

Court File No. CV-25-00740088-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF CLEARPIER ACQUISITION CORP.
AND 1000238820 ONTARIO INC.

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS

April 1, 2025

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TO: THE SERVICE LIST

LIST OF AUTHORITIES

Cases

1. Re Cinram, 2012 ONSC 3767
2. Stelco Inc., Re, 2004 CanLII 24933
3. Re 4519922 Canada Inc. 2015 ONSC 124
4. Lemare Holdings Ltd. (Re), 2012 BCSC 1591
5. Lydian International Limited (Re), 2019 ONSC 7473
6. Clover Leaf Holdings Company, Re., 2019 ONSC 6966
7. Stelco Inc. (Re), 2005 CarswellOnt 1188 (Ont. C.A.)
8. Nortel Networks Corporation (Re), 2009 CanLII 39492 (ON SC)
9. Sino-Forest Corporation (Re), 2012 ONSC 2063
10. Nortel Networks Corporation (Re), 2010 ONSC 1304
11. Stelco Inc., Re, 2005 CanLII 8671 (ON CA)
12. Lehndorff General Partner Ltd., Re, 17 CBR (3d) 24 (Ont Gen Div [Commercial List])
13. Re, Doman Industries Ltd. (Trustee of), 2003 BCSC 376
14. First Leaside Wealth Management Inc., Re, 2012 ONSC 1299
15. Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C.S.C.)
16. Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
17. Jaguar Mining Inc, Re, 2014 ONSC 494
18. Canwest Publishing Inc, Re, 2010 ONSC 222
19. Timminco Limited (Re), 2012 ONSC 506

Other Authorities

20. J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at p. 128
21. A. Rogers et Pamela L.J. Huff, *Commercial Restructuring and Insolvency in Canada*, Journal of the Insolvency Institute of Canada
22. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

CITATION: Cinram International Inc. (Re), 2012 ONSC 3767
COURT FILE NO.: CV-12-9767-00CL
DATE: 20120626

**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 CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE “A”, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Robert J. Chadwick, Melaney Wagner and Caroline Descours, for the Applicants

Steven Golick, for Warner Electra-Atlantic Corp.

Steven Weisz, for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler, for Twentieth Century Fox Film Corporation

David Byers, for the Proposed Monitor, FTI Consulting Inc.

**HEARD &
ENDORSED: JUNE 25, 2012**

REASONS: JUNE 26, 2012

ENDORSEMENT

[1] Cinram International Inc. (“CII”), Cinram International Income Fund (“Cinram Fund”), CII Trust and the Companies listed in Schedule “A” (collectively, the “Applicants”) brought this application seeking an initial order (the “Initial Order”) pursuant to the *Companies’ Creditors Arrangement Act* (“CCAA”). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership (“Cinram LP”, collectively with the Applicants, the “CCAA Parties”).

[2] Cinram Fund, together with its direct and indirect subsidiaries (collectively, “Cinram” or the “Cinram Group”) is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

[3] The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram’s primary markets of North America and Europe, which impacted consumers’ discretionary spending and adversely affected the entire industry.

[4] Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

[5] Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

- (i) to ensure the ongoing operations of the Cinram Group;
- (ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and
- (iii) to complete the sale and transfer of substantially all of the Cinram Group’s business as a going concern (the “Proposed Transaction”).

[6] Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

[7] The Applicants also seek authorization for Cinram International ULC (“Cinram ULC”) to act as “foreign representative” in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code (“Chapter 15”). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

[8] Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world’s largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

- (i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;
- (ii) provides various digital media services through One K Studios, LLC; and
- (iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the “Cinram Business”).

[9] Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

[10] The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram’s First Lien Credit Facilities (the “Steering Committee”), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram’s First Lien Credit Facilities (the “Initial Consenting Lenders”). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

[11] Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram’s corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties’ business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the “Monitor”) at paragraph 13. A copy is attached as Schedule “B”.

[12] Cinram Fund, CII, Cinram International General Partner Inc. (“Cinram GP”), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the “Canadian Applicants”). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

[13] Cinram (US) Holdings Inc. (“CUSH”), Cinram Inc., IHC Corporation (“IHC”), Cinram Manufacturing, LLC (“Cinram Manufacturing”), Cinram Distribution, LLC (“Cinram Distribution”), Cinram Wireless, LLC (“Cinram Wireless”), Cinram Retail Services, LLC (“Cinram Retail”) and One K Studios, LLC (“One K”) are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the “U.S. Applicants”). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

[14] Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms

part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

[15] Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

[16] The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

[17] All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

[18] As at March 31, 2012, there was approximately \$233 million outstanding under the First-Lien Term Loan Facility; \$19 million outstanding under the First-Lien Revolving Credit Facilities; approximately \$12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately \$12 million outstanding under the Second-Lien Credit Agreement.

