undertaken by the company prior to the filing may include (a) out-of-court restructuring initiatives, (b) negotiations with its existing lender, (c) attempts to refinance and/or to secure financing for the restructuring, and (d) attempts to sell the company or certain parts of its business.

i. — Restructuring initiatives

Before considering a court-supervised insolvency process, a company has usually been experiencing financial difficulty for some time. During this period of financial difficulty, a company has likely implemented some restructuring initiatives to try and improve performance. These initiatives are generally centred on cutting costs and include reducing discretionary spending (*e.g.*, travel and marketing budgets), implementing a salary freeze (perhaps even cutting salaries) or reducing headcount, or closing one or more underperforming locations.

The restructuring initiatives implemented prior to a filing provide insight into the management team of an organization. The initiatives speak to management's ability and willingness to recognize a problem and develop solutions, take action in a timely fashion, implement initiatives, successfully or not, and obtain buy-in from stakeholders.

ii. — Status of negotiations with existing lender

Where a company seeks to implement restructuring initiatives to prevent, or have a creditor forbear in respect of, a breach of covenant under its existing loan agreement(s), the company should already be in discussions with its existing lender. [34] The status of discussions between the company and its secured creditors is of central importance to the debate regarding the appropriateness of a liquidating *CCAA* versus a receivership. It is often a breakdown in communication between the parties that results in adversarial positions being adopted in respect of a restructuring, which may in turn lead to opposition of one party to the other's application for relief, or opposing applications for *CCAA* relief and appointment of a receiver.

While in the past it was fairly commonplace for a *CCAA* application to be made *ex parte*, it is no longer the practice. The secured creditor is usually involved in the discussions leading up to the filing and in many instances the secured creditor's legal counsel has reviewed the materials and provided comments to the applicant's legal counsel. This involvement would certainly be the case in a consent-based process.

If a *CCAA* proceeding is considered after one or more forbearance agreements, or extensions thereof, have been executed by the secured lender and the debtor company, it is often the case that the debtor has defaulted in repayment dates and other obligations under such agreements. In this type of situation, creditors become frustrated with delays in recovering amounts due and become unwilling to (a) give the debtor more time to refinance or restructure, or (b) consider going forward financing. [35] Instead, the secured creditor will often take steps to realize on its security. [36]

iii. — Efforts to secure financing (alternative or existing lender)

1. — Refinancing to avoid court-supervised insolvency proceedings

Prior to commencing court proceedings, a debtor company will usually have made an attempt to refinance existing debt by obtaining replacement credit with a longer period to maturity that would put the debtor in a position where it is no longer in default and subject to the threat of enforcement proceedings by a secured creditor. Ideally, a refinancing would also provide additional working capital. Whether the debtor has been able to elicit any interest from a new lender will provide some indication of the market value of a company and the effectiveness of its pre-filing attempts to restructure.

2. — Financing court-supervised insolvency proceedings

Where attempts to refinance are unsuccessful, and the debtor does not have sufficient working capital, it may be necessary to secure additional funding for insolvency proceedings, whether under the *CCAA* or in a receivership. The expectation in a receivership is that any additional funding will be provided by the existing lender, *i.e.*, the creditor appointing the receiver. When a company files for *CCAA* protection, a debtor will often ask its existing lender to fund working capital shortfalls and administrative costs during the proceeding. The decision the existing lender makes in this regard is influenced by many factors, including:

a) whether the existing lender agrees with the debtor company's current plans to restructure its business;

b) the existing lender's view of the credibility of the debtor's management;

c) the quantum of funding required;

d) transparency in the debtor's use of funds;

e) control over the debtor's use of funds;

f) return to the lender on at-risk capital; and

g) any concerns the existing lender has that another lender will prime their security by obtaining a priority charge for providing interim financing.

More often than not, the existing lender will agree to provide interim financing, mainly because it does not want an alternative lender to have a priority position. Often in the context of negotiating this additional funding, the existing secured creditor will extract concessions with respect to the manner in which the *CCAA* proceeding unfolds, as well as additional fees and generally higher interest rates.

It may also be the case that the existing lender is pressuring the company to find an alternative lender to provide interim financing and to pay out the existing lender. The status of discussions of this nature will have an impact on the relief sought in an application under the *CCAA* and the stance of the secured creditor in respect of such relief.

iv. — Efforts to sell the company

It is often the case that the company has embarked on a sales process whereby the company or its financial advisor solicits offers for a sale of or investment in the company prior to commencing a *CCAA* proceeding. It may be the case that a secured creditor has required the company to embark on such a process as part of agreeing to forbear on enforcing its security. Alternatively, the company, with or without the assistance of its advisors, may have recognized that it should explore this option and determine if a sale will maximize returns to creditors.

This pre-filing market testing provides information to the parties' professionals, stakeholders and the court regarding whether a going-concern sale is feasible and whether the debtor's management is the appropriate party to run the process.

If the company has been "on the market" for an extensive period of time without an acceptable offer prior to commencing *CCAA* proceedings, it would be prudent for the court to approach an application for *CCAA* relief with scepticism. To borrow from a famous Passover prayer, "Ma Nishtana", what has changed, this attempt to sell the company from all other attempts?[37] In this scenario, it would be difficult to see how a secured creditor would be happy with management continuing to pursue a sales process that has failed to achieve results prior to court involvement. It may be, however, that certain barriers to obtaining an acceptable offer can be remedied through the *CCAA* process (*e.g.*, reducing the workforce and disclaiming contracts), and for whatever reason, management was not aware of this ability or had not been willing in previous sales processes to effectuate the sale through *CCAA*.

In the alternative, a company may have been successful in finding a going-concern buyer but the contemplated transaction requires a "cleansing" of liabilities because the purchase price is not sufficient to pay all of the company's existing debt. In this type of situation, often referred to as a "pre-pack", a debtor company will seek court approval of the sale agreement along with the application for an initial *CCAA* order. [38] The transaction negotiated pre-filing by the debtor company may also serve as a minimum starting (or "stalking horse") bid in a sales process that will continue after the initial *CCAA* order is entered.

3. — Position of Secured Creditors

When considering liquidation or restructuring options, the position of a debtor company's secured creditor(s) will dictate what type of restructuring options can be pursued on a consensual basis, and what type of restructuring options will be met with opposition. The support or opposition of a secured creditor will have significant effects on the probability of success of each strategy, the administrative costs likely to be incurred, and the length of time the strategy will take. [39] Judges also view the support of major creditors, particularly secured ones, as key to their assessment of whether to grant an initial order. [40]

By the time a distressed company or its professionals are considering a court-supervised process, generally, the company and its secured creditors have been in discussions for some time regarding some sort of compromise, refinancing or extension of the maturity date of the company's indebtedness to the secured creditors. Often forbearance agreements have already been negotiated or attempted. Notice and demands may have been issued. The secured creditor may have already filed or threatened to file a petition to commence receivership proceedings. The company and its professionals will therefore have a good idea what the secured creditor's position is in respect of the various restructuring or liquidation options available to the debtor company. The secured creditor's view will have a significant impact on the assessment of whether a *CCAA* or a receivership type process is better suited to a company's circumstance.

i. — Adversarial or consent-based process

Although courts have found that the support of its secured creditor is not necessary for a company applying for *CCAA* protection, [41] whether a company has such support will be a key factor in determining whether a liquidating *CCAA* is appropriate. Trite though it sounds, the reality is that a consent-based *CCAA* process will be quicker, more efficient, less expensive, and will have a higher likelihood of success. Largely for these reasons alone, it will be significantly easier to obtain a *CCAA* stay if secured creditors are onside. [42]

Consequently, an adversarial relationship between debtor and secured creditor will usually militate strongly in favour of a receivership process over a liquidating *CCAA*. Moreover, "one should never lose sight of the fact that a stay of proceedings is a power whereby the court suspends, and in certain circumstances terminates, the exercise of undisputed legal and contractual rights. If that interference with contractual and legal rights is justified in pursuit of the statutory objectives, it is only justified on the basis of balancing that prejudice as against the benefits promised by the application." [43]

That said, where a debtor company, with the advice and assistance of its professional advisors, believes a liquidating *CCAA* is warranted and will result in a better outcome for stakeholders over all, it is possible to obtain court approval of an initial order to permit a liquidating *CCAA* to move forward in the face of an objecting secured creditor. [44]

The opposition of the secured creditors will have a significant impact on the decision to grant an initial *CCAA* order where:

a) the debtor company has failed to engage with its secured creditors in a meaningful way; [45]

b) the value of the security is in question; [46]

c) evidence shows a real risk to the lender's security position if the debtor company remains in possession; [47] or

d) the debtor lacks the ability to formulate a reasonable and realistic plan. [48]

Secured creditors often oppose an application for an initial *CCAA* order on the basis that they will not vote in favour of any compromise the debtor could propose and consequently any plan of compromise or arrangement would be "doomed to failure". [49] However, courts have found that a creditor cannot forestall a *CCAA* application on the basis of a blanket refusal to vote in favour of any plan the debtor proposes. [50]

Additionally, where there is a commercially reasonable prospect of getting secured creditor approval in the early days of a *CCAA*, based on evidence before the court, such as the proposed monitor's preliminary report, the court has granted short stays to give the debtor some time to try to get its major creditors on side. [51] Thus, it is not merely the words of secured creditors in opposing a *CCAA* application, but the history of the debtors' and the secured creditors' conduct as presented to the court that will impact the likelihood of success of a *CCAA* application. Where, however, a secured creditor has alternative remedies that are more advantageous to the creditor than what would be available through *CCAA*, it is doubtful that a debtor will be able to get such creditor on side.

ii. — Confidence in management

In the context of a liquidating *CCAA*, the confidence of a secured creditor in the management of the insolvent company will often determine whether the secured creditor and the debtor are in an adversarial posture or whether they can work together through a consensual process. Loss of confidence in management is routinely cited by objecting secured creditors as a reason to oppose a *CCAA* application, whether for a liquidating or restructuring *CCAA*. [52]

It is important in assessing liquidation options to look at whether any loss of confidence is a long-standing situation, or whether it is a result of one or two recent actions. As noted above, the restructuring initiatives implemented by management provide insight into management's ability to recognize problems and propose viable solutions. The secured creditor's confidence in management can also be backstopped by its choice of financial and legal advisors. If the secured creditor or its professionals are familiar with the debtor's advisors, the creditor may be more inclined to proceed down the path of a *CCAA*. The reverse is also true — if a secured creditor is unfamiliar or uncomfortable with the debtor's advisors it may be more inclined to take an adversarial position. In these circumstances the secured creditor may agree to proceed with a *CCAA* proceeding on conditions, which may include, *inter alia*, (a) selecting the firm that will be proposed as the court-appointed monitor, (b) expanding the powers of the monitor (thereby limiting the powers of the debtor company within the context of the proceedings), [53] and (c) including a deadline for emergence from *CCAA* in the initial *CCAA* order. [54]

From the perspective of succeeding in a court application for a *CCAA* stay, a secured creditor's counsel's saying the words "lost confidence in management" is not enough for the application to fail. An evidentiary basis is required for any such claim.

iii. — — Confidence in CCAA or receivership process

A debtor company and its secured creditor may also be at loggerheads regarding processes because of a lack of confidence in either a *CCAA* process or court-supervised processes generally. The *CCAA* is perceived as significantly more debtor friendly than other insolvency proceedings. Consequently, secured creditors may have significant concerns regarding

supporting a *CCAA* process, not trusting the court to protect what it views as its rights during proceedings in which debtors have significant power and flexibility in actions they can take.

Secured creditors may have similar concerns with respect to any court process, including a receivership, because of the loss of control that occurs when a court and a receiver become involved. One benefit to the secured creditor of going through a receivership process over *CCAA* is that the creditor's counsel will draft the receivership order detailing the powers and duties of the receiver. Depending on the circumstances and subject to court approval, the receiver's powers may be expanded or they may be circumscribed. This influence over the form of receivership order gives the secured creditor more control, at least at the outset, and may make the creditor more comfortable with the receivership process overall.

Notably, *CCAA* initial orders can also be, and often are, tailored to fit the requirements of a secured creditor to ensure they are supportive of the *CCAA* process. For example, in *Tamerlane*, the initial order includes a "sunset date" at which time, if the proceedings have not concluded, the *CCAA* stay will terminate and a receiver will be appointed pursuant to an order attached to the approved initial order, unless both the monitor and the debtor's secured lender give their written consent to the continuation of the proceedings. [55]

4. — Other Stakeholders/Third Party Rights

i. — Potential for conflicting interests

While it is well established that a court-appointed receiver must take into consideration the interests of all stake holders, not just the secured creditor, there remains a public perception that the court-appointed receiver is acting solely in the interest of the secured creditor that petitioned for its appointment. [56] Key in evaluating the potential for conflicting creditor interests during a liquidation is determining who the residual beneficiary of the debtor's estate is. Are all secured lenders fully secured? Are there second lienholders whose interests may or may not align with senior secured lenders? Are unsecured creditors the residual beneficiaries? How able is the residual beneficiary to protect its rights in the receivership process as compared to the *CCAA* process? [57] Where the senior secured lender is fully secured and enforcement of their remedies could significantly impact other secured creditors, unsecured creditors and other stakeholders (including impacting the priority of claims), the debtor, the senior secured creditor, the subordinate secured creditors and the unsecured creditors may have very different views on the appropriate liquidation proceeding. [58]

The court oversight and the duties of receivers to all stakeholders inherent in the receivership process means that it is not always necessary to use the procedural and jurisdictional tools of *CCAA* to liquidate a company where such inter-creditor conflicts exist. These conflicting interests can be balanced in a receivership proceeding. [59] It should be noted that, in the event that the receivership proceeding is coupled with a bankruptcy proceeding with the same practitioner acting as receiver and trustee in bankruptcy often for purposes of convenience and efficiency, other issues around real and perceived conflicts of interest can surface. [60]

ii. — Impact on community

In determining the appropriate course of action in each case, courts and practitioners seek to balance the interests of all those who are impacted by a distressed company's operations. The broader community of stakeholders includes employees, suppliers, customers, landlords and other parties impacted by the business operations. In both receivership and liquidating *CCAA* proceedings, the goal of effecting a going-concern sale is to minimize the negative impact on such stakeholders. Any provider of credit to the business may also continue to maintain a relationship with the business under its new ownership. These stakeholders may indirectly recover, through continued income or profit margin on supply, amounts lost in respect of pre-petition claims. The terms of sale will also impact stakeholders, possibly in an unequal manner. Additionally, some stakeholders may receive different treatment if a going-concern sale is effected by a receivership or under the *CCAA*.

A liquidating *CCAA*, at least according to prevailing perceptions, gives the court overseeing the process broader powers to impact third-party rights throughout and after the sale process, through the authority to compel assignment of contracts, to require "critical suppliers" to supply on credit terms, and similar powers. [61] In this way, the debtor in *CCAA* has a broader ability to limit or compel stakeholder action, with the idea that the exercise of such ability will result in greater recovery overall.

Additionally, the differences in the priority regimes in *CCAA* and receivership may disproportionately affect certain stakeholders. If, for example, there are significant trade claims arising from goods supplied within 30 days of filing that could qualify as 30-day good claims, it could be strategic for a secured creditor to support a debtor's *CCAA* application rather than commence receivership proceedings. In *CCAA*, these claims would be unsecured and, even if the business continues operating, trade creditors may be unable to recover any pre-petition amounts owed. In contrast, in a receivership, these claims could enjoy priority status ahead of the secured creditor pursuant to section 81.1 of the *BIA*. [62] In *CCAA*, the court may approve certain charges that may be ranked ahead of the secured creditor, such as an administrative charge for the fees and expenses of the debtor's professionals, and a directors' charge to indemnify directors for claims against them in their role as directors.

The differences in priority schemes may come into play in a debtor company's attempts to obtain the support of its secured creditors for a liquidating *CCAA* over a receivership. It should also be considered by the court at an application for an initial order to ensure that third-party interests are also considered. It may be that such priority difference is justified in the circumstances.

iii. — Flexibility of receiverships

The Chapter 36 *BIA* reforms expanded receivers' ability to market and sell a business while ensuring the uninterrupted continuation of a debtor company's operations for the benefit of all stakeholders. [63] In particular, commentators have argued that these changes to the *BIA* and the enactment and integration of the *WEPPA* [64] have resulted in a shift in the focus of receiverships from expedient recovery of assets for the benefit of secured creditors to a "regime focused on fairness and certainty for various stakeholders in an insolvent corporation". [65]

Further, a receivership order may be structured such that a debtor maintains possession or control of certain business operations during the receivership, enabling all stakeholders to take advantage of the debtor's greater knowledge of its own operations to maximize value. [66] A receiver can also seek court approval to repudiate executory contracts and enter into replacement contracts in the context of its attempting to maximize value in its marketing of a debtor's assets. [67] Additionally, a receiver may have greater powers to sell assets free and clear of unfavourable intellectual property obligations, due to certain restrictions on disclaimer and resiliation of such contracts under the *CCAA*. [68]

Where an alternative mechanism, such as a receivership, a foreclosure or a *BIA* liquidation, will provide sufficient protection of all stakeholders, the use of the *CCAA* to liquidate has been discouraged by courts. [69] For this reason, it is crucial not to fall into the habit of considering only *CCAA* paths. In particular with the possibility for flexible application of the *BIA*, other options that may have less of an impact on third parties' rights should be considered.

iv. — Use of distribution orders in CCAA

It is common in liquidating *CCAA* proceedings that the majority of creditors will have no say or impact on the debtor's restructuring process. Although a debtor will often obtain the support of significant secured creditors, it is rare (and not required by statute) that debtors canvass their entire creditor body, through a voting process or similar, to obtain broad creditor approval before selling the debtor's business. [70]

The lack of opportunity for creditors to impact a restructuring is further compounded by the fact that the general practice in liquidating *CCAA* proceedings is to bypass the presentation of any plan to creditors and simply obtain a distribution order in respect of the sale proceeds. [71] In such a situation, subject to the constraints of the *CCAA* rules on priority, which, as discussed, differ in some respects from the *BIA* rules, the court, with the advice of the monitor, is substituting its view of what distribution is fair to creditors, rather than permitting creditors to vote to accept or reject a compromise of their claims.