[19] Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

[20] Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

[21] The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

- (a) the lenders demanding payment in full for money owing under the Credit Agreements;
- (b) potential termination of contracts by key suppliers; and
- (c) potential termination of contracts by customers.

[22] As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession (“DIP”) Financing in the amount of \$15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the “DIP Lenders”) through J.P. Morgan Chase Bank, NA as Administrative Agent (the “DIP Agent”) whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of \$15 million.

[23] The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

- (a) the active employment of employees in the ordinary course;
- (b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;
- (c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and
- (d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

[24] Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

[25] The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC (“Moelis”), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

[26] In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the “Directors/Trustees”) requested a Director’s Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their

Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

[27] Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

[28] Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

[29] Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

[30] Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

[31] The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

[32] Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

[33] The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

[34] Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

[35] The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

[36] In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

[37] As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

[38] The Applicants have also requested that the confidential supplement – which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules – be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, (2002) 2 S.C.R. 522, I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

[39] Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

[40] In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally

integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

- (a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;
- (b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;
- (c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;
- (d) meetings of the board of trustees and board of directors typically take place in Canada;
- (e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;
- (f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;
- (g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;
- (h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;
- (i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;
- (j) new business development initiatives are centralized and managed from Toronto, Ontario; and
- (k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

[41] Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

[42] The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court – in this case, the United States Bankruptcy Court for the District of Delaware – to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a “foreign main proceeding” for the purposes of Chapter 15.

[43] In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

MORAWETZ J.

Date: June 26, 2012

**SCHEDULE “A”
ADDITIONAL APPLICANTS**

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

Cinram Distribution LLC

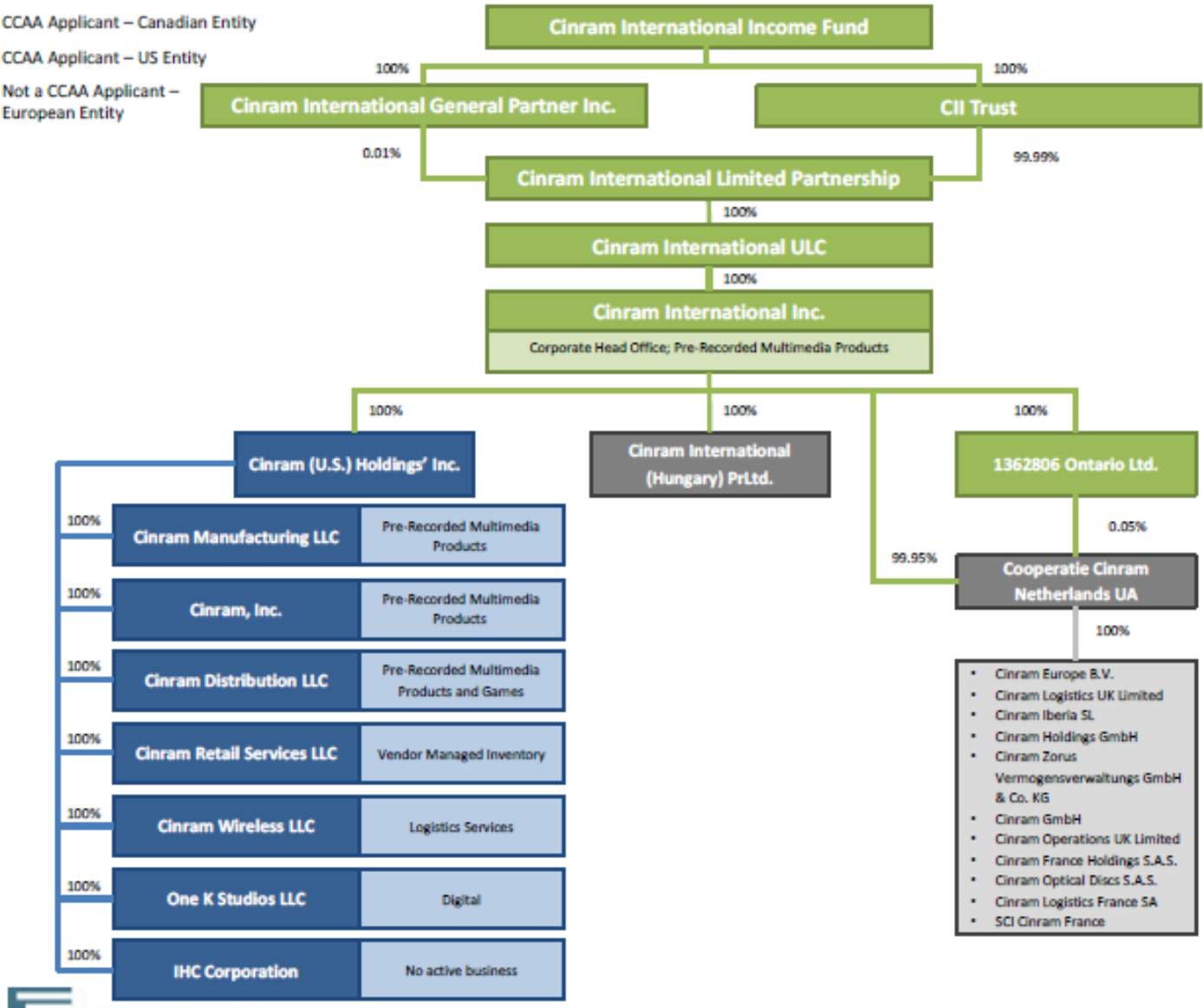
Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

SCHEDULE "B"

- CCAA Applicant – Canadian Entity
- CCAA Applicant – US Entity
- Not a CCAA Applicant – European Entity



SCHEDULE “C”

A. THE APPLICANTS ARE “DEBTOR COMPANIES” TO WHICH THE CCAA APPLIES

41. The CCAA applies in respect of a “debtor company” (including a foreign company having assets or doing business in Canada) or “affiliated debtor companies” where the total of claims against such company or companies exceeds \$5 million.

CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a “debtor company” and the total of the claims against the Applicants exceeds \$5 million.

(1) The Applicants are Debtor Companies

43. The terms “company” and “debtor company” are defined in Section 2 of the CCAA as follows:

“company” means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.

“debtor company” means any company that:

- (a) is bankrupt or insolvent;
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
- (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.

CCAA, Section 2 (“company” and “debtor company”).

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are “companies”

45. The Applicants are “companies” because:

- a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and
- b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for “having assets or doing business in Canada” is disjunctive, such that either “having assets” in Canada or “doing business in Canada” is sufficient to qualify an incorporated company as a “company” within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of “company”. In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Re Canwest Global Communications Corp. (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants (“**Book of Authorities**”), Tab 1.

Re Global Light Telecommunications Ltd. (2004), 2 C.B.R. (5th) 210 (B.C.S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of “instant” transactions immediately preceding a CCAA application, such as the creation of “instant debts” or “instant assets” for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

Global Light, supra at para. 17; Book of Authorities, Tab 2.

Re Cadillac Fairview Inc. (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.

Elan Corporation v. Comiskey (Trustee of) (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are “debtor companies” as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of “insolvent”, courts have taken guidance from the definition of “insolvent person” in Section 2(1) of the *Bankruptcy and Insolvency Act* (the “BIA”), which defines an “insolvent person” as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is “insolvent” under one of the following tests:

- a. is for any reason unable to meet his obligations as they generally become due;
- b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- c. the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 (“insolvent person”).

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.[Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, at para. 4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

- a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.
- b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.
- d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

- e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.
- f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.
- g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of \$5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

- a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and
- b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule “A” hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are “affiliated companies” for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately \$252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately \$12 million in letter of credit exposure) and approximately \$12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed \$5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. THE RELIEF IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute’s goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Elan Corp. v. Comiskey, supra at paras. 22 and 56-60; Book of Authorities, Tab 4.
Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 at para.5 (Ont. Gen. Div. [Commercial List]); Book of Authorities, Tab 6.
Re Chef Ready Foods Ltd; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall

objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

Re Sulphur Corporation of Canada Ltd. (2002), 35 C.B.R. (4th) 304 (Alta Q.B.) (“*Sulphur*”) at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants’ direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a “Subsidiary Counterparty”), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

- a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;
- b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants’ ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and
- c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants’ stakeholders.

Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

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.