The distribution order sought by the debtor may be impacted by the monitor's valuation of different encumbered or unencumbered assets of the debtor and any allocation of the purchase price among such assets set out in the sale transaction. Creditors may object to a distribution order reflecting such valuation and allocation if they do not view it as fair and if they believe distribution in accordance with classification of creditors that would occur in a plan of compromise and arrangement or a *BIA* liquidation would provide them with a better return. [72]

It should be noted that creditors have the opportunity to be heard at the hearings to approve the sale process, to obtain a vesting order, and to obtain a distribution order, although these court proceedings may not be accessible to many creditors and require significantly more effort to participate as opposed to creditors' meetings and plan voting processes. [73] Additionally, because a liquidation of the debtor's assets leaves a fixed pool of funds available to complete the administration of the proceedings, it is arguably in the best interest of creditors to minimize the cost of the proceedings by forgoing filing a plan of compromise or arrangement and holding a meeting of creditors.

In some cases, the debtor will seek creditor approval of a proposal to distribute the proceeds of sale. [74] Where there are inter-creditor disputes and uncertainties as to the validity or priority of creditor claims, proposing a plan to creditors can be a way to resolve the existing uncertainty and conflict through a binding plan vote. Where such disputes exist, the *CCAA* does not provide guidance on how to resolve them and distribute funds absent a creditor vote or court order. Thus, where a plan fails to obtain the requisite level of approval, further negotiations with the stakeholders, with or without the court's assistance, and/or a determination of rights by the court would still be required to determine how proceeds are distributed and a distribution order could be obtained.

One factor that may impact the decision of whether to submit a plan to creditors or seek a distribution order is the level of sophistication of the creditor body. A highly sophisticated creditor group will have a better understanding of the debtor's proposed plan of compromise or arrangement, and what the impact of their vote will be on their recovery and the recovery of other stakeholders. An unsophisticated creditor group will likely require assistance understanding the plan, which will impact the cost of holding a creditor vote. The amount of time spent preparing materials to be sent to creditors in respect of the plan will reflect this level of sophistication. The debtor, its advisors, and the court need to strike a balance between allowing for participation in the process and maximizing recoveries for creditors.

There is also the danger that, in spite of efforts to inform unsophisticated creditors regarding the benefits of a plan over the alternatives, creditors will not vote in favour of a plan that is truly in their best interests. Unlike in Chapter 11 proceedings in the United States, Canadian debtors do not have the benefit of being able to "cram down" objecting creditor groups and obtain court approval of a plan over the objection of one class of creditor. [75]

The ability to take advantage of the broad discretion and power of the *CCAA* and any court overseeing a *CCAA* proceeding is viewed as a significant benefit to pursuing a liquidating *CCAA* over a receivership. However, it serves to highlight the importance of the *CCAA* monitor's role and the court's role in ensuring that distributions are fair. The monitor or the court may be required to step in to define what distribution is "fair" in the circumstances.

5. — Cost Considerations

It is the general view that restructuring under the *CCAA* is more expensive in terms of administrative costs than a receivership. [76] In particular, when it is clear from the outset (as it is not always) that the company and its secured creditor are at odds, proceeding by way of a liquidating *CCAA* has the potential to result in significant costs. The additional costs must be weighed against any perceived benefit to proceeding down the path of a *CCAA*.

Although it is possible to convert an on-going *CCAA* proceeding to a receivership proceeding, this action is usually taken after significant costs have been incurred, to the detriment of the creditor body. At the stage when a decision regarding whether to convert from *CCAA* to a receivership is being made, significant energy, time, and resources have been sunk into the *CCAA* process. Because the *CCAA* provides limited statutory guidance regarding how to distribute sale proceeds or priority of different classes of creditor claims relative to the *BIA*, a liquidating *CCAA* can involve significant litigation, which may impair recoveries particularly for unsecured creditors. [77] Even so, conversion to a receivership or *BIA* proceedings is not without costs and therefore one must weigh the costs compared to the benefits of conversion.

Pursuing a receivership process from the outset tends to be more streamlined, although it may be due to sample selection bias and the fact that *CCAA* is favoured in more complicated liquidations. Additionally, the need for secured creditors to provide receivers with substantial indemnities to protect them from, among other things, successor employer liability has largely dissipated with the enactment of Chapter 36. [78] Therefore, unless some of the other factors discussed herein are in play from an administrative efficiency perspective, receiverships are an under-utilized option. [79]

Aside from quantum considerations, who bears the cost of a court-supervised liquidation process is relevant to the determination of which process is most appropriate. The party who bears the costs of liquidation will depend to a large degree on who the residual beneficiary of the insolvent estate is, *i.e.*, whether the secured creditor is fully secured or whether unsecured creditors stand to recover.

6. — Risk Management

i. — Professional liability

One of the key factors that caused the increased use of the *CCAA* and the "flight away from receiverships" [80] for liquidation purposes was the concern over liability. *TCT Logistics* heightened the concerns of insolvency practitioners with respect to professional liability, specifically liabilities of the receiver as successor employer of the debtor company. [81] Secured creditors were unwilling to provide the quantum of indemnity required by trustees to operate a debtor company's business as receiver.

Legal counsel and insolvency practitioners determined that this risk would be minimized if a restructuring proceeding, in most instances the *CCAA*, were used to facilitate a liquidation of the business. The thinking behind this shift was that insolvency professionals would be insulated from liability in a *CCAA* or Division 1 *BIA* proposal because the monitor or trustee does not take possession or control of the debtor company's business. [82]

The *BIA* amendments that expanded the powers of receivers and created a national receiver attempted to address this risk by specifying that receivers are not successor employers of the debtor. [83] Additionally, the model form national receiver order incorporates language that specifically states that:

> ... *all employees of the Debtor shall remain the employees of the Debtor* until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities of the Debtor, including any successor employer liabilities as provided for in Section 14.06(1.2) of the *BIA*, other than amounts the Receiver may specifically agree in writing to pay and amounts in respect of obligations imposed specifically on receivers by applicable legislation. [84]

The *BIA* amendments and model orders certainly mitigate this risk, but nothing is absolute. Additional risks beyond successor employer such as liability for environmental damage are also addressed in the model receivership order and in the *BIA*, but again nothing is absolute. Consequently, professionals have been gun shy about moving back to receiverships, or have been satisfied to continue using the *CCAA* where either process could be used.

ii. — Reputation risk

Risk management remains a central issue for insolvency practitioners, but it is also an issue for secured creditors. Secured creditors may perceive a risk that an application to appoint a receiver over a company will negatively impact their reputation. This risk is generally highest when one or more of these circumstances exist:

a) the company is a large employer in the community;

b) the company's business is in a politically sensitive industry;

c) management is exuberant and in the spotlight;

d) the application to appoint a receiver is contentious;

e) the company is already in the media spotlight; and

f) the receiver plans to liquidate the company in a piecemeal fashion.

As a result of the perceived (if not real) risk to the secured creditor's reputation, the creditor may favour the use of a liquidating *CCAA* to facilitate a sale of a debtor's business because the debtor maintains possession and control of the business and the process provides a degree of separation from the secured creditor.

iii. — Stigma

Risk management is an important element of maximizing value of the debtor's business for stakeholders. There is certainly a stigma associated with receiverships and other insolvency proceedings that potentially impacts the value associated with the sale of a business as a going concern.[85] Two questions that come to mind are:

a) is the stigma associated with a receivership greater than the stigma associated with a liquidating *CCAA*?; and

b) does this stigma have an impact on the value realized in a sales process?

One would expect that a sophisticated buyer would arrive at the same estimate of value regardless of whether the sale is conducted through *CCAA* or a receivership. An unsophisticated buyer, however, may not arrive at the same estimate. An analysis of buyer behaviour in sales conducted in or out of insolvency proceedings is beyond the scope of this article but such behaviour, real or perceived, is a potential issue to consider when choosing a form of proceeding.

7. — Cross-Border Considerations

If a company or corporate group has assets, subsidiaries, and/or operations in jurisdictions outside Canada, the insolvency regimes in those jurisdictions will also impact the choice of proceeding. While an in-depth treatment of how cross-border issues may influence the choice between a receivership or *CCAA* liquidation is beyond the scope of this article, a list of key factors for consideration would not be complete without mentioning the need to consider whether foreign insolvency regimes may be involved or whether coordination of court processes in multiple jurisdictions may be required.

An insolvent company's professionals should have, or should seek out other professionals with, at least a broad understanding of the restructuring nomenclature of the foreign jurisdictions in which the insolvent company or corporate group operates. It is also important to know whether the foreign jurisdictions in which a company operates have adopted the UNCITRAL Model Law on Cross-Border Insolvency, [86] and to have a strategy for ensuring that whatever relief is sought in Canada will be recognized in those foreign jurisdictions.

Where a company or a group of affiliates has operations in the United States and Canada, for example, simultaneous Chapter 11 and *CCAA* proceedings may be required. Alternatively, the debtor company or its creditors may pursue recognition proceedings under Chapter 15 of the US *Bankruptcy Code*, Part XII of the *BIA*, or Part IV of the *CCAA*. [87] Insolvency practitioners in Canada and the United States view Chapter 11 and the *CCAA* as analogs. [88] As a consequence, where a sale will take place in respect of assets and/or potential purchasers in both Canada and the United States, it may be easier for insolvency practitioners to explain the effects of a *CCAA* proceeding to potential bidders and US creditors. Bankruptcy practitioners in the United States do not have the same reference point when it comes to receivership proceedings. Where a receiver is appointed by a Canadian court, Chapter 15 recognition may still be obtained. However, creditors may require more explanation of the impact of a receivership on their claims.

It should also be noted that, although *CCAA* and Chapter 11 have similar purposes, there are important differences. Primarily, the *CCAA* is a short, extremely flexible statute, with many elements left to the debtor's or the court's discretion. Chapter 11, while still flexible, is significantly more rigid, with many more statutory rules regarding, for example, how plans must be structured and put to creditors, requirements in asset sales, and claim priorities. In some ways, Chapter 11 has more in common with a proceeding under the *BIA* which is more fully codified than the *CCAA*. [89]

IV. — Considerations for Judges at Application for Initial CCAA Order

To grant relief under the *CCAA*, a court hearing an application for an initial *CCAA* order must be satisfied that "circumstances exist that make the order appropriate", and the applicant has acted and is acting "in good faith and with due diligence". [90] Where a company intends to liquidate, the court should consider most, if not all, of the practical considerations discussed above, although the court's balancing of these considerations may differ.

The presence of a competing application for a receiver provides a significantly different playing field than where there is opposition to a *CCAA* application but no creditor is willing to shoulder some of the restructuring or liquidation burden. In *Tallgrass*, Madam Justice Romaine was faced with two competing applications — one for a receiver and one for *CCAA* relief. [91] A similar situation was faced by Madam Justice Mesbur in *Callidus*. [92] In both cases, the court considered statutory and practical considerations under both statutes and found in favour of the secured creditor, finding the appointment of a receiver justified and the application for *CCAA* relief inappropriate in the circumstances. [93] In *Forest & Marine*, Mr Justice Masuhara was also faced with two competing applications. [94] The Court found in favour of the debtor and granted the relief requested under the *CCAA*.

1. — CCAA Considerations

In deciding if an initial order is appropriate in the circumstances, courts have highlighted that the *CCAA* is a remedial, not a preventative, statute. [95] In other words, a judge deciding a *CCAA* application will consider whether, based on the evidence before the court, it appears that the *CCAA* filing will not result in a successful restructuring (using a broad definition that includes liquidation) and will only delay inevitable creditor enforcement action.

The good faith and due diligence of a debtor filing for *CCAA* protection is often evaluated based on the actions a debtor has taken prior to, or in the course of filing for *CCAA* protection to obtain support from its creditors, to ensure continued supply of goods and services to the business, to support employees, and to obtain refinancing or concessions from stakeholders.

There is a judicial requirement that a debtor present at least a "germ of a plan" to the court in order to obtain *CCAA* protection, even where the plan will likely involve liquidation.[96] Consideration must be given to what a "germ of a plan" is in the context of a liquidating *CCAA* where the debtor's assets will be sold as part of the proceedings.[97] In *Tallgrass*, Madam Justice Romaine held that "there should be germ of a *reasonable and realistic plan*, particularly if there is opposition from the major stakeholders."[98] The court must undertake a consideration of whether the debtor intends to put forward a plan before its creditor body, and whether the debtor's plan is or has any potential to be reasonable or realistic in the circumstances. It should be noted that, at this stage, only limited affidavit evidence is before the court, and the court has had very limited time to consider such evidence given the urgent nature of most applications for *CCAA* protection.[99]

To determine whether granting *CCAA* relief is appropriate, the considerations set forth above should be examined, with a particular focus on:

> a) the potential of the debtor's business to become viable, taking into consideration management's action plan, the degree of confidence in management and the anticipated role of the debtor company's advisors in the proceedings to implement the action plan;
>
> b) the degree of creditor support;
>
> c) the extent to which the proposed course of action will preserve the economic value of the debtor company's business;
>
> d) any danger to the value of encumbered assets (i.e., risk to the security);
>
> e) the impact the debtor's plan will have on third-party rights; and
>
> f) whether alternative means of liquidation exist, and how different stakeholder groups, would fare in alternative proceedings compared to *CCAA*.

2. — Receivership Considerations

Where there is a competing application to appoint a receiver, the court will have to examine whether such appointment is "just and convenient".[100] To make this determination, the court must consider the effect on the parties of appointing the receiver (including potential costs and the likelihood of maximizing return on and preserving the property subject to the creditor's security for the benefit of all stakeholders), the parties' conduct leading up to the filings, and the nature of the property and the rights and interests of all parties in relation thereto.[101]

It will be rare that circumstances will not favour one or the other remedy, in particular when the actions of all parties leading up to the filing have been taken into account.

V. — Conclusion

Liquidating *CCAA* proceedings are a useful tool in the restructuring landscape where the best option for an insolvent debtor and its stakeholders is a going-concern sale of its business, especially when a debtor company's business operations must be restructured prior to marketing the business for sale. However, liquidating *CCAA* proceedings are not appropriate in all circumstances. Often, a receivership will be able to accomplish the same going-concern sale, and associated benefits thereof, with less impact on creditor rights. Given the *BIA* reforms that came into force in 2009, insolvency professionals may want to take another look at receiverships as an option to facilitate a going-concern sale of a business.

As liquidating *CCAA* proceedings are here to stay, legislative and judicial attention should be given to the differences in priority schemes under the *CCAA* and the *BIA* and the limited creditor participation that is sometimes permitted in liquidating *CCAA* proceedings. These differences between the two statutes may be used to the advantage of major creditors with the power to influence a debtor company's *CCAA* proceedings, to the detriment of other, less powerful creditors. If it is truly the case that the differences in priority or participation are the will of the policy makers, then that is their prerogative. However, given the increase in circumstances where relief under the *CCAA* or the *BIA* may both be appropriate, it may be time to revisit these issues and examine what is "fair" in these overlapping circumstances.

Where circumstances appear to favour a liquidating *CCAA*, some thought should be given to creditor participation in the process. Because it is accepted practice to seek only a distribution order rather than filing a plan of arrangement, many creditors may have had no opportunity to voice their views on the fairness of their treatment. If, however, a plan of arrangement is put to a creditor vote and the required votes to accept the plan are obtained, it can be inferred that the majority of creditors have accepted the settlement that has been proposed in the plan of arrangement. Although obtaining a distribution order is faster and less costly, insolvency practitioners and the judiciary need to weigh the cost considerations against any unfairness or potential prejudice (even if only perceived) to creditors.

Because liquidating *CCAA* proceedings and receiverships are both ways of accomplishing a going-concern sale, it becomes important to identify the key, if not the deciding, factors that come into play when choosing between the two. In the authors' view, the viability, or the potential for viability, of a debtor company's business is a deciding factor. A liquidating *CCAA* will rarely if ever be appropriate when a debtor company has no prospect of effecting a going-concern sale and the likely result of the debtor's restructuring attempts will be a piecemeal liquidation. The other factors discussed herein largely serve as evidence of whether the debtor's business is or can become viable.

We have certainly jumped off the *Cliffs*, [102] and are now in a position to build off of the excellent work that has been done analyzing the jurisdictional basis for liquidating *CCAA* proceedings, both pre- and post-enactment of section 36 of the *CCAA*. The authors hope this article will be a *Catalyst* to further discussion and analysis of the practical interplay between liquidating *CCAA* proceedings and other restructuring options.

Footnotes

* Michelle Grant, CIRP is a Vice President of Ernst & Young Inc. Tevia R M Jeffries is an associate with Dentons Canada LLP. The authors wish to thank Geoff Pedlow, Jeff Walls, and Allan Wu (who all visited Cliffs over Maple Bay in August 2013 and wished us to note that the site bore a striking resemblance to Mordor) for their excellent research assistance.

2 *Companies' Creditors Arrangement Act* RSC 1985, c C-36, as amended [*CCAA* or the "*Act*"].

3 Lloyd Houlden, Geoffrey Morawetz & Janis Sarra, *The 2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013) at 1136.

4 See, *e.g.*, *Re Ivaco* (24 October 2003), Toronto 03-CL-5145 (Ont.S.C.J. [Commercial List]) (Amended and Restated Initial Order); *Re Nortel* (2009), 49 C.B.R. (5th) 283, 173 A.C.W.S. (3d) 991 (Ont.S.C.J. [Commercial List]); *Re Planet Organic Corp* (29 April 2010), Toronto 10-8699-00CL (Ont.S.C.J. [Commercial List]) (Initial Order); *Re Azure Dynamics Corporation* (26 March 2012), Vancouver S122223 (B.C.S.C.) (Initial Order) [*Azure Dynamics*]; *Re Amcan Consolidated Technologies Corp* (11 September 2007), Toronto 07-CL-7116 (Ont.S.C.J. [Commercial List]) (Initial Order) [*Amcan*]; *Re Oilexco* (5 February 2009), Calgary 0901-01613 (Alta.Q.B.) (Initial Order); *Re Sterling Shoes* (21 October 2011), Vancouver S117081 (B.C.S.C.) (Initial Order).

5 *CCAA*, *supra* note 1, s. 36.

6 *Re Winnipeg Motor Express Inc*, 2008 MBQB 297, 49 C.B.R. (5th) 302 (Man.Q.B.) at para. 42 [*WME*].

7 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

8 Janis Sarra, "Reflections on a Decade of Financing Insolvency Restructurings", in Janis Sarra, ed, *Annual Review of Insolvency Law 2012* (Toronto: Thomson Carswell, 2013) 59 at 60 [Sarra, "Reflections"].

9 Bill Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in Janis Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Thomson Carswell, 2009) 79 at 97 [Kaplan].

10 *Ibid.* at 87.

11 *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont.Gen.Div. [Commercial List]); additional reasons (1998), 5 C.B.R. (4th) 319 (Ont.Gen.Div. [Commercial List]); further additional reasons (1998), 5 C.B.R. (4th) 321 (Ont.Gen.Div. [Commercial List]); leave to appeal refused (1998), 32 C.B.R. (4th) 21 (Ont.C.A.) [*Red Cross*]. *Red Cross* is referenced in many papers and textbooks. See also Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) at 195-216.

12 See, *e.g.*, sources cited at note 3 above.

13 See *GMAC Commercial Credit Corp — Canada v TCT Logistics Inc*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) [*TCT Logistics*]; Anna Turinov, "Reform of Receivership in Chapter 36: Toward Certainty and a More Inclusive Group of Stakeholders", in Janis Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Thomson Carswell, 2009) 501 at 506 [Turinov]; and Kelly J Bourassa & Deryck Helkaa, "Increased Flexibility in Appointments of Receivers: The Highlights from 2009", in Janis Sarra, ed, *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2010) 291 at 296 [Bourassa & Helkaa]. The authors note that the use of receiverships generally remained in favour in the province of Québec.

14 *Bankruptcy Code*, 11 USC ch 11 [US *Bankruptcy Code*].

15 A detailed analysis of the reasons behind the fall in popularity of receiverships in Canada, as well as the statutory amendments undertaken to revive their use, are beyond the scope of this article. For more information and analysis, see Turinov, *supra* note 12, and Bourassa & Helkaa, *supra* note 12.

16 Sarra, "Reflections", *supra* note 7 at 63.

17 *Ibid.*

18 *The Oxford English Dictionary*, 2d ed, *sub verbo* "liquidation".

19 For a more detailed analysis of the differing forms of liquidation and the impact on stakeholders see Kaplan, *supra* note 8 at 86-89.

20 See Shelley J Fitzpatrick, "Liquidating *CCAAs* — Are We Praying to False Gods?", in Janis Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Thomson Carswell, 2009) 33 at 33.

21 The *CCAA* only applies to certain insolvent companies with debts greater than $5 million. In addition, the costs of restructuring under the *CCAA* means that it is only a viable option for larger Canadian companies (see Sarra, "Reflections", *supra* note 7 at 64).

22 See Karma Dolkar, "Re-Thinking Rescue: A Critical Examination of *CCAA* Liquidating Plans" (2011), 27 *BFLR* 111 at 112.

23 *Re Consumers Packaging Inc* (2001), 27 C.B.R. (4th) 197, 150 O.A.C. 384 (Ont.C.A.) at para. 5.

24 *Wage Earner Protection Program Act*, SC 2005, c 47 [*WEPPA*].

25 See *BIA*, *supra* note 6, ss. 81.4 & 81.6; *CCAA*, *supra* note 1, ss. 6(5), 6(6), & 36(7). For a more complete discussion of the *CCAA* provisions that provide for charges in respect of employee claims, see Bourassa & Helkaa, *supra* note 12 at 311-12 and see generally Turinov, *supra* note 12.

26 Additional criteria for eligibility to claim under *WEPPA* can be found at: http://www.servicecanada.gc.ca/eng/sc/wepp/apply/who.shtml.

27 See *BIA*, *supra* note 7, s. 14.06(7); *CCAA*, *supra* note 1, s. 11.8(8).

28 See *BIA*, *ibid.*, s. 81.1. See, *e.g*, *Re Boutiques San Francisco Inc*, [2004] R.J.Q. 986, 5 C.B.R. (5th) 174, REJB 2004-54298, J.E. 2004-620 (Que.S.C.).

29 See *BIA*, *ibid.*, s. 81.2.

30 See *Re Inducon Development Corp* (1991), 8 C.B.R. (3d) 306, 31 A.C.W.S. (3d) 94 (Ont.Gen.Div.) [*Inducon*]; *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 (Alta.Q.B.) [*Tallgrass*]; and *Callidus Capital Corp v Carcap Inc*, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont.S.C.J. [Commercial List]) at para. 57 [*Callidus*].

31 *Inducon*, *ibid.*, at para. 13.

32 *Ibid.*

33 The viable business emerging from *CCAA* may be a component of the larger *CCAA* debtor that is spun off as part of the *CCAA* process.

34 These discussions could be prompted by the lender (making demand and/or accelerating amounts due in respect of the loan) or by the company, seeking *CCAA* relief.

35 See Sarra, "Reflections", *supra* note 7 at 62.

36 Such steps could include pressuring a debtor to file for *CCAA* relief, if that is viewed as the best way to realize on the security.

37 See Rabbi Nathan Goldberg, *Passover Haggadah — New Revised Edition* (Brooklyn, NY: Ktav Publishing House, 1966) at 8.

38 See, *e.g.*, *Re Wilson Auto Group* (14 February 2008), Winnipeg CI-08-01-55576 (Man.Q.B.) (Initial Order) [*Wilson*]; *Re Extreme Fitness* (7 February 2013), Toronto CV-13-100000-00CL (Ont.S.C.J. [Commercial List]) (Initial Order).

39 See Bourassa & Helkaa, *supra* note 12 at 297.

40 See *e.g.*, *Tallgrass*, *supra* note 29 at paras. 14, 18; *Inducon*, *supra* note 29 at para. 16.

41 See, *e.g.*, *Tallgrass*, *ibid.* at para. 14.

42 See *Re Worldspan Marine Inc*, 2011 BCSC 1758, [2012] B.C.W.L.D. 2061 (B.C.S.C.) at para. 3; *WME*, *supra* note 5 at para 5; *Re Nortel Networks Corp* (2009), 50 C.B.R. (5th) 77, 174 A.C.W.S. (3d) 332 at paras. 17-19 (Ont.S.C.J. [Commercial List]).

43 Kaplan, *supra* note 8 at 118.

44 See, *e.g.*, *Re Calpine Canada Energy Ltd*, 2007 ABQB 504, 35 C.B.R. (5th) 1 (Alta.Q.B.) at paras. 80-82 [*Calpine*].

45 See, *e.g.*, *Re Dondeb Inc*, 2012 ONSC 6087, 97 C.B.R. (5th) 264 (Ont.S.C.J. [Commercial List]) at para. 25 [*Dondeb*].

46 See, *e.g.*, *Re Marine Drive Properties Ltd*, 2009 BCSC 145, [2009] B.C.W.L.D. 2023 (B.C.S.C.) at paras. 33-35 [*Marine Drive*].

47 See, *e.g.*, *Dondeb*, *supra* note 44 at paras. 6, 13.

48 See, *e.g.*, *Tallgrass*, *supra* note 29 at para. 14 and *Callidus*, *supra* note 29 at paras. 58-60.

49 See, *e.g.*, *Re Forest & Marine Financial Corp*, 2009 BCCA 319, 54 C.B.R. (5th) 201 (B.C.C.A.) at para. 25 [*Forest & Marine*].

50 *ibid.* at para. 27.

51 See, *e.g.*, *Inducon*, *supra* note 29 at para. 18.

52 See *e.g.*, *Tallgrass*, *supra* note 29; *Azure Dynamics*, *supra* note 3 at para. 40.

53 See, *e.g.*, *Re Concrete Equities Inc* (29 July 2009), Calgary 0901-11048 (Alta.Q.B.) (Initial Order) [*Concrete Equities*]; *Azure Dynamics*, *supra* note 3; and *Wilson*, *supra* note 37.

54 See, *e.g.*, *Re Tamerlane Ventures Inc and Pine Point Holding Corp* (23 August 2013), Toronto CV-13-10228-00CL (Ont.S.C.J. [Commercial List]) (Initial Order) [*Tamerlane*], granting a *CCAA* stay, approving and directing a sales and investor solicitation process, and containing a fixed "sunset date" for the *CCAA* proceeding beyond which extensions to the proceedings cannot be sought without the consent or payment in full of the secured creditor.

55 *Tamerlane*, *supra* note 53 at paras. 50-51. The restructuring of Catalyst Paper Corporation and its affiliates provides another example of creditor control, although it was not strictly a liquidating *CCAA*. In this restructuring, major creditors conditioned their support on court approval of a sale process that would immediately go into effect if a plan vote failed, unless these creditors consented to delay such process (*Re Catalyst Paper Corporation* (22 March 2012), Vancouver S120712 (B.C.S.C.) (Order Approving Sale and Investor Solicitation Process)). Additionally, the initial *CCAA* order provided protections to the secured creditors' position by providing that proceeds from any asset sales of secured creditors' collateral would remain in an account with the collateral trustee *Re Catalyst Paper Corporation* (3 February 2012), Vancouver S120712 (B.C.S.C.) at para. 40 (Amended and Restated Initial Order)).

56 See Turinov, *supra* note 12 at 516.

57 Creditor groups will often form *ad hoc* committees to participate in court proceedings to take advantage of cost sharing and mounting a united front to the debtor and the court. See *e.g.*, *Concrete Equities*, *supra* note 52, where the individual limited partners (over 3,700) created a steering committee represented by legal counsel.

58 There may also be concerns or complications related to debt or claim trading that occurred prior to filing for insolvency relief or would arise after filing for *CCAA* relief.

59 See *infra* notes 62-67 and surrounding text.

60 See Turinov, *supra* note 12 at 516-17. Notably, in order to accept a dual appointment, the trustee is required to obtain a legal opinion on the validity of the secured creditor's claim (*BIA*, *supra* note 6, s. 13.4).

61 See *CCAA*, *supra* note 1 at ss. 11.3-11.7.

62 The *CCAA* of The Puratone Corporation, Pembina Valley Pigs Ltd. and Niverville Swine Breeders Ltd. (collectively, "Puratone") provides an extreme example of an attempt by unpaid pre-petition trade creditors to recover in respect of over $900,000 in grain supplied to the debtors within two weeks of the *CCAA* filing. Because the liquidation occurred under the *CCAA* and secured creditors were underwater, in order to obtain any payment in respect of these claims, the suppliers have sought relief from the *CCAA* stay to pursue Puratone, its officers and directors, and its secured creditors, on the basis that these deliveries were acquired by fraud (*Re Puratone Corp*, 2013 MBQB 171, 229 A.C.W.S. (3d) 632 (Man.Q.B.)). These creditors face a high evidentiary burden to obtain any recovery, and may cost themselves and the estate significant legal fees. Had this liquidation occurred by way of receivership, the relative priority position of these trade creditors may have been significantly different.

63 See Bourassa & Helkaa, *supra* note 12, and Turinov, *supra* note 12 at 503.

64 *WEPPA*, *supra* note 23.

65 Turinov, *supra* note 12 at 52.

66 See, *e.g.*, *Canadian Imperial Bank of Commerce v Polymer Technologies* (8 August 2011), Toronto CV-09-8109-DOCL (Ont.S.C.J. [Commercial List]) (Receivership Order); see also Bourassa & Helkaa, *supra* note 12 at 298-99.

67 See, *e.g.*, *WestLB AG v Rosseau Resort Developments Inc* (22 May 2009), Toronto CV-09-8201-OOCL (Ont.S.C.J. [Commercial List]) (Initial Order); see also Bourassa & Helkaa, *supra* note 12 at 309.

68 *CCAA*, *supra* note 2, s 32(6). See David Ullmann & Melissa McCready, "Licensed to Steal: The Rights of IP Licensors and Licensees in an Insolvency" in Janis Sarra, ed, *Annual Review of Insolvency Law 2010* (Toronto: Thomson Carswell, 2011) 6.

69 See *e.g.*, *Marine Drive*, *supra* note 45 at para. 42; *Dondeb*, *supra* note 44 at para. 34.

70 See *e.g.*, *Calpine*, *supra* note 43 (GSA to resolve inter-company claims between US and Canada in consultation with major Canadian stakeholders). But see *Re Pine Valley Mining Corp*, 2007 BCSC 926, [2007] B.C.W.L.D. 5178 (B.C.S.C.) (the debtor held a vote on an interim plan to sell its business and then held a second vote on a final plan to distribute on proceeds).

71 See, *e.g.*, *WME*, *supra* note 5; *Azure Dynamics*, *supra* note 3; *Amcan*, *supra* note 3.

72 See, *e.g.*, *WME*, *ibid.*

73 For a fuller discussion regarding whether a creditor vote should be required prior to a sale of assets in a liquidating *CCAA* and whether a plan should be required, see Kaplan, *supra* note 8 at 121-29.

74 See, *e.g.*, *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge*, 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299 (Ont.Gen.Div [Commercial List]); *Re Xillix Technologies Corp* (21 June 2007), Vancouver S066835 (B.C.S.C.), *Wilson*, *supra* note 37 (plan distribution followed *CCAA* priorities).

75 US *Bankruptcy Code*, *supra* note 13, §1129.

76 See *Dondeb*, *supra* note 44 at para. 34.

77 See Sarra, "Reflections", *supra* note 7 at 63-64.

78 See *CCAA*, *supra* note 1 at s. 14.06(1.2); and Turinov, *supra* note 12 at 511-14.

79 See generally Roderick J Wood, "The Regulation of Receiverships", in Janis Sarra, ed, *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2010) 243 at 288-89.

80 *WME*, *supra* note 5 at para. 41.

81 See *TCT Logistics*, *supra* note 12; Turinov, *supra* note 12 at 509.

82 See Wood, *supra* note 78 at 285.

83 Turinov, *supra* note 12 at 512.

84 Supreme Court of British Columbia *CCAA*, *Model Receivership Order* (Standard Form, 30 June 2011) at s. 12 [emphasis added]. Each province has a different model form order, but the clause on employee claims is generally consistent across provinces.

85 Bourassa & Helkaa, *supra* note 12 at 304-5.

86 UNCITRAL Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (30 January 1998); U.N. Comm'n on Int'l Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. DOC. A/CN.9/442 (1997) available at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

87 US *Bankruptcy Code*, 11 USC ch 15; *BIA*, *supra* note 6, Part XII; *CCAA supra* note 1, Part IV.

88 See, *e.g.*, *In Re Teleglobe Communications Corporation*, 493 F.3d 345 (3d Cir. 2007) at 353; In *Re Fracmaster Ltd*, 237 B.R. 627 (Bankr. E.D. Texas 1999) at note 3.