Lehndorff General Partner Ltd., Re, supra at para. 5; Book of Authorities, Tab 6.
Canwest Global, supra at para. 27; Book of Authorities, Tab 1.
CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

Lehndorff, supra at paras. 5 and 16; Book of Authorities, Tab 6.
T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

- a. where it is important to the reorganization process;
- b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as “companies” within the meaning of the CCAA;
- c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

- d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10.

Lehndorff, *supra* at para. 21; Book of Authorities, Tab 6.

Canwest Global, *supra* at paras. 28 and 29; Book of Authorities, Tab 1.

Re Sino-Forest Corp. 2012 ONSC 2063 (Commercial List) at paras. 5, 18, and 31; Book of Authorities, Tab 11.

Re MAAX Corp., Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's

practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Canwest Global supra, at paras. 41 and 43; Book of Authorities, Tab 1.

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

- a. whether the goods and services were integral to the business of the applicants;
- b. the applicants' dependency on the uninterrupted supply of the goods or services;
- c. the fact that no payments would be made without the consent of the Monitor;
- d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
- e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and
- f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global supra, at para. 43; Book of Authorities, Tab 1.

Re Brainhunter Inc., [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.

Re Prizm Income Fund (2012), 75 C.B.R. (5th) 213 (Ont. Sup. Ct. J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an

efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of intercompany accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of \$15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

11.2(1) *Interim financing* - 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.

11.2(2) *Priority* – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Re Timminco Ltd. (2012), 211 A.C.W.S. (3d) 881(Ont. Sup. Ct. J. [Commercial List]) at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

11.2(4) Factors to be considered – 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.

CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrow funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

Re Canwest Publishing Inc./Publications Canwest Inc. (2010), 63 C.B.R. (5th) 115 (Ont. Sup. Ct. J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

Re Catalyst Paper Corporation, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.
Angiotech, supra, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18
Re Fraser Papers Inc., Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

- a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

- b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;
- c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedings and implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;
- d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;
- e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;
- f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;
- g. the DIP Lenders' Charge will not secure any pre-filing obligations;
- h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings; and
- i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD\$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent,

the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the “Administration Charge”). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

11.52(1) *Court may order security or charge to cover certain costs*

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.

11.52(2) *Priority*

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

CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco, Canwest Global* and *Canwest Publishing*.

Canwest Global, supra; Book of Authorities, Tab 1.

Canwest Publishing, supra; Book of Authorities, Tab 16.

Re Timminco Ltd., 2012 ONSC 106 (Commercial List) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

- a. the size and complexity of the business being restructured;
- b. the proposed role of the beneficiaries of the charge;
- c. whether there is 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.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, supra, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

- a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;
- b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;

- c. there is no unwarranted duplication of roles;
- d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and
- e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD\$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

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 -- 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 creditors 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.

CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

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.

Canwest Global, supra at paras 46-48; Book of Authorities, Tab 1.

Canwest Publishing, supra at paras. 56-57; Book of Authorities, Tab 16.

Timminco, supra at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD\$13 million, given:

- a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
- b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;
- c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;

- d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;
- e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
- f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257 ; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD\$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
- h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Re Grant Forest Products Inc. (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.

Canwest Publishing supra, at paras 59; Book of Authorities, Tab 16.

Canwest Global supra, at para. 49; Book of Authorities, Tab 1.

Re Timminco Ltd. (2012), 95 C.C.P.B. 48 (Ont. Sup. Ct. J [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest, supra at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD\$3 million, given:

- a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora

Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

- b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;
- c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;
- d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;
- e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;
- f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
- g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate

in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

Sino-Forest, supra, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

- a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;
- b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and
- c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

Bell Affidavit, para. 176; Application Record, Tab 2.

**SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)**

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

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

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

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage and Geoff R. Hall*, for the Applicants

David Jacobs and Michael McCreary, for Locals 1005, 5328 and 8782 of the
United Steel Workers of America

Ken Rosenberg, Lily Harmer and Rob Centa, for United Steelworkers of America

Bob Thornton and Kyla Mahar, for Ernst & Young Inc., Monitor of the
Applicants

Kevin J. Zych, for the Informal Committee of Stelco Bondholders

David R. Byers, for CIT

Kevin McElcheran, for GE

Murray Gold and Andrew Hatnay, for Retired Salaried Beneficiaries

Lewis Gottheil, for CAW Canada and its Local 523

Virginie Gauthier, for Fleet

H. Whiteley, for CIBC

Gail Rubenstein, for FSCO

Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[2] Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

[3] For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed – addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

[4] The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

[5] The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

[6] If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I.C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

[7] S. 2 of the CCAA defines "debtor company" as:

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

[8] Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

[9] This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.) where at p. 45 I observed:

The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

[10] Anderson J. in *Re MGM Electric Co. Ltd.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This

common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

[11] The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring – which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

[12] It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

[13] There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throes.