89 For a discussion of coordination of cross-border insolvencies and the treatment of corporate groups in concurrent cross-border proceedings, see Janis Sarra, "Corporate Group Insolvencies: Seeing the Forest and the Trees" (2008) 24 *BFLR* 63. For a comparison of the sale processes in Chapter 11 and *CCAA*, see Stephanie Ben-Ishai & Stephen J Lubben, "Comparative Approaches to Systemic Risk and Resolution" (2011) 6 *Brooklyn Journal of Corporate, Financial & Commercial Law* 79.

90 *CCAA*, *supra* note 2, s. 11.02(3). The debtor must also satisfy the technical requirements that it is a corporation with debts greater than $5 million (*CCAA*, s. 3(1)).

91 *Tallgrass*, *supra* note 29.

92 *Callidus*, *supra* note 29.

93 *Tallgrass*, *supra* note 29; see also *Callidus*, *ibid.*

94 *Forest & Marine*, *supra* note 48.

95 See, *e.g.*, *Inducon*, *supra* note 29 at para. 13; *Tallgrass*, *supra* note 29 at para. 14; *Callidus*, *supra* note 29 at para. 57.

96 *Inducon*, *supra* note 29 at para. 14.

97 See, *e.g.*, *Tallgrass*, *supra* note 29 at para. 14; *Callidus*, *supra* note 29 at paras. 57-60.

98 *Tallgrass*, *ibid.* at para. 14 [emphasis added].

99 Kaplan, *supra* note 8 at 129.

100 *BIA*, *supra* note 6 at s. 243(1); see also *Callidus*, *supra* note 29 at para. 40.

101 *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont.Gen.Div. [Commercial List]) at paras. 11-13; see also *Callidus*, *supra* note 29 at para. 41.

102 *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C.C.A.).

TAB 6

CITATION: Colossus Minerals Inc. (Re), 2014 ONSC 514
COURT FILE NO.: CV-14-10401-00CL
DATE: 20140207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, As Amended

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: S. Brotman and D. Chochla, for the Applicant Colossus Minerals Inc.

L. Rogers and A. Shalviri, for the DIP Agent, Sandstorm Gold Inc.

H. Chaiton, for the Proposal Trustee

S. Zweig, for the Ad Hoc Group of Noteholders and Certain Lenders

HEARD: January 16, 2014

ENDORSEMENT

[1] The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

[2] The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has

no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

[3] The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

[4] First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

[5] Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

[6] Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

[7] Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

[8] Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

[9] Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

[10] For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

[11] Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

[12] Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

[13] First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

[14] Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

[15] Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

[16] Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

[17] The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

[18] First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

[19] Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

[20] Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

[21] Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

[22] The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

[23] First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

[24] Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

[25] Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

[26] Lastly, the Proposal Trustee supports the proposed SISP.

[27] Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

[28] The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

[29] Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[30] Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

[31] For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

[32] Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

[33] As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

[34] In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

[35] Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

[36] Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

[37] The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

[38] The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

[39] First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

[40] Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

[41] Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

[42] Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

[43] Lastly, the Proposal Trustee supports the requested relief.

Wilton-Siegel J.

Released: February 7, 2014

TAB 7

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

Companies' Creditors Arrangement Act[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

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[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

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[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6]and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

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[6] 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

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[8] 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

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[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

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[12] Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
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> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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[13] This exception also applies to the other charges granted.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

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[14] Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

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[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

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[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

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[19] Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

TAB 8

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-042345-120

DATE: May 8, 2012

PRESIDING: THE HONOURABLE MARK SCHRAGER, J.S.C.

IN THE MATTER OF THE PROPOSED PLAN OF COMPROMISE AND ARRANGEMENT OF:

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
and
AERO TECHNICAL US, INC.
Insolvent Debtors/Petitioners
and
FTI CONSULTING CANADA INC.
Monitor

REASONS FOR JUDGMENT

Introduction

[1] Following are the reasons for the judgment and amended order issued on May 4, 2012 with regard to the directors' and officers' («D&O») charge.

[2] The initial order under the Companies' Creditors Arrangement Act[1] («CCAA») was issued by the undersigned on March 19, 2012. The order included a $5 million D&O charge pursuant to section 11.51 CCAA.

[3] On the evening of March 19, 2012 and, after the filing, all of the directors but one resigned. The remaining director signed an affidavit in support of the motion to name a chief restructuring officer («CRO»), which was presented to and granted by the undersigned on March 20, 2012.

[4] The operations of Aveos remaining as at the issuance of the initial order on March 19 were shut down as of 1 PM on March 20, 2012. This shutdown included the termination of the remaining employees but for a limited number (approximately 82) retained to assist in the liquidation of the Debtors' assets. (The airframes division was closed just before the filing under the CCAA. The employees working in that division were terminated on March 18, 2012.)

[5] The facts as presented to this Court by the Debtors in support of the motion to name the CRO were that, faced with the inability to obtain accommodations requested from Air Canada and daily expenses of $500,000, it was deemed impossible by the Directors for Aveos to pursue its business operations.

[6] At the initial hearing, it was reported that the D&O liability insurance would expire on May 1, 2012. No details were provided to the Court of the coverage. On March 19, 2012, the Debtor's ability to pay any renewal premium was doubtful given the liquidity crisis.

[7] Against this factual context and given the principles for establishing a D&O charge, the undersigned suggested at the initial comeback hearing that the amount of the D&O charge was, in the circumstances, exaggerated or the very existence of a D&O charge was no longer justified so that in either event the matter should be re-visited. To this end counsel for the Debtors and the Monitor informed the former directors and it was agreed that the matter would be addressed at the hearing scheduled for the continuation of the stay order on May 4, 2012.

[8] The directors have presented a motion seeking that the charge in their favour be reduced to $2 million.

[9] The Court was informed at the hearing of the directors' motion that the policy period has been extended until April 30, 2013 and that the coverage limit under the D&O liability insurance policy is $100 million. No documents have been produced so that the Court is unaware of the extent of the coverage or exclusions nor of any other particulars.

[1] R.S.C., 1985, c.C-36.

ISSUE

[10] The issue before the Court is whether the amount of the D&O charge created in the initial order should be reduced or if, in the circumstances described above, the charge should be eliminated.

DISCUSSION

[11] The Supreme Court of Canada has stated that the purpose of the CCAA is «to permit the Debtor to continue to carry on business and where possible avoid the social and economic costs of liquidating its assets».[2]

[12] Other purposes have been articulated by the courts such as permitting the broad balancing of stakeholder interests in the insolvency and permitting a sale, winding-up, or liquidation of a debtor company and its assets, in appropriate circumstances.[3]

[13] The rationale of the D&O charge is to encourage directors and officers to continue to occupy their positions during the restructuring of an insolvent company by providing an assurance that the company will ultimately be able to hold directors harmless for any personal liability incurred by continuing to act as a director after the insolvency filing.[4]

[14] The Monitor and counsel for the union suggest another purpose underpinning the D&O charge, namely the ultimate benefit of the employees. Directors are personally liable for certain employee claims. The recourse of employees against directors for various statutory liabilities does not guarantee recovery. Thus, creating security in favour of directors for sums in respect of which they are liable to employees but for which the company is ultimately liable, enhances the employees' chances of recovery by in effect creating security for their claims.

[15] In the present case, realistically, there will be no continuation of the business by the Debtors. A sales process has been approved by this Court and initiated by Aveos under the guidance of the CRO and the Monitor. Hopefully this will result in a sale to one or more persons of all or parts of the assets and business enterprise of Aveos in the best interests of all stakeholders. The rationale behind maintaining the CCAA legal framework after the shutdown on March 20 and allowing Aveos to avoid a bankruptcy liquidation was the speed and flexibility of realization under the CCAA while maintaining the critical mass and enterprise value of Aveos so as to maximize the value of the assets and hopefully retain, in some measure, the business enterprise, again for the benefit of all stakeholders, including particularly employees. Although Aveos will no longer carry on the business, hopefully somebody else will do so.

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[2] *Century Services Inc.* v. *AG Canada*, [2010] 3 SCR 379, para. 15.
[3] Houlden & Morewetz, «The 2011 Annoted Bankruptcy and Insolvency Act, Carswell, 2001, p. 1066.
[4] *Mecachrome International Inc.*, [2009] QCCS 1575, para. 58, Gascon, j.c.s.

[16] The D&O charge is only available to protect against liability incurred by directors and officers after the initial filing (section 11.51(1) CCAA). After the filing, the directors were only in their positions for a few hours. They do not appear to have been directors when the post filing layoffs occurred on or around 1 PM on March 20, 2000. However counsel for the union suggested that the facts of those final hours may require closer scrutiny to see whether and when directors' liability was triggered by those post-filing layoffs.

[17] The second report of the Monitor indicates by way of rough estimate, post filing liability to employees of approximately $10 million per month (excluding severence). In any event the potential liability appears within the insurance coverage stated by the parties to be $100 million. Section 11.51(3) CCAA provides that where insurance coverage "could" be obtained, the D&O charge should not be granted. The initial order under the CCAA provides in paragraph 31 that the charge only has effect to the extent that the insurance coverage is not available or is insufficient. The parties urged that the Court not adhere to a literal reading of section 11.51(3) CCAA. Moreover as counsel for the union points out, the Court does not have the particulars of any exclusions in the D&O insurance policy. There may be uninsured liability that the D&O charge could satisfy.

[18] The employees would like to retain the $5 million D&O charge as they feel, as set forth above, that the charge could only help them recover against directors and thus counsel for the union requested that the D&O charge be maintained at $5 million .

[19] From the record as it stands, it appears that Credit Suisse, the agent for the banking syndicate has valid security for a debt of $205 million. The Monitor's counsel is preparing a formal opinion but does indicate at this time that the security appears to be valid. Credit Suisse supports the directors' motion to reduce the charge to $2 million. Though nobody knows ultimately what the recovery on assets will be, the banking syndicate does have the initial if not most significant economic interest in any charge or security that primes the rank of the lenders' security. As such, the submission of Credit Suisse should be respected in this instance.

[20] The process of reducing the D&O charge and the directors motion were instigated by comments from the undersigned at the first comeback hearing following the events of March 19 and 20, 2012 as described above. The Court was sensitive to the precedent and the appearance of a $5 million D&O charge where directors were only in place for a few hours following the creation of the charge in the initial order. This state of affairs seemed conspicuous and out of step with the primary policy reason for D&O charges. On the other hand sufficient arguments have been brought to bear to maintain the D&O charge and the Court is particularly sensitive to the arguments that the charge may enhance employee recovery. Also, the Monitor testified that the $2 million amount suggested in the directors' motion was a compromise number arrived at after discussion between the directors, the Debtors (through the CRO), the Monitor and the secured creditors, following the Court's comments at the first comeback hearing.

Communication and compromise between stakeholders in a CCAA file is to be encouraged.

[21] For all of the above reasons the undersigned granted the directors' motion to amend the initial order by reducing the D&O charge from $5 million to $2 million.

MARK SCHRAGER, J.S.C.

Fraser Milner Casgrain LLP
Roger Simard
Attorneys for Insolvent Debtors/Petitioners

Norton Rose Canada LLP
Sylvain Rigaud
Attorneys for Monitor

Date of hearing: May 4, 2012

TAB 9

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-039940-107

DATE: November 25, 2010

PRESENT: THE HONOURABLE MR. JUSTICE MARTIN CASTONGUAY

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BOUTIQUE JACOB INC.
and
9101-2096 QUÉBEC INC.
and
9192-4126 QUÉBEC INC.

Petitioners

and
PRICEWATERHOUSECOOPERS INC.

Monitor

AMENDED AND RESTATED INITIAL ORDER

[1] ON READING the amended petition of Boutique Jacob Inc. ("**Boutique**"), 9101-2096 Québec Inc. ("**Ipco**") and 9192-4126 Québec Inc ("**9192**" and collectively with Boutique and Ipco, the "**Petitioners**") for an amended and restated initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C-36 (the "**CCAA**") and the exhibits, the affidavit of Joseph Basmaji filed in support thereof (the "**Petition**"), relying upon the submissions of counsel and being advised that the interested parties, including secured creditors who are likely to be affected by the charges created herein, were given prior notice of the presentation of the

Petition;

[2] **GIVEN** the provisions of the CCAA;

WHEREFORE, THE COURT:

[1] **GRANTS** the Petition.

[2] **ISSUES** an order pursuant to the CCAA (the "**Order**"), divided under the following headings:

- Service
- Application of the CCAA
- Effective Time
- Plan of Arrangement
- Stay of Proceedings against the Petitioners, Basco I.P., LP and the Property
- Stay of Proceedings against the Directors (as defined hereinafter)
- Possession of Property and Operations
- No Exercise of Rights or Remedies;
- No Interference with Rights
- Continuation of Services
- Non-Derogation of Rights
- Key Employment Retention Plan
- Restructuring
- Real Estate Leases
- Personal Information
- Powers of the Monitor
- Priorities and General Provisions Relating to CCAA Charges
- General

Service

[3] **DECLARES** that sufficient prior notice of the presentation of this Petition has been given by the Petitioners to interested parties, including the secured creditors who are likely to be affected by the charges created herein.

Application of the CCAA

[4] **DECLARES** that the Petitioners are debtor companies to which the CCAA applies.

Effective time

[5] **DECLARES** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard / Daylight Time on the date of this Order (the "**Effective Time**").

Plan of Arrangement

[6] **DECLARES** that the Petitioners shall have the authority to file with this Court and to submit to its creditors one or more plans of compromise or arrangement (collectively, the "**Plan**") in accordance with the CCAA.

Stay of Proceedings against the Petitioners, Basco and the Property

[7] **ORDERS** that, until and including December 14, 2010, or such later date as the Court may order (the "**Stay Period**"), no right, remedy, enforcement process or proceeding (collectively the "**Proceedings**") may be exercised, commenced or continued by anyone, whether a person, firm, partnership, company, corporation, financial institution, trust, bank, stock exchange, joint venture, association, organization, agency, government, administration or any other entity (collectively, "**Persons**" and, individually, a "**Person**") against or in respect of the Petitioners and Basco IP, L.P. ("**Basco**"), or any of the present or future property, assets, sums, rights and undertakings of the Petitioners or Basco, of any nature and in any location (including in bank accounts, wherever situated) (collectively, the "**Property**"), or affecting the Petitioners' and Basco's business operations and activities (collectively, the "**Business**") except with leave of the Court, and all Proceedings already commenced against the Petitioners, Basco or any of the Property, are stayed and suspended until the Court authorizes the continuation thereof, the whole subject to subsections 11.1, 34(9) and any other applicable provisions of the CCAA.

Stay of Proceedings against the Directors and Officers

[8] **ORDERS** that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director, officer or executive who manages the business, commercial activities and internal affairs of the Petitioners or Basco, nor against any person deemed to be a director or an officer of the Petitioners or Basco under subsection 11.03(3) of the CCAA, (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the Petitioners or Basco where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

Possession of Property and Operations

[9] **ORDERS** that the Petitioners and Basco shall remain in possession and control of their Property.

[10] **ORDERS** that the Petitioners and Basco shall continue to carry on their operations and financial affairs, including the business and affairs of any Person owned by a Petitioner or Basco or in which a Petitioner or Basco owns an interest, in a manner consistent with the commercially reasonable preservation thereof.

[11] **ORDERS** that the Petitioners and Basco shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, the "**Assistants**") currently retained or employed by them, with liberty to retain such further Assitants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

[12] **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners and Basco shall be entitled to pay all reasonable expenses incurred by them in carrying on the Business in the ordinary course from 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 their Property or the Business; and

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

[13] **ORDERS** that the Petitioners and Basco shall be entitled but not compelled to pay the following expenses incurred prior to this Order, with the prior approval of the Monitor:

(a) all wages, salaries, management fees, commissions, vacation pay (when due), RRSP contributions and other benefits, and reimbursement of expenses (including, without limitation, amounts charged by employees to credit cards) payable to current employees, managers or Directors, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) DELETED

(c) all outstanding amounts payable to customs authorities;

(d) all outstanding amounts payable in respect of gift-cards and other customer certificates; and

(e) the fees and disbursements of any Persons benefiting from the Administration Charge (as defined below).

No Exercise of Rights or Remedies

[14] **ORDERS** that, without limiting the generality of the foregoing but subject to subsections 11.1 and 34(7) of the CCAA, during the Stay Period, all Persons having oral or written agreements, contracts or arrangements, including insurance or similar agreements/instruments with the Petitioners or Basco or in connection with any of the Property or the Business, for any subject or purpose:

(a) are restrained from accelerating, altering, terminating, cancelling, suspending, modifying on reasonable terms such agreements, contracts or arrangements or the rights of the Petitioners or Basco;

(a1) are restrained from refusing to renew or extend agreements, contracts or arrangements or the rights of the Petitioners or Basco by reason only of the filing or the insolvency of the Petitioners or Basco, but unless as otherwise entitled to do so in accordance with the law, agreements, contracts or arrangements;

(b) are restrained from modifying, suspending or otherwise interfering with the supply of any goods, services or other benefits including, without limitation, any directors' and officers' insurance, any telephone numbers, any form of communication, banking or financial services and any oil, gas, water, steam, electricity or other utility supply; and

(c) shall continue to perform and observe the terms and conditions contained in such agreements, contracts or arrangements, so long as the Petitioners or Basco pay the normal prices or charges for such goods and services received after the date of this Order as such prices or charges become due in accordance with normal payment practices or as may be hereafter negotiated and agreed by Petitioners and Basco with the consent of the Monitor, without having to provide any guarantee, security or deposit whether by way of cash, letter of credit, stand-by fees or similar items.

[15] **ORDERS** that no public or private utility may discontinue or seek to discontinue service to any of the Petitioners or Basco, without a specific order of this Court,

notwithstanding any disagreement with the Petitioners and Basco as to the payment terms applicable for services rendered after the date of the present Order;

[16] **DECLARES** that, to the extent any rights, obligations, or prescription, time or limitation periods, including, without limitation, to file grievances, relating to the Petitioners or Basco or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Petitioners or Basco become bankrupt or a receiver as defined in subsection 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") is appointed in respect of the Petitioners or Basco, the period between the date of the Order and the day on which the Stay Period ends shall not be calculated in respect of the Petitioners or Basco in determining the 30 day periods referred to in Sections 81.1 and 81.2 of the BIA.

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

Continuation of Services

[18] **ORDERS** that, without limiting the generality of the foregoing, during the Stay Period and subject to paragraph [20] hereof and subsection 11.01 of the CCAA, all Persons having oral or written agreements with the Petitioners or Basco or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Petitioners or Basco, 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 Petitioners and Basco, and that the Petitioners and Basco shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of the Order are paid by the Petitioners or Basco, without

having to provide any security deposit or any other security, in accordance with normal payment practices of the Petitioners or Basco or such other practices as may be agreed upon by the supplier or service provider and the Petitioners or Basco, with the consent of the Monitor, or as may be ordered by this Court.

[19] **ORDERS** that, notwithstanding anything else contained herein and subject to subsection 11.01 CCAA, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the Petitioners or Basco on or after the date of this Order, nor shall any Person be under any obligation on or after the date of the Order to make further advance of money or otherwise extend any credit to the Petitioners or Basco.

[20] **ORDERS** that, without limiting the generality of the foregoing cash or cash equivalents placed on deposit by the Petitioners or Basco with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of the Order or due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by the Petitioners or Basco and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into the Petitioners or Basco's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

[20.1] **ORDERS** that from the date hereof, National Bank of Canada ("**NBC**") shall extend credit to Boutique under the Second NBC Credit Agreement (as defined in the Petition) up to an amount not exceeding $8,885,000 (including any outstanding letters of credit) without reserve, save and except as to the borrowing base calculation contained at Section 2.2 of the Amendment dated September 10, 2010.

[20.2] **ORDERS** that all amounts held by Boutique Jacob Inc. in its bank account at Royal Bank of Canada (the "**RBC Account**") shall be transferred to the Concentration Account (as defined in the Petition) within two business days of the issuance of this Order and **ORDERS** that from the date hereof, Boutique shall periodically transfer all amounts collected in the RBC Account to the Concentration Account in accordance with past practice.

Non-Derogation of Rights

[21] **ORDERS** that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the "**Issuing Party**") at the request of the Petitioners or Basco shall be required to continue honouring any and all such

letters, guarantees and bonds, issued on or before the date of the Order, provided that all conditions under such letters, guarantees and bonds are met; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

[22] DELETED

[23] DELETED

[24] DELETED

Key Employee Retention Plan

[25] **DECLARES** that, in order to facilitate the Restructuring, the terms and conditions of the Key Employees Retention Program ("**KERP**"), Exhibit P-12, are hereby approved but only in respect of the six Vice-Presidents listed therein, and Boutique is hereby authorized to implement the KERP substantially in the form and substance provided as Exhibit P-12 in respect of those individuals, and to perform its obligation thereunder in respect of those individuals and **DECLARES** that the KERP contains sensitive and confidential information and shall be sealed in the court file in these proceedings and segregated from, and not form part of, the public record.

[26] **ORDERS** that the employees eligible under the KERP shall be entitled to the benefit of and are hereby granted a hypothec, mortgage, lien, charge and security interest in the Property to the extent of the aggregate amount of $484,000 (the "**KERP Charge**"), as security for the retention payments in paragraph [25] of this Order as it relates to obligations and liabilities that the Jacob Group may incur after the Effective Time. The KERP Charge shall have the priority set out in paragraphs [40] and [41] of this Order.

Restructuring

[27] **DECLARES** that, to facilitate the orderly restructuring their businesses and financial affairs (the "**Restructuring**") but subject to such requirements as are imposed by the CCAA, the Petitioners and Basco shall have the right, subject to approval of the Monitor or further order of the Court (save that no lease shall be assigned without agreement of the Petitioners, Basco, the Monitor and the applicable landlord or further order of the Court), to:

(a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan (provided that no retail store leased premises shall be temporarily shutdown);

(b) pursue all avenues to finance or refinance, market, convey, transfer, assign or in any other manner dispose of the Business or Property

outside the ordinary course of business under reserve of section 36 of the CCAA;

(c) convey, transfer, assign, lease, or in any other manner dispose of the Property, outside of the ordinary course of business, in whole or in part, provided that the price in each case does not exceed $200,000 or $1 million in the aggregate;

(d) DELETED

(e) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Petitioners or Basco, as applicable, and such employee, or failing such agreement, make provision to deal with, any consequences thereof in the Plan, as the Petitioners or Basco may determine;

(f) DELETED

(g) settle claims of customers and vendors that are in dispute;

(h) subject to the provisions of section 32 of the CCAA, disclaim or resiliate, any of their agreements, contracts, leases or arrangements of any nature whatsoever, whether oral or written, with such disclaimers or resiliation to be on such terms as may be agreed between the Petitioners or Basco, as applicable, and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; and

(i) subject to section 11.3 of the CCAA, assign any rights and obligations of the Petitioners or Basco.

Real Estate

[28] **ORDERS** that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Petitioners and Basco, as the case may be, 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 between the Petitioners and Basco, as the case may be, and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of the Initial Order shall be paid in advance (but not in

arrears) the first business day of each month (and on a pro-rata basis for the month of November 2010).

[29] **DECLARES** that, if a notice of disclaimer or resiliation is given to a landlord of the Petitioner pursuant to section 32 of the CCAA and subsection [27](h)of this Order, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving the Petitioners and the Monitor, 24 hours prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Petitioners or Basco, as the case may be, provided nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

[30] **ORDERS** that the Petitioners shall provide each of the relevant landlords with notice of the Petitioners' 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 Petitioners' 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 Petitioners or by further Order of this Court upon application by the Petitioners on at least two (2) days notice to such landlord and any such secured creditors. If the Petitioners disclaims or resiliates the lease governing such leased premises in accordance with section 32 of the CCAA, 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 section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Petitioners claim to the fixtures in dispute.

[31] DELETED

Personal Information

[32] **DECLARES** that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the Petitioners and Basco are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in its possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to its advisers (individually, a "**Third Party**"), but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners and Basco 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 transaction or Restructuring 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 Petitioners and Basco or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners and Basco.

Powers of the Monitor

[33] **ORDERS** that PricewaterhouseCoopers Inc. ("**PWC**" or the "**Monitor**") is hereby appointed to monitor the business and financial affairs of the Petitioners and Basco as an officer of this Court and that PWC, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

(a) shall publish, without delay after the Order is made, once a week for two (2) consecutive weeks in La Presse and the National Post, a notice of this Order, advising that copy of this Order and other public documents regarding the proceeding may be found on the internet at the website of the Monitor (the "**Website**");

(b) shall monitor the Petitioners and Basco's receipts and disbursements;

(c) shall assist the Petitioners and Basco, to the extent required by them, in dealing with their creditors and other interested Persons during the Stay Period;

(d) shall assist the Petitioners and Basco, to the extent required by them, in pursuing all avenues to finance or refinance, market, convey, transfer, assign or in any other maner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 of the CCAA;

(e) shall assist the Petitioners and Basco, to the extent required by them, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(f) shall advise and assist the Petitioners and Basco, to the extent required by them, to review the Petitioners' and Basco's business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

(g) shall assist the Petitioners and Basco, to the extent required by them, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(h) shall report to the Court on the state of the business and financial affairs of the Petitioners and Basco or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order;

(i) shall report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

(j) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of the Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(k) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceeding, under the Order or under the CCAA;

(l) may act as a "foreign representative" of the Petitioners or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada;

(m) may give any consent or approval as may be contemplated by the Order; and

(n) may perform such other duties as are required by the Order or the CCAA or by this Court from time to time.

the Monitor shall not otherwise interfere with the business and financial affairs carried on by the Petitioners and Basco, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the Petitioners or Basco.

[34] **ORDERS** that the Petitioners and their Directors, employees and agents, accountants, auditors and all other Persons having notice of the Order shall forthwith provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data,

including data in electronic form, and all other documents of the Petitioners and of Basco in connection with the Monitor's duties and responsibilities hereunder.

[35] **DECLARES** that the Monitor may provide creditors and other relevant stakeholders of the Petitioners with information in response to requests made by them in writing addressed to the Monitor and copied to the Petitioners' counsel. In the case of information that the Monitor has been advised by the Petitioners or Basco is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Petitioners or Basco unless otherwise directed by this Court.

[36] **DECLARES** that if the Monitor, in its capacity as Monitor, carries on the business of the Petitioners or continues the employment of the Petitioners's employees, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

[37] **DECLARES** that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out the provisions of any order of this Court, except with prior leave of this Court, on at least seven days notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor referred to in subparagraph 34(i) hereof shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

[38] **ORDERS** that Petitioners shall pay the reasonable fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioners's legal counsel and other advisers, directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after the Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

[39] **DECLARES** that the Monitor, the Monitor's legal counsel, the Petitioners' and Basco's legal counsel and the Monitor and the Petitioners' and Basco's respective advisors, as security for the professional fees and disbursements incurred both before and after the making of the Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a hypothec, mortgage, lien, charge and security interest in the Property to the extent of the aggregate amount of $500,000 (the "**Administration Charge**"), having the priority established by paragraphs [40] and [41] hereof.

Priorities and General Provisions Relating to CCAA Charges

[40] **DECLARES** that the priorities of the Administration Charge and the KERP Charge (collectively, the "**CCAA Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge; and

(b) second, the KERP Charge;

[41] **DECLARES** that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") affecting the Property charged by such Encumbrances.

[42] **ORDERS** that, except as otherwise expressly provided for herein, the Petitioners shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Petitioners obtains the prior written consent of the Monitor and the prior approval of the Court.

[43] **DECLARES** that, subject to paragraph [46] hereof, each of the CCAA Charges shall attach, as of the Effective Time, to all Property, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[44] **DECLARES** that the CCAA Charges and the rights and remedies of the beneficiaries of such Charges, as applicable, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insolvency made herein; (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioners or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Petitioners (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) the creation of any of the CCAA Charges shall not create or be deemed to constitute a breach by the Petitioners or Basco of any Third Party Agreement to which it is a party; and

(b) any of the beneficiaries of the CCAA Charges shall not have liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

[45] **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioners and any receiving order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by the Petitioners pursuant to the Order and the granting of the CCAA Charges, do not and will shall not be void

or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a preference, a fraudulent assignment or conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada), section 1631 and ss. of the *Civil Code of Quebec* or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

[46] **ORDERS** that any of the CCAA Charges over the leases of real property in Canada shall only be a CCAA Charge in the Petitioners' or Basco's, as the case may be, interest in such real property leases.

[47] **DECLARES** that the CCAA Charges shall be valid and enforceable as against all Property and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners, for all purposes.

General

[48] **ORDERS** that no Person shall commence, proceed with or enforce any Proceedings against any employees, legal counsel or financial advisors of the Petitioners, Basco or of the Monitor and its counsel, without first obtaining leave of this Court, upon five (5) days written notice to the Petitioners' and Basco's counsel and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

[49] **DECLARES** that the Order and any proceeding or affidavit leading to the Order, shall not, in and of themselves, constitute a default or failure to comply by the Petitioners under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[50] **ORDERS** that the Petitioners' and Basco's financial statements and cash flow statements, Exhibits P-3 to P-10, as well as the annexes of the PWC Report, Exhibit P-11 be kept confidential and under seal in the office of counsel for the Petitioners and Basco until, as the case may be, further order of this Court. However, all creditors of the Petitioners and Basco shall be entitled to obtain disclosure of the said Exhibits upon written request and provided they have signed a confidentiality agreement in standard form.

[51] **DECLARES** that, except as otherwise specified herein, the Petitioners are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Petitioners and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

[52] **DECLARES** that the Petitioners and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Petitioners shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

[53] **DECLARES** that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on the solicitors for the Petitioners and the Monitor and has filed such notice with this Court, or appears on the service list prepared by the Petitioners or their attorneys, save and except when an order is sought against a Person not previously involved in these proceedings;

[54] **DECLARES** that any interested Person may apply to this Court to vary or rescind this Order or seek other relief upon seven days notice to Petitioners and Basco, to counsel to Petitioners (Stikeman Elliott LLP, c/o Guy P. Martel, Joseph Reynaud & Danny Duy Vu), to the Monitor (PriceWaterhouseCoopers Inc., c/o Philippe Jordan, Claudio Filipone & Jonathan D. Zidel) and to the Monitor's counsel (Borden Ladner Gervais LLP, c/o Marc Duchesne):

(i) Me Guy P. Martel – gmartel@stikeman.com
Me Joseph Reynaud – jreynaud@stikeman.com
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(ii) Mr. Philippe Jordan - philippe.jordan@ca.pwc.com
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(iii) Me Marc Duchesne - mduchesne@blg.com
Borden Ladner Gervais LLP
1000 de la Gauchetière Street West, Suite 900
Montréal, Québec, H3B 5H4

[55] **DECLARES** that the Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[56] **DECLARES** that the Monitor, with the prior consent of the Petitioners and Basco, shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and

complement the Order and any subsequent orders of this Court and, without limitation to the foregoing, an order under Chapter 15 of the *U.S. Bankruptcy Code*, for which the Monitor shall be the foreign representative of the Petitioners. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

[57] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order.

[58] **ORDERS** the provisional execution of this Order notwithstanding any appeal.

Copie Conforme
25 novembre 2010.
Maître Castonguay, J.S.C.

Martin Castonguay, J.S.C.

TAB 10

CITATION: Re: Canwest Publishing Inc., 2010 ONSC 1841
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100514

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

BEFORE: Pepall J.

COUNSEL: *Lyndon A.J. Barnes and Elizabeth Putnam*, for the Applicant LP Entities
Hilary Clarke, for the Administrative Agent for the Senior Secured Lenders Syndicate
Maria Konyukhova, for the Monitor
Hugh O'Reilly, for the CWA/SCA
Thomas McRae, for the Canwest Salaried Employees and Retirees' Group

ENDORSEMENT

[1] The LP Entities sought an order: authorizing them to make certain employee retention payments up to $1 million; approving amendments to the LP MIP and the Special Arrangements (as defined in the Initial Order) and increasing the size of the LP MIP charge to $4.3 million; amending the Initial Order to extend the director and officer protections contained therein to any deemed or de facto directors; authorizing the LP Entities to enter a consulting agreement with Dennis Skulsky and permitting D. E. Lanus to execute it; and sealing the Further Confidential Supplement to the Fifth Report of the Monitor which contained proposed employee retention payments, the unredacted LP MIP, and the Skulsky consulting agreement. I granted the order requested but indicated that I would provide a brief endorsement at a later date.

a) Retention Payments

[2] Under the October 26, 2009 New Shared Services Agreement, the extent of shared services between the LP Entities and other affiliated Canwest Global entities was being significantly reduced. Some of the employees performed critical functions and could not be easily replaced. There was a risk that some might be motivated to seek alternative employment during the restructuring period. Their departure could undermine the continued performance or transition of shared services and other business functions and could hamper the restructuring. The same applied with respect to employees whose business units were being relocated. The proposed retention payments of $400,000 would provide an incentive to certain employees to remain and would avoid disruption. The LP Entities also sought authorization to make future payments to critical employees yet to be identified with the prior consent of the Monitor and the Bank of Nova Scotia as Administrative Agent for the Senior Secured Lenders. The payments would be subject to availability under the DIP facility and the DIP Definitive Documents and the approved cash flow. The Monitor would provide subsequent reports to the Court in this regard. The Monitor and the LP CRA supported the proposed retention payments and the order.

[3] I agreed with the position of the Applicants that the proposed payments should be approved and that the factors enumerated in the *Re Grant Forest Products Inc.*[1] may be considered when the employees in question are less senior than executives. Having considered those factors including the support of the Monitor, the LP CRA and the LP Administrative Agent, I was satisfied that the retention payment relief requested was in the best interests of the restructuring and should be provided. Similarly, the amendments to the LP MIP and Special Arrangements should be approved and the LP MIP charge increased to $4.3 million.