[14] It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.), I went on to expand on this at p. 228:

I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

[15] I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101; 1 O.R. (3d) 280 (C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

[16] In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) I observed at p. 32:

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.

[17] In *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

[18] Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least \$5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of \$5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* ...

To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)...

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at p. 580:

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:

- (a) identification of the debtor's stakeholders and their interests;
- (b) arranging for a process of meaningful communication;
- (c) dealing with immediate relationship issues arising from a CCAA filing;
- (d) sharing information about the issues giving rise to the debtor's need to restructure;

- (e) developing restructuring alternatives; and
- (f) building a consensus around a plan of restructuring.

[32] I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to pre-filing liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

With respect to the Business Plan, the average spot market sales price per ton was \$514, and the average contract business sales price per ton was \$599. The Forecast reflects an average spot market sales price per ton of \$575, and average contract business sales price per ton of \$611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

[33] I note that \$145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of \$350 million had increased from \$241 million on November 30, 2003 to \$293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of \$75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Re Pacific Mobile Corporation; Robitaille v. Les Industries l'Islet Inc. and Banque Canadienne Nationale* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of \$80 million now to a projected loss of \$192 million and cash has gone from a positive \$209 million to a negative \$114 million.

[34] Locker made the observation at paragraph 8 of his affidavit that:

8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.

37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

[35] But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

[36] I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil, supra* at p. 162.

[37] The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.) where I stated as to the MacGirr affidavit:

The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing \$74 million investment. In stating his opinion MacGirr defined solvency as:

- (a) the ability to meet liabilities as they fall due; and
- (b) that assets exceed liabilities.

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

[38] As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run...eventually*" is not a finite time in the foreseeable future.

[39] I have not given any benefit to the \$313 - \$363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

[40] It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

[41] What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Reglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Gen. Div.) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may

be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (S.C.J.) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (C.A.). At paragraph 33, I observed in closing:

33...They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

[42] The Court of Appeal stated at paragraphs 24-25 as follows:

24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

[43] Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

[44] In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Div Ct.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

[45] The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I. M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (C.A.) where it is stated at paragraph 11:

"11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnished. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and its text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

[46] In *Barsi v. Farcas*, [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stanton* (1883), 11 Q.B.D. 518 that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

[47] Saunders J. noted in *633746 Ont. Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

[48] There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

[49] In *King, supra* at p. 81 Steele J. observed:

To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

[50] To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

[51] S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

[52] *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

[53] In *Garden v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *In re A Debtor (No. 64 of 1992)*, [1993] 1 W.L.R. 264 (Ch. D) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Re Leo Gagnier* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store – in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

[54] It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

[55] I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

[56] All liabilities, contingent or unliquidated would have to be taken into account. See *King, supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisseuers Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S.S.C.) at p. 29; *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (B.C.S.C.) at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

Mr. MacAdam argues also that the \$4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

[57] With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital, supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.

There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:

A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.

Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due"

for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re* 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

[58] There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

[59] It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical supra* at pp. 756-7; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at pp. 164-63-4; *Re Consolidated Seed Exports Ltd.* (1986), 62 C.B.R. (N.S.) 156 (B.C.S.C.) at p. 163. In *Consolidated Seed*, Spencer J. at pp. 162-3 stated:

In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its

obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. ...

The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

[60] The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

[61] I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged – the "Possible Reductions in Capital Assets."

71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over \$600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

[62] Stelco went on at paragraphs 74-5 of its factum to submit:

74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

[63] Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

[64] As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as \$804.2 million. From that, he deducted the loss for December 2003 – January 2004 of \$17 million to arrive at an equity position of \$787.2 million as at the date of filing.

[65] From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) \$294 million of future income tax recourse which would need taxable income in the future to realize; (b) \$57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the capitalized deferred debt issue expense of \$3.2 million which is being written off over time and therefore, truly is a "nothing". This totals \$354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be \$433 million.

[66] On a windup basis, there would be a pension deficiency of \$1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of \$656 million. If the \$1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of \$198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as \$909.3 million but only \$684 million has been accrued and booked on the financial statements so that there has to be an increased provision of \$225.3 million. These off balance sheet adjustments total \$1080 million.