[1] [2009] O.J. No. 3344.

b) Officers and Directors

[4] The decision making within the LP Entities had been streamlined through the use of numerous shareholder declarations that removed the rights, powers and duties of the directors of the Applicants, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. The effect of these declarations was to consolidate decision making within the Canwest Global Communication Corp. directors. On March 1, 2010, the directors and officers of the LP Entities resigned and were not replaced. Day-to-day operations had been carried out under the supervision of a group of senior employees and in particular, Dennis Skulsky, the President of CPI. He advised that he was resigning effective April 30, 2010. After April 30, 2010, he agreed to provide assistance in a consulting role until August 31, 2010.

[5] In light of the resignations, the LP Entities are asking that the Initial Order be amended to clarify that the director and officer protections including the indemnification and charge apply to any deemed or de facto directors or officers. The affected secured creditors consent.

[6] Section 109(4) of the *Canada Business Corporations Act*[2] provides that:

> If all of the directors have resigned or have been removed without replacement, a person who manages or supervises the management of the business and affairs of the corporation is deemed to be a director for the purposes of this Act.

[7] In addition, section 2(1) of the CCAA defines a director as "a person occupying the position of director by whatever name called." There is no definition for an officer. Section 5.1(4) of the CCAA provides that where the directors have resigned or have been removed by the shareholders without replacement "any person who manages or supervises the management of the business and officers of the debtor company shall be deemed to be a director for the purposes of this section."

---

[2] R.S.C. 1985 c. C-44, s.109(4).

[8] Even though the powers of the directors have been consolidated with the directors of Canwest Global, the LP Entities have a concern that liability could be imposed on deemed directors and, in this case, those who remain to manage the day-to-day operations of the LP Entities.

[9] Prior to the recent CCAA amendments, courts had granted charges in favour of directors and officers even though the statute was silent on the issue. Section 11.51 now expressly provides for the granting of a directors and officers charge. It says:

> 11.51(1) *Security or charge relating to director's indemnification* – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) *Priority* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> 11.51(3) *Restriction – indemnification insurance* – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault* – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer

> if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[10] In light of the overall purpose and language of the CCAA and the policy imperative that supports providing protection to those assuming leadership roles in a restructuring, section 11.51 should be treated as broad enough to permit its application to deemed directors and officers. Certainly there is nothing prohibiting the extension of a charge in favour of deemed directors and officers.

[11] In my view, the remaining senior employees of the LP Entities should not be expected to manage the day-to-day operations of the LP Entities and play critical roles in the restructuring while being exposed to personal liability. It is appropriate in these circumstances to extend the director and officer protections found in the Initial Order to deemed or *de facto* officers or directors. This includes the charge that was provided pursuant to section 11.51 of the CCAA. This is not to say that those individuals are deemed to be directors or officers. If they are, however, they would have some protection under the terms of the amended Initial Order.

c) Skulsky's Consulting Agreement, MIP and Special Arrangement

[12] I accepted that the LP Entities should be authorized to enter into the proposed Skulsky consulting agreement which was stated to be in the best interests of the restructuring. The LP Entities, supported by the Monitor and the Administrative Agent,were of the view that they would benefit greatly from being able to call on Mr. Skulsky's experience and acumen over the next few months. In light of his resignation, the Special Arrangement relating to him was to be terminated. Furthermore, other individuals have been required to assume new responsibilities. It was important that these individuals be retained to provide for continuity and that the MIP charge be increased so as to enhance this objective. Again all of the Monitor, the LP CRA and the Administrative Agent supported these revisions.

d) Sealing Order

[13] Lastly, the LP Entities requested an order sealing the Further Confidential Supplement. Applying the same analysis I used in *Re CPI*[3], the Further Confidential Supplement was ordered to be sealed.

Pepall J.

Date: May 14, 2010

[3] [2010] O.J. No. 188 at paras. 63-65.

TAB 11

2009 CarswellOnt 6161
Ontario Superior Court of Justice

Arclin Canada Ltd./Arclin Canada Ltée, Re

2009 CarswellOnt 6161, [2011] W.D.F.L. 2898, [2011] W.D.F.L. 2899, [2011] W.D.F.L. 2907, [2011] W.D.F.L. 2924, [2011] W.D.F.L. 2929, [2011] W.D.F.L. 2930, [2011] W.D.F.L. 2985, 181 A.C.W.S. (3d) 418, 59 C.B.R. (5th) 165

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 ARCLIN CANADA LTD./ARCLIN CANADA LTÉE., ARCLIN MANAGEMENT HOLDINGS INC., ARCLIN HOLDINGS GP I INC., ARCLIN HOLDINGS GP II INC., ARCLIN HOLDINGS III INC. and ARCLIN HOLDINGS IV INC. (Applicants)

A. Hoy J.

Heard: October 13, 2009
Judgment: October 14, 2009
Docket: CV-09-8290-00CL

Counsel: Steven J. Weisz, Jackie Moher for Applicants
David Bish for Monitor, Ernst & Young Inc.
Marc Wasserman for UBS, agent for First Lien Lenders & DIP Lenders
Kevin P. McElcheran for Official Committee of Unsecured Creditors

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Judges and courts
XVII Jurisdiction
XVII.10 Jurisdiction of court over own process
XVII.10.e Sealing files

Headnote

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

Companies obtained protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Board of directors approved key employee retention program agreements with chief executive officer ("CEO") and chief financial officer ("CFO") — Companies brought application for approval of agreements and sealing order with respect to agreements — Application granted in part — Agreements approved; agreements sealed for seven days to permit companies and monitor to clarify significant prejudice that could result if sealing did not continue — Substantial weight placed on strong recommendation of monitor that agreements be approved — First lien lenders and DIP lender supported agreements — Unsecured creditors would be satisfied as to reasonableness of agreements — CEO and CFO were approached about other opportunities for employment and indicated they would take advantage of them if agreements were not approved — CEO and CFO were essential to successful restructuring and could not easily be

replaced — Amounts payable under agreements were insignificant in relation to total debt outstanding — Agreements were reasonable in relation to current compensation of CEO and CFO — US affiliates would derive benefit from agreements — Key employee retention programs were controversial and CCAA process had to be open and transparent to greatest extent possible.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Companies obtained protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Board of directors approved key employee retention program agreements with chief executive officer ("CEO") and chief financial officer ("CFO") — Companies brought application for approval of agreements and sealing order with respect to agreements — Application granted in part — Agreements approved — Agreements sealed for seven days to permit companies and monitor to clarify significant prejudice that could result if sealing did not continue — Key employee retention programs were controversial — CCAA process had to be open and transparent to greatest extent possible.

Table of Authorities

Cases considered by *A. Hoy J.*:

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — referred to

Statutes considered:

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

Generally — considered

United States Code, Title 11, c. 11

Generally — referred to

APPLICATION under *Companies' Creditors Arrangement Act* for approval of key employee retention program agreements and sealing order with respect to agreements.

***A. Hoy J.*:**

1 Arclin Canada Ltd./Arclin Canada Ltee. ("Arclin") and related companies obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S., 1985, c. C-36 (the "CCAA") on July 27, 2009. Arclin's U.S. affiliates have commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Code (the "U.S. Code") before the United States Bankruptcy Court for the District of Delaware (the "U.S. Court").

2 Arclin now seeks approval of key employee retention program agreements with its Chief Executive Officer, Claudio D'Ambrosio, and its Chief Financial Officer, Scott Maynard (collectively, the "KERP") and seeks a sealing order with respect to such agreements. Mr. D'Ambrosio and Mr. Maynard also fill those roles in respect of Arclin's U.S. affiliates. They are paid by Arclin, and their services are provided to the U.S. affiliates under a management agreement. The Monitor and Arclin confirmed that the costs of the KERP will be borne by Arclin and that the KERP cannot result in increased charges under the management agreement without the approval of the U.S. Court.

3 The board of directors of Arclin has approved the KERP. The Monitor recommends approval of the KERP, and the First Lien Lenders (which I understand are owed in excess of $200 million) and the DIP Lender support the KERP. Counsel for the First Lien Lenders and the DIP Lender was involved in the negotiation of the KERP. The KERP has been contemplated since the time of the initial order, and is referenced in the Monitor's report filed at that time and reflected in cash flows filed with the Court.

4 Canadian counsel for the Official Committee of Unsecured Creditors (the "UCC"), which represents unsecured creditors of Arclin's U.S. based affiliates in the Chapter 11 proceeding, appeared at the hearing, initially to oppose the KERP. In the course of the hearing, counsel for the UCC advised that the UCC, like Arclin, the Monitor and the First Lien Lenders, was in fact of the view that a retention arrangement with Mr. D'Ambrosio and Mr. Maynard was critical. The UCC's real objection is one of process: it was not provided with the amounts payable under the KERP in advance of the hearing, and was therefore not in a position to evaluate the reasonableness of the terms. Arrangements were made during the hearing for the UCC to be provided with the KERP, through the U.S. estate, in order to ensure confidentiality.

Given the payments provided for in the KERP, the level of payments that counsel for the UCC advised that the UCC was concerned about, and the fact that unless the U.S. bankruptcy court approves an increase in the management fee Arclin will bear the cost of the KERP, I am of the view that the UCC will be, as I am, satisfied as to the reasonableness of the KERP.

5 Arclin, the Monitor, the First Lien Lenders and the DIP Lender all argued that the UCC did not have standing to make objections on this motion. Counsel for the UCC sought an adjournment in relation to the standing issue. All, however, wished the motion to proceed, given the importance of implementing the KERP promptly. It was specifically agreed that the fact that counsel for the UCC was permitted to make submissions today was without prejudice to the parties' ability to argue on any subsequent motion in this matter that the UCC does not have standing. In support of this argument, the Monitor advised the court that at present Arclin is owed approximately $87 million by its U.S. affiliates; Arclin is a creditor of the U.S. affiliates, not the other way around. Also, as noted above, the KERP is without cost to the U.S. affiliates unless approved by the U.S. Court.

6 Arclin and the Monitor also submit, and I note, that the UCC was served with notice of this motion a week ago, and that counsel for the UCC only asked today to see a copy of the KERP.

7 The evidence before me is that: both Mr. D'Ambrosio and Mr. Maynard have been approached about other opportunities for long-term and stable employment and both have indicated that they will take advantage of those opportunities if the KERP is not approved; Mr. D'Ambrosio and Mr. Maynard cannot be readily or easily replaced, given their intimate knowledge of Arclin's affairs, and it would be a lengthy and costly process to do so; and Mr. D'Ambrosio and Mr. Maynard have taken on a significant volume of additional responsibilities in connection with the CCAA proceedings.

8 The amounts payable under the KERP are insignificant in relation to the total debt outstanding. They appear to me reasonable in relation to what I was advised were Mr. D'Ambrosio's and Mr. Maynard's current compensation arrangements.

9 The Monitor confirmed in court that the alternative employment opportunities available to Mr. D'Ambrosio and Mr. Maynard, referred to in the evidence, are comparable opportunities.

10 I have specifically considered that the KERP will funded by Arclin, yet its U.S. affiliates will also derive a benefit from it. Counsel for the UCC pointed out that the U.S. Code contains rigorous conditions that must be met before a key employee retention agreement can be approved for an insolvent company, and submits that, on the evidence before this Court, it appears that those conditions would not be met in this case. As Leitch, R.S.J. pointed out in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.), Canada has not adopted equivalent legislative principles.

11 I place substantial weight on the strong recommendation of the Monitor that the KERP be approved.

12 I am advised that the "goal" of the restructuring is to swap debt for equity. I understand that the First Lien Lenders are the primary economic stakeholders. They, as noted above, support this motion. They have confidence in Mr. D'Ambrosio and Mr. Maynard.

13 All parties agree that Mr. D'Ambrosio and Mr. Maynard are essential to the successful restructuring of the Arclin group.

14 I am satisfied that, in these circumstances, the KERP should be approved.

15 I understood counsel for Arclin to submit that a sealing order is important to ensure: (1) that other employees are not able to point to the terms offered to Mr. D'Ambrosio and Mr. Maynard to attempt to secure retention arrangements, and thereby jeopardize the restructuring; and (2) that third parties desirous of engaging the services of Mr. D'Ambrosio and

Mr. Maynard not know what terms they have to "better" in order to woo them away from Arclin. I further understood counsel to submit that Arclin is a private company, and that sealing orders in respect of key employment retention arrangements are customary. The Monitor simply submits in its report that disclosure may cause significant prejudice to Arclin and the other Canadian participants in the CCAA proceeding.

16 Neither Arclin nor the Monitor has indicated that there are other employees that it considers essential to the current operations and the successful restructuring of the Arclin group. I assume that all truly key employees would have been identified at this time. It appears to me that the KERP does not provide that its terms are confidential and restrict Mr. D'Ambrosio and Mr. Maynard from disclosing its terms.

17 Key employee retention programs are controversial. The CCAA process should be open and transparent to the greatest extent possible.

18 I am prepared to provide for sealing of the KERP for a short period of time only -seven days, subject to such short extension as may be necessary in light of counsels' schedules - to permit Arclin and the Monitor to clarify the significant prejudice to Arclin and the Canadian participants in the CCAA process that they submit may result if the sealing does not continue.

Application granted in part.

End of Document

TAB 12

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
No. 500-
DATE: December 23, 2015

PRESIDING : CHANTAL FLAMAND Registrar

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF:

SENSIO TECHNOLOGIES INC.

Debtor/Petitioner

-and-

DELOITTE RESTRUCTURING INC.

TRUSTEE

ORDER

ON READING Sensio Technologies Inc. (the "**Petitioner**")'s *Motion for the Issuance of an Order Approving and Ratifying the Sale of Certain Assets, an Interim Financing and Certain Priority Charges* pursuant to the *Bankruptcy and Insolvency Act* (the "**BIA**") and the exhibits, the affidavit of Mr. Éric Choquette filed in support thereof (the "**Motion**"), relying upon the submissions of the counsels to the Petitioner and being advised that the interested parties were given prior notice of the presentation of the Motion;

GIVEN the filing by the Petitioner of a *Notice of Intention to Make a Proposal* under the BIA;

GIVEN the provisions of the BIA;

WHEREFORE, THE COURT:

1. **GRANTS** the Motion.

Service

2. **DECLARES** that sufficient prior notice of the presentation of this Motion has been given by the Petitioner to interested parties who are likely to be affected by the charges created herein.

Approval of the Transactions

3. **ORDERS AND DECLARES** that the transactions (the "**Transactions**") set forth in the *Letter of Intent* (the "**LOI**") and the definitive agreement attached thereto, filed *under seal* as **Exhibit P-2** in support of the Motion, are hereby approved, and the execution by the Petitioner of a definitive asset purchase agreement in respect of assets futher described in **Schedule "A"** hereto (the "**Purchased Assets**") is hereby authorized and approved, with such non-material alterations, changes, amendments, deletions or additions thereto as may be agreed to but only with the consent of the Company and of Deloitte Restructuring Inc. (the "**Trustee**").

4. **AUTHORIZES** the Petitioner and $3D^N$, LLC, the purchaser under the LOI (the "**Purchaser**"), to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in the LOI and any other ancillary document which could be required or useful to give full and complete effect thereto.

5. **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Petitioner to proceed with the Transactions and that no shareholder or regulatory approval, if applicable, shall be required in connection therewith.

6. **ORDERS** and **DECLARES** that upon the issuance of a Trustee's certificate substantially in the form appended as **Schedule "B"** hereto (the "**Certificate**"), all rights, title and interest in and to the Purchased Assets shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities (direct, indirect, absolute or contingent), obligations, interests, prior claims, security interests (whether contractual, statutory or otherwise), liens, charges, hypothecs, mortgages, pledges, deemed trusts, assignments, judgments, executions, writs of seizure or execution, notices of sale, options, adverse claims, levies, rights of first refusal or other pre-emptive rights in favour of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "**Encumbrances**"), including without limiting the generality of the foregoing all charges, security interests or charges evidenced by registration, publication or filing pursuant to any applicable legislation providing for a security interest in personal or movable property, and, for greater certainty, **ORDERS** that all of the Encumbrances affecting or relating to the Purchased Assets be expunged and discharged as against the Purchased Assets, in each case effective as of the applicable time and date of the Certificate.

7. **ORDERS** that upon the issuance of the Certificate, the Petitioner shall also be authorized to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Purchased Assets, including filing such financing change statements or other required documents at the applicable registry, as may be necessary, from any registration filed against the Petitioner in such registry, provided that the Petitioner shall not be authorized to effect any discharge that would have the effect of releasing any collateral other than the Purchased Assets, and the Petitioner shall be authorized to take any further steps by way of further application to this Court.

8. **ORDERS** and **DIRECTS** the Trustee to file with the Court a copy of the Certificate, forthwith after issuance thereof.

9. **ORDERS** that the Petitioner shall be entitled to use net proceeds from the sale of the Purchased Assets (the "**Net Proceeds**") in order to reimburse the Bridge Loan (as

defined hereunder), to fund its on-going operations well as the Sale Process (as defined in the Motion).

10. **ORDERS** that notwithstanding:

    a) the pendency of these proceedings;

    b) any petition for a receiving order now or hereafter issued pursuant to the BIA and any order issued pursuant to any such petition; or

    c) the provisions of any federal or provincial legislation;

    the vesting of the Purchased Assets contemplated in this Order, as well as the execution of the LOI pursuant to this Order, are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, as against the Petitioner, the Purchaser Trustee.

11. **ORDERS** that the Petitioner or the Trustee shall be authorized to take all steps as may be necessary to effect the discharge of the Encumbrances.

12. **ORDERS** that the LOI (Exhibit P-4) and the Cash-Flow Forecast (Exhibit P-3) be kept confidential and under seal until further order of this Court.

13. **ORDERS** that for its remaining Property (as defined hereunder), the Petitioner shall be entitled to interest or solicit one or several potential buyers for all or any part of such assets, including, without limitation, by carrying out, with the assistance of the Trustee, a public call for tenders, a sale process in which an offer is submitted as a "*stalking horse*", or private solicitations, in order to dispose of such property;

Interim Financing

14. **ORDERS** that the Petitioner be and is hereby authorized to borrow, repay and reborrow from Mr. Nicholas Routhier (the "**Interim Lender**") such amounts from time to time as Petitioner may consider necessary or desirable, up to a maximum principal amount of $100,000 outstanding at any time (the "**Bridge Loan**"), on the terms and conditions as set forth in the Loan Agreement filed as Exhibit P-5 in support of the Motion (the "**Loan Agreement**"), to fund the ongoing expenditures of Petitioner, including the Sale Process, and to pay such other amounts as are permitted by this Order and by the Loan Agreement, the terms of which are hereby ratified;

15. **ORDERS** that Petitioner is hereby authorized to execute and deliver such other documents, as may be required by the Interim Lender in connection with the Bridge Loan and the Loan Agreement (collectively the "**Interim Financing Documents**"), including the hypothec executed by the Company in favour of the Interim Lender (the "**Hypothec**") (Exhibit P-6), which terms are hereby ratified by this Court, and **ORDERS** that the Petitioner is hereby authorized to perform all of its obligations under the Interim Financing Documents;

16. **ORDERS** that Petitioner shall pay to the Interim Lender, when due, all amounts owing under the Loan Agreement and shall perform all of its other obligations to the Interim

Lender pursuant to the Loan Agreement, the Interim Financing Documents and this Order;

17. **DECLARES** that all of the Petitioner's present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof, including the proceeds resulting from the sale of the Purchased Assets (collectively, the "**Property**") is hereby subject to a charge and security for an aggregate amount of $125,000 (such charge and security is referred to herein as the "**Interim Lender Charge**") in favour of the Interim Lender as security for all of the Petitioner's obligations under or in connection with the Loan Agreement and the Interim Financing Documents. The Interim Lender Charge shall have the priority established by paragraphs 29 and 30 of this Order;

18. **ORDERS** that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to any proposal or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any such proposal;

19. **ORDERS** that the Interim Lender may:

    a) notwithstanding any other provision of the Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents, including the Hypothec, in all jurisdictions where it deems it is appropriate; and

    b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to Petitioner if the Petitioner fails to meet the provisions of the Loan Agreement and the Interim Financing Documents;

20. **ORDERS** that the Interim Lender shall not take any enforcement steps under the Interim Financing Documents or the Interim Lender Charge without providing at least 5 business days written notice (the "**Notice Period**") of a default thereunder to the Petitioner, the Trustee and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period, the Interim Lender shall be entitled to take any and all steps under the Interim Financing Documents and the Interim Lender Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA;

21. **ORDERS** that subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 14 to 20 hereof unless either (a) a notice of a motion for such order is served on the Interim Lender by the moving party within seven (7) days after that party was served with this Order or (b) the Interim Lender applies for or consents to such order.

Key Employee Contracts

22. **ORDERS** that the terms and conditions of the Key Employee Contracts (as defined in the Motion), Exhibit P-7, are hereby ratified and that the Petitioner is authorized to perform its obligation thereunder, including making all payments required in accordance with the terms thereof and **DECLARES** that the Key Employee Contracts contain sensitive and confidential information and shall be sealed in the court file in this proceedings and segregated from, and not form part of, the public record.

23. **ORDERS** that the employees eligible under the Key Employee Contracts shall be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of $111,000 (the "**KERP Charge**"), as security for the payment of the shortfall between the amounts owed under the Key Employee Contracts and any payment or distribution made or expected to be made under a proposal to be filed in the context of these proceedings or any other insolvency or liquidation proceedings filed by the Petitioner. The KERP Charge shall have the priority set out in paragraphs 29 and 30 of this Order.

Directors' and Officers' Indemnification and Charge

24. **ORDERS** that the Petitioner shall indemnify its directors and officers (collectively, the "**Directors**") from all claims relating to any obligations or liabilities they may incur by reason of or in relation to their capacity as directors or officers of the Petitioner for accrued and unpaid/unremitted sales taxes, wages and vacation not already covered by section 81.3 of the BIA, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, wilful misconduct or gross or intentional fault as further detailed in Section 64.1(4) BIA.

25. **ORDERS** that the Petitioner's directors shall be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of $25,000 (the "**Directors' Charge**"), as security for the indemnity provided in paragraph 5 of this Order as it relates to obligations and liabilities that such directors or officers may incur as directors or officers of the Petitioner. The Directors' Charge shall have the priority set out in paragraphs 29 and 30 of this Order.

26. **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 Directors 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 for which the Directors are entitled to be indemnified in accordance with paragraph 24 of this Order.

Administration Charge

27. **ORDERS** that Petitioner shall pay the reasonable fees and disbursements of the Trustee, the Trustee's legal counsel and the Petitioner's legal counsel (collectively, the "**Professionals**"), which are directly related to these proceedings, including the Sale Process, as defined in the Motion, whether incurred before or after the Order (collectively, the "**Professionnal Fees**"), and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

28. **DECLARES** that the Professionals shall be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of $150,000 (the "**Administration Charge**"), as a security for the payment of the Professional Fees. The Administration Charge shall have the priority set out in paragraphs 29 and 30 of this Order.

Priorities and General Provisions Relating to Charges

29. **DECLARES** that the priorities of the Interim Lender Charge, the KERP Charge, the Administration Charge and the Directors' Charge (collectively, the "**Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

    (a) first, Administration Charge;

    (b) second, the Interim Lender Charge;

    (c) third, the Directors' Charge; and

    (d) fourth, the KERP Charge.

30. **DECLARES** that each of the Charges shall rank in priority to any and all other Encumbrances affecting the Property.

31. **ORDERS** that, except as otherwise expressly provided for herein, the Petitioner shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Petitioner obtains the prior written consent of the Trustee and the prior approval of the Court.

32. **DECLARES** that each of the Charges shall attach, as of the date hereof, to all present and future Property of the Petitioner, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

33. **DECLARES** that the Charges and the rights and remedies of the beneficiaries of such Charges, as applicable, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insolvency made herein; (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Petitioner (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

    (a) the creation of any of the Charges shall not create or be deemed to constitute a breach by the Petitioner of any Third Party Agreement to which it is a party; and

    (b) any of the beneficiaries of the Charges shall not have liability to any person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the Charges.

34. **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner and any receiving order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by the Petitioner pursuant to the Order and the granting of the Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

35. **DECLARES** that the Charges shall be valid and enforceable as against all Property of the Petitioner and against all persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioner, for all purposes.

General

36. **DECLARES** that the Petitioner and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Petitioner shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

37. **DECLARES** that, unless otherwise provided herein, under the BIA, or ordered by this Court, no document, order or other material need be served on any person in respect of these proceedings, unless such person has served a notice of appearance on the solicitors for the Petitioner and the Trustee and has filed such notice with this Court, or appears on the service list prepared by the Trustee or its attorneys, save and except when an order is sought against a person not previously involved in these proceedings;

38. **DECLARES** that the Petitioner or the Trustee may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice only to each other.

39. **DECLARES** that the Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

40. **DECLARES** that the Trustee, with the prior consent of the Petitioner, shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement the Order and any subsequent orders of this Court and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Trustee shall be the foreign representative of the Petitioner. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Trustee as may be deemed necessary or appropriate for that purpose.

41. **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or

administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order.

42. **ORDERS** the provisional execution of the Order notwithstanding any appeal.

Signé: CHANTAL FLAMAND

Copie Conforme

Registraire

SCHEDULE "A"
DESCRIPTION OF THE PURCHASED ASSETS

All right, title and interest in all patents and patent applications listed or described below, including, without limitation, the right to sue for and recover damages in respect of past acts of infringement thereof:

3D[N] Reference #	Country Name	Serial #	Publication #	Patent #	Status
G01250AU	Australia	2003227151	2003227151		Abandoned
G01250CA1	Canada	2380105	2,380,105		Abandoned
G01250CA2	Canada	2481423	2,481,423		Allowed
G01250CN1	China	03808028.1	1647546	1647546	Issued
G01250CN2	China	201210361273.X	102905149	102905149	Issued
G01250CN3	China	201110043036.4	102098529		Published
G01250CN4	China	201510582062.2			Pending
G01250DE	Germany	60345274.4		60345274	Issued
G01250DE2	Germany	60345279.5		60345279	Issued
G01250EP	EPO	3746205.8	1495642		Abandoned
G01250EP1	EPO	9159209.7	2083574	2083574	Issued
G01250EP3	EPO	10158655	2211558		Published
G01250EP2	EPO	10158653.5	2211557	2211557	Issued
G01250FR	France	9159209.7	2083574	2083574	Issued
G01250FR2	France	10158653.5	2211557	2211557	Issued
G01250GB	UK	9159209.7	2083574	2083574	Issued
G01250GB2	UK	10158653.5	2211557	2211557	Issued
G01250HK	Hong Kong	13107924.1	1180860		Published
G01250HK1	Hong Kong	10111398.3	1145110	1145110	Issued
G01250IN1	India	2211/CHENP/2004	2211/CHENP/2004	242873	Issued
G01250JP1	Japan	2003-585449	2005-522958	5230892	Issued
G01250JP2	Japan	2010-044392	2010-161794	5421821	Issued
G01250JP3	Japan	2013-040017	2013-153475A	5663617	Issued
G01250US1	US	10/409,073	2003-0223499	7,580,463	Issued
G01250US2	US	10/960,058	2005-0117637	7,693,221	Issued
G01250US3	US	12/406,078	2009-0219382	8,804,842	Issued
G01250US4	US	12/691,786	2010-0171814	8,384,766	Issued
G01250US5	US	12/718,081			Abandoned
G01250US6	US	12/764,071	2010-0188482	7,844,001	Issued
G01250US7	US	12/955,140	2011-0187821	8,743,177	Issued
G01250US8	US	14/455,042	2014-0347455		Published
G01250WO	WIPO	PCT/CA2003/000524	WO/2003/088682		Nat Phase

Plus:

(i) all patents and patent applications owned by Sensio Technologies Inc. (the "**Seller**") or any affiliate of Seller to, from or through which any patent or patent application listed Schedule claims priority;

(ii) all patents and patent applications owned by Seller or any affiliate of Seller that claim priority to, from or through any existing or abandoned patents or patent applications to, from or through which any patent or patent application listed or described in this Schedule A; and

(iii) all patents and patent applications owned by Seller or any affiliate of Seller deriving from or having substantially the same specifications as any patent or patent application owned by Seller or any affiliate of Seller that claim priority to, from or through any existing or abandoned patents or patent applications to, from or through which any patent or patent application listed or described in this Schedule A, and any inventions disclosed in any such patent or patent application including all patents and patent applications owned by Seller or any affiliate of Seller claiming priority to, from or through, any such patent or patent application;

in each such case including all:

(1) patents, patent applications, provisional applications, continuation applications, continuation-in-part applications, divisional applications, reissue patents, reexamination patents, design patents, design patent applications and patent extensions thereof owned by Seller or any affiliate of Seller relating to or having the substantially the same specifications as any patent or patent application listed or described in this Schedule A, any applications owned by Seller or any affiliate of Seller claiming priority to, from or through, any of the foregoing and all counterparts thereof; and

(2) foreign patents, foreign patent applications, foreign counterparts including utility models and the like owned by Seller or any affiliate of Seller claiming priority to, from or through, or having the substantially the same specifications as any of the foregoing.

SCHEDULE "B"
DRAFT CERTIFICATE OF THE TRUSTEE

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Commercial Division)

No. : 500-11

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF:

SENSIO TECHNOLOGIES INC., a legal person incorporated under the laws of Canada, having its registered office at 1751 Rue Richardson, in the city and district of Montréal, Province of Quebec, H3K 1G6.

Petitioner

-and-

DELOITTE RESTRUCTURING INC., a legal person incorporated under the laws of Canada, having its registered office at 1190, Avenue des Canadiens-de-Montréal in the city and district of Montréal, Province of Quebec, H3B 0M7.

Trustee

CERTIFICATE OF THE TRUSTEE

RECITALS:

WHEREAS on December 23, 2015, the Petitioner, Sensio Technologies Inc. (the "**Petitioner**") filed a Notice of Intention to Make a Proposal (the "**NOI**") pursuant to the *Bankruptcy and Insolvency Act* (the "**Act**");

WHEREAS Deloitte Restructuring Inc. (the "**Trustee**") was appointed as **Trustee** to the NOI; and

WHEREAS on December ●, 2015 the Superior Court of Quebec (the "**Court**") issued an Order (the "**Order**") thereby, *inter alia*, authorizing and approving the execution by the Petitioner of a *Letter of Intent* (the "**LOI**") by and between the Petitioner, as vendor (the "**Vendor**") and $3D^N$, LLC, as purchaser (the "**Purchaser**"), copy of which was filed in the Court record, as well as all of the transactions contemplated therein (the "**Transactions**") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Trustee.

WHEREAS the Order contemplates the issuance of this Certificate of the Trustee once the (a) a definitive purchase agreement, if deemed necessary, has been executed and delivered; and (b) the purchase price set forth in the LOI (the "**Purchase Price**") has been paid by the Purchaser; and (c) and all the conditions to the closing of the Transactions have been satisfied or waived by the parties thereto.

THE TRUSTEE CERTIFIES THAT IT HAS BEEN ADVISED BY THE VENDOR AND THE PURCHASER AS TO THE FOLLOWING:

(a) a definitive purchase agreement has been executed and delivered;

(b) the Purchase Price payable upon the closing of the Transactions and all applicable taxes have been paid; and

(c) all conditions to the closing of the Transactions have been satisfied or waived by the parties thereto.

This Certificate was issued by the Trustee at ____ **[TIME]** on _____ **[DATE].**

DELOITTE RESTRUCTURING INC., in its capacity as trustee to the Notice of Intention to Make a Proposal of Sensio Technologies Inc., and not in its personal capacity.

Name: _____

Title: _____

*****

TAB 13

COUR SUPÉRIEURE

(Division commerciale)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE LONGUEUIL

N° : 505-11-013317-156

DATE : Le 26 mars 2015

SOUS LA PRÉSIDENCE DE L'HONORABLE MARTIN CASTONGUAY, J.C.S.

IN THE MATTER OF THE INTENTION TO MAKE A PROPOSAL OF :

GROUPE BINIKI VILLAGE INC.
Debtor
et
PRICEWATERHOUSECOOPERS INC.
Trustee

MOTIFS DU JUGEMENT RENDU ORALEMENT ET DE L'ORDONNANCE SIGNÉE LE 5 MARS 2015

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[1] Le 17 février 2015, Groupe Bikini Village inc. déposait un avis selon l'article 50.4 de la *Loi sur la faillite et l'insolvabilité*[1] (ci-après L.F.I.) dénonçant son intention de faire une proposition à ses créanciers.

[2] Le 5 mars 2015, Groupe Bikini Village inc., avec l'appui du syndic à la proposition, présentait une requête intitulée de la façon suivante :

> «Motion for the issuance of an order for an administrative charge, a directors and officers charge, a key employee retention program pursuant to sections 64.1 and 64.2 of the *Bankruptcy and insolvency act* and other remedies»

[3] Cette requête ne fit l'objet d'aucune contestation.

[4] La preuve administrée devant le Tribunal l'a satisfait que la sûreté demandée en faveur des administrateurs[2] de même que celle en faveur du syndic et d'experts tant pour celui-ci que pour Bikini Village[3] était justifiée.

[5] Le Tribunal a également accordé le troisième volet de cette requête, soit l'établissement d'une sûreté visant à garantir les émoluments de certains employés clés en vertu d'un Plan de rétention et ce même si rien dans la L.F.I. ne prévoit l'établissement d'une telle sûreté.

[6] Voici pourquoi.

[7] Nos tribunaux se sont peu penchés sur cette question, du moins ce qui a été soumis au Tribunal[4], et de fait, il n'existe qu'une seule décision ayant accordé un Plan de rétention pour certains employés dans le cadre d'un avis d'intention et celle-ci n'était pas motivée.