[67] Taking that last adjustment into account would result in a *negative* equity of (\$433 million minus \$1080 million) or *negative* \$647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

[68] In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible

assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the \$773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that \$773 million. Lastly, the Union indicated that there should be a \$155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

[69] In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

[70] I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace – and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

J.M. Farley

Released: March 22, 2004

CITATION: Re 4519922 Canada Inc. 2015 ONSC 124
COURT FILE NO.: CV-1410791-00CL
DATE: 20150112

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF 4519922 CANADA INC.

BEFORE: Newbould J.

COUNSEL:

*Robert I. Thornton, John T. Porter, Lee M.
Nicholson and Asim Iqbal*, for the Applicant

Harry M. Fogul, for 22 former CLCA
partners

Orestes Pasparakis and Evan Cobb, for the
Insurers

Avram Fishman and Mark Meland, for the
German and Canadian Bank Groups, the
Widdrington Estate and the Trustee of
Castor Holdings Limited

James H. Grout, for 22 former CLCA
partners

Chris Reed, for 8 former CLCA partners

Andrew Kent, for 5 former CLCA partners

Richard B. Jones, for one former CLCA partner

John MacDonald, for Pricewaterhouse Coopers LLP

James A. Woods, Sylvain Vauclair, Bogdan Catanu and Neil Peden, for Chrysler Canada Inc. and CIBC Mellon Trust Company

Jay A. Swartz, for the proposed Monitor Ernst & Young Inc.

HEARD: December 8, 2014 and January 6, 2015

ENDORSEMENT

[1] On December 8, 2014 the applicant 4519922 Canada Inc. (“451”), applied for an Initial Order granting it protection under the *Companies’ Creditors Arrangement Act* (“CCAA”), extending the protection of the Initial Order to the partnership Coopers & Lybrand Chartered Accounts (“CLCA”), of which it is a partner and to CLCA’s insurers, and to stay the outstanding litigation in the Quebec Superior Court relating to Castor Holdings Limited (“Castor”) during the pendency of these proceedings. The relief was supported by the Canadian and German bank groups who are plaintiffs in the Quebec litigation, by the Widdrington Estate that has a final judgment against CLCA, by the insurers of CLCA and by 22 former CLCA partners who appeared on the application.

[2] The material in the application included a term sheet which the applicant wishes to use as a basis of a plan and which provides for an injection of approximately \$220 million in return for a release from any further litigation. The term sheet was supported by all parties who appeared.

[3] I granted the order with a stay to January 7, 2015 for reasons to follow, but in light of the fact that Chrysler Canada Inc., with a very large claim against CLCA in the litigation, had not been given notice of the application, ordered that Chrysler be given notice to make any submissions regarding the Initial Order if it wished to do so.

[4] Chrysler has now moved to set aside the Initial Order, or in the alternative to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. On the return of Chrysler's motion, a number of other former CLCA partners and PricewaterhouseCoopers appeared in support of the granting of the Initial Order.

Structure of Coopers & Lybrand Chartered Accounts

[5] The applicant 451 is a corporation continued pursuant to the provisions of the *Canada Business Corporations Act*, and its registered head office is in Toronto, Ontario. It and 4519931 Canada Inc. ("4519931") are the only partners of CLCA.

[6] CLCA is a partnership governed by the *Partnerships Act (Ontario)* with its registered head office located in Toronto, Ontario. It was originally established in 1980 under the name of "Coopers & Lybrand" and was engaged in the accountancy profession. On September 2, 1985, the name "Coopers & Lybrand" was changed to "Coopers & Lybrand Chartered Accountants" and the partnership continued in the accountancy profession operating under the new name. Until 1998, CLCA was a national firm of chartered accountants that provided audit and accounting services from offices located across Canada and was a member of a global network of professional firms.

[7] In order to comply with the requirements of the various provincial Institutes of Chartered Accountants across Canada, many of which restricted chartered accountants providing audit services from being partners with persons who were not chartered accountants, Coopers & Lybrand Consulting Group ("CLCG") was established under the *Partnerships Act (Ontario)* in

September 1985 to provide management consulting services. Concurrent with the formation of CLCG, Coopers & Lybrand (“OpCo”) was established as a partnership of CLCA, CLCG and two other parties to develop and manage the CLCA audit and CLCG management consulting practices that had to remain separate. Until 1998, OpCo owned most of the operating assets of CLCA and CLCG