[8] Il est utile de rappeler que la *Loi sur les arrangements avec les créanciers des compagnies* (ci-après LACC)[5] est également silencieuse quant à la possibilité de créer une sûreté pour garantir un tel plan de rétention.

[9] Il est également acquis que nos tribunaux en vertu de leurs pouvoirs inhérents ont à plusieurs reprises permis l'établissement d'une telle sûreté dans le cadre de l'application de la LACC.

[10] L'objectif premier, alors recherché par nos tribunaux, dans le cadre de la LACC était inspiré de l'objectif de base de celle-ci soit, le sauvetage de l'entreprise. Le principe de la rétention d'employés clés pour réussir semblable sauvetage a toujours été accepté par nos tribunaux bien qu'il s'agisse d'un cas par cas puisque semblable plan, par sa nature, affecte les droits de tous les créanciers.

[11] Il ne fait aucun doute que la LACC et la L.F.I., quant à l'aspect «Proposition» poursuivent les mêmes buts soit, la survie de l'entreprise. De fait, l'utilisation de l'une ou l'autre loi par une personne insolvable ou par une compagnie débitrice[6] est fonction du niveau d'endettement de celle-ci et, par voie de conséquence, de la taille de cette entreprise.

[12] En fonction de la communauté et finalité des buts recherchés par la LACC et la LFI, nos tribunaux ont consacré le principe d'harmonisation de ces deux lois. Voici comment s'exprime le juge Morawetz dans l'affaire *Kitchen Frame limited (Re)*[7] :

> [47] Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See NAV Canada c. Wilmington Trust Co., 2006 SCCC 24 (CanLII). This principle militates in favour of adopting an interpretation of the BIA that is harmonious, to the greatest extent possible, with the interpretation that has been given to the CCAA.

[...]

> [73] I also accept that if s. 62(3) of the BIA is interpreted as a prohibition against including the third-party release in the BIA proposal, the BIA and the CCAA would be inclear disharmony on this point. An interpretation of the BIA which leads to a result that is different from the CCAA shoud only be adopted pursuant to clear statutory language which, in my view, is not present in the BIA.

[13] Cela étant, il n'en demeure pas moins que les deux lois sont muettes sur la question des plans de rétention.

[14] Ainsi peut-on harmoniser, par une ordonnance en vertu de la L.F.I., des pouvoirs, maintes fois accordés dans le cadre de la LACC mais qui le furent par l'exercice des pouvoirs inhérents du Tribunal.

[15] Le Tribunal est d'avis que oui et voici pourquoi.

[16] Dans un premier temps notons que la LFI ne contient aucune interdiction quant à la création d'un Plan de rétention d'employés clés.

[17] Par voie de conséquence, l'article 3 des *Règles générales sur la faillite et l'insolvabilité* doit recevoir application. Il est ainsi libellé :

> **3.** Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.[8]

[18] La «compétence respective» de la Cour supérieure au Québec, par l'application des dispositions du *Code de procédure civile* notamment l'article 46 fait en sorte qu'elle possède des pouvoirs inhérents pour l'exercice de sa compétence. En voici le libellé :

> **46.** Les tribunaux et les juges ont tous les pouvoirs nécessaires à l'exercice de leur compétence.
>
> Ils peuvent, en tout temps et en toutes matières, tant en première instance qu'en appel, prononcer des ordonnances de sauvegarde des droits des parties, pour le temps et aux conditions qu'ils déterminent. De plus, ils peuvent, dans les affaires dont ils sont saisis, prononcer, même d'office, des injonctions ou des réprimandes, supprimer des écrits ou les déclarer calomnieux, et rendre toutes ordonnances appropriées pour pourvoir aux cas où la loi n'a pas prévu de remède spécifique

[19] La Cour d'appel du Québec dans l'arrêt *Les Meubles Poitras (2002) inc.* a reconnu en ces termes l'existence du pouvoir inhérent de la Cour supérieure dans le cadre de l'application de la L.F.I. [9]:

> [8] À la suite d'une analyse détaillée, le juge de première instance ordonne la suspension des procédures. Il conclut à la triple identité requise pour conclure à la litispendance, mais n'applique pas l'article 3137 *C.c.Q.* puisque l'action ontarienne a été intentée après les procédures au Québec. Il estime par ailleurs avoir le pouvoir de suspendre les procédures dont il est saisi, en vertu de l'article 46 *C.p.c.*, de l'article 3 des *Règles générales sur la faillite et l'insolvabilité*[4] et de sa compétence inhérente. L'existence de jugements contradictoires possibles, le fait que le dossier au Québec n'était pas susceptible de mettre fin aux débats et l'absence de préjudice réel pour l'appelant et les mises en cause militent en faveur de l'exercice de sa discrétion dans le sens choisi.
>
> [...]
>
> [13] Dès lors, la Cour supérieure n'est pas dépourvue de ses pouvoirs inhérents, à titre de tribunal de droit commun, lorsqu'elle exerce sa compétence en matière de faillite et d'insolvabilité. Bien que l'exercice de ceux-ci ne soit pas sans limites en ce que la LFI doit primer (limites sur lesquelles il n'est pas nécessaire de se prononcer en l'instance), elle possède le pouvoir de suspendre les procédures dont elle est saisie, si elle conclut qu'il est dans l'intérêt de la justice de le faire[8]. Ce pouvoir inhérent est lié au processus judiciaire et doit être exercé en tenant compte des objectifs et des particularités propres à la LFI. [...]
>
> (Références omises)

[20] Le Tribunal conclut qu'en vertu de ses pouvoirs inhérents, il lui est loisible de permettre l'établissement d'une sûreté visant à garantir le paiement des émoluments de certains employés clés.

[21] Avant de traiter du cas sous étude, il y a lieu d'établir certains paramètres.

[22] Par souci d'harmonisation et comme le souligne le juge Morawerz dans l'affaire *Kitchener Frame Limited (Re)*, il y a lieu d'importer les principes sous-jacents établis dans le cadre de l'application de la LACC pour un plan de rétention des employés avec les adaptations nécessaires à la réalité d'une entreprise ayant l'intention de faire une proposition à ses créanciers.

[23] Ainsi, le maintien des employés clés doit avoir une incidence directe soit sur la possibilité de faire une proposition viable à ses créanciers soit sur la bonification de celle-ci.

[24] Le Tribunal doit également tenir compte du contexte social entourant la viabilité de l'entreprise notamment quant à la pérennité de tous les emplois, et ce en fonction des droits des créanciers. En termes clairs, le Tribunal doit considérer un facteur bien connu du monde des affaires soit le rapport coût-bénéfice.

[25] Même si l'endettement de Bikini Village l'empêche de se prévaloir des dispositions de la LACC, la réalité est qu'il s'agit d'une grande entreprise, en effet il n'en demeure pas moins que celle-ci exploite quelque 52 points de vente et compte quelque 400 employés dont 53 au siège social de l'entreprise à Boucherville.

[26] Bikini Village a démontré au Tribunal que les employés visés par sa demande occupent justement une position clé au sein de l'entreprise et sont essentiels pour bonifier une éventuelle proposition de Bikini Village à ses créanciers.

[27] Qui plus est, le maintien de ces employés est essentiel pour un investisseur éventuel ou encore pour un acheteur, le tout ayant pour effet d'assurer la pérennité de quelque 400 emplois.

[28] Le Plan de rétention suggéré par Bikini Village emporte l'établissement d'une garantie pour une somme de 179 913,00 $ et vise six employés clés. Les créances garanties totalisent quelque 2 390 000,00 $ et les non garanties quelque 6 688 000,00 $

[29] Le montant du Plan de rétention est somme toute minime en regard de la contribution que peuvent apporter les employés visés à la relance de l'entreprise.

[30] Il y a lieu d'y faire droit.

[31] Le Tribunal joint aux présents motifs, l'ordonnance signée le 5 mars 2015 pour en faire partie intégrante.

MARTIN CASTONGUAY, J.C.S.

Me Isabelle Desharnais
Borden Ladner Gervais
Procureurs de Groupe Bikini Village inc., Debtor

Me Alain Riendeau
Fasken Martineau LLP
Procureurs de Pricewaterhousecoopers inc., Trustee

Date d'audience : 17 mars 2015

CANADA

SUPERIOR COURT
Commercial Division

PROVINCE OF QUEBEC
DISTRICT OF LONGUEUIL
No : 505-11-013317-156
Estate No.: 41-1961514

Date : March 5, 2015

PRESENT : THE HONOURABLE MARTIN CASTONGUAY J.S.C.

IN THE MATTER OF THE INTENTION TO MAKE A PROPOSAL OF:

GROUPE BIKINI VILLAGE INC.

Debtor

-and-

PRICEWATERHOUSECOOPERS INC.

Trustee

JUDGMENT

[1] **THE COURT**, being seized with the Debtor Groupe Bikini Village inc. ("**GBV**")'s *Motion for the Issuance of an Order for an Administrative Charge, a Director and Officer Charge, a Key Employee Retention Program pursuant to sections 64.1 and 64.2 of the Bankruptcy and Insolvency Act and Other Remedies* (the "**Motion**");

[2] **SEEING** the Affidavit filed in support of the Motion;

[3] **SEEING** the exhibits filed in support of the Motion;

[4] **CONSEDERING** the testimony of Mr. Jocelyn Dumas, GBV's representative in this matter;

505-11-013317-156

[5] **CONSIDERING** the testimony of Mr. Claudio Filiponne, Pricewaterhousecoopers Inc. ("**PWC**")'s representative in this matter;

[6] **CONSIDERING** the representations of counsel;

FOR THESE REASONS, THE COURT:

A. **GRANTS** GBV's *Motion for the Issuance of an Order for an Administrative Charge, a Director and Officer Charge, a Key Employee Retention Program pursuant to sections 64.1 and 64.2 of the Bankruptcy and Insolvency Act and Other Remedies*;

B. **ORDERS** that any prior delay for the presentation of the Motion is hereby abridged and validated so that this Motion is properly returnable and hereby dispenses with further service thereof;

C. **DECLARES** that the order (the "**Order**") and its effects shall survive the filing by GBV of a proposal pursuant to the terms of the *Bankruptcy and Insolvency Act* (the "**BIA**"), the issuance of an initial order in regard of GBV pursuant to the terms of the *Companies Creditors Arrangements Act* (the "**CCAA**") or the bankruptcy of GBV, unless the Court orders otherwise;

D. **DECLARES** that as security for the professional fees and disbursements incurred in relation to these proceedings, both before and after the date of the Order, a charge and security over all the property of GBV of every nature and land whatsoever, wherever situated and regardless of whose possession it may be in (the "**Property**") is hereby constituted in favour of PWC, of PWC's legal counsels and GBV's legal counsels, to the extent of the aggregate amount of $120,000 (the "**Administration Charge**"). The Administration Charge shall have the priority set out in paragraphs I and J of this Order;

E. **ORDERS** that the Key Employee Retention Program (the "**KERP**") filed with the Court are hereby ratified and that GBV is hereby authorized and empowered to perform its obligation thereunder and to make the payments in accordance with the terms set out in said KERP;

F. **ORDERS** that an amount of $117,413 be transferred by GBV to PWC In Trust for the benefit of the employees eligible under the KERP (the "**KERP In Trust**");

G. **ORDERS** that the GBV's eligible employees are eligible under the KERP and shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Property, which charge shall not exceed $62,500, as security for payment of the obligations set forth under the KERP. The KERP Charge shall have the priority set out in paragraphs I and J of this Order;

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H. **DECLARES** that as security for any deductible to be incurred in relation to the Executive Protection Policy ("**EPP**") a charge and security over the Property is hereby constituted in favour of all the officers and administrators of GBV, to the extent of the aggregate amount of $50,000 (the "**D&O Charge**"). The D&O Charge shall have the priority set out in paragraphs I and J of this Order;

I. **DECLARES** that the priorities of the Administration Charge, the KERP Charge and the D&O Charge (collectively, the "**NOI Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge;

(b) second, the KERP Charge; and

(c) third, the D&O Charge.

J. **DECLARES** that the NOI Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") affecting the Property charged by such Encumbrances, but after the Encumbrances granted by GBV in favour of Royal Bank Canada;

K. **DECLARES** that the NOI Charges are effective and shall charge, as of 12:01 a.m. (Montreal time) the day of the Order (the "**Effective Time**"), all GBV's Property present and future notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent;

L. **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a receiver order filed pursuant to the *BIA* in respect of GBV and any receiving order granting such petition or any assignment in bankruptcy made or deemed to be made in respect of GBV and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by GBV pursuant to the Order and the granting of the NOI Charges and the KERP In Trust do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting a recourse for abuse under an applicable law, and shall be valid and enforceable as against any person, including any trustee in bankruptcy, and any receiver to the Property of GBV;

M. **AUTHORIZES** PWC to collect the payment of its fees and disbursements and those of its attorneys and of GBV's legal counsel, with the consent of GBV, the whole subject to taxation in conformity with the BIA, if applicable;

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GENERAL

N. **DECLARES** that the Order, the Motion and the affidavit do not, in and of themselves, constitute a default or failure to comply by GBV under any statute, regulation, license, permit, contract, permission, covenant, agreement, undertaking or any other written document or requirement;

O. **DECLARES** that PWC and/or GBV are at liberty to serve any notice, circular or any other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to persons or other appropriate parties at their respective given address as last shown in the records; the documents served in this manner shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three (3) business days after mailing if delivered by ordinary mail;

P. **DECLARES** that PWC and/or GBV may serve any court materials in these proceedings on all represented parties, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that PWC and/or GBV shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter;

Q. **DECLARES** that any party interested in these proceedings may serve any court material in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that such party shall deliver a "hard copy" on paper of such PDF or electronic materials to GBV's and the PWC's counsel and to any other party who may request such delivery;

R. **DECLARES** that, unless otherwise provided herein, ordered by this Court, or provided by the BIA, no document, order or other material need be served on any person in respect of these proceedings, unless such person has served a notice of appearance on the solicitors for GBV and PWC and has filed such notice with the Court;

S. **DECLARES** that the present Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada;

T. **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order;

505-11-013317-156

U. ORDERS the provisional execution of the present Order notwithstanding appeal.

MARTIN CASTONGUAY J.S.C.

[1] L.R.C. (1985) ch. B-3.
[2] Art. 64.1 (1), L.F.I..
[3] Art. 64.2(1), L.F.I..
[4] Proposal of XS Cargo Limited Partnership, Ontario Superior Court of Justice, August 6th, 2014, Docket Number 32-1896275.
[5] L.R.C., (1985), ch. C-36.
[6] L.F.I., art. 2, définition personne insolvable LACC, art. 2 définit compagnie débitrice et art. 3.
[7] *Kitchener Frame Limited (Re)*, 2012 ONSC 234 (C.S. Ont.).
[8] Art. 3, *Règles générales sur la faillite et l'insolvabilité* (*Loi sur la Faillite et l'Insolvabilité*), C.R.C. 1978, c. 368..
[9] *Dans l'affaire de la faillite de Les Meubles Poitras (2002) inc.*, 2013 QCCA, 1671.

TAB 14

COURT FILE NO.: CV-09-8247-00CL
DATE: 20090811

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF Grant Forest Products Inc., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Applicants

BEFORE: Justice Newbould

COUNSEL: A. Duncan Grace for GE Canada Leasing Services Company

Daniel R. Dowdall and Jane O. Dietrich, for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Sean Dunphy and Katherine Mah for the Monitor Ernst & Young Inc.

Kevin McElcheran for The Toronto-Dominion Bank

Stuart Brotman for the Independent Directors

DATE HEARD: August 6, 2009

ENDORSEMENT

[1] KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was

made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

[2] GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

[3] The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

[4] The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

[5] Grant Forest has total funded debt obligations of approximately $550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately $400 million. The second lien lenders are owed approximately $150 million.

[6] Grant Forest has unsecured trade creditors of over $4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. $6.5 million.

[7] The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately $50 million for debt financing provided to the business.

Analysis

[8] Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

[9] In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by

> the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

[10] I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

[11] The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

[12] Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

[13] It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296. In that

case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from Re *Warehouse Drug Store Ltd.,* [2006] O.J. No. 3416, that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

[14] I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Re Nortel Networks Corp.* [2009] O.J. No. 1188, Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

[15] In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

[16] It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

[17] It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

[18] A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

[19] The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

> When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

[20] The first lien security holders owed approximately $400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

[21] With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately $400 million are consenting and the second lien lenders owed approximately $150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be

any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately $50 million, supports the KERP provisions for Mr. Lynch.

[22] In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

[23] In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

[24] I have been referred to the case of *Re MEI Computer Technology Group Inc.* (2005), 19 C.B.R. (5th) 257, a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are

necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

[25] The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

NEWBOULD J.

DATE: August 11, 2009

TAB 15

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

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[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

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[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

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

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

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

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

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

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

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

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

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

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

> the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

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[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Pepall J.

Released: October 13, 2009

Estate/Court File No.: 32-2403547

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED OF IMPOPHARMA INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANT
(Application for an Order Approving a Sale and Investment Solicitation Process, Priority Charges and Other Interim Reliefs)

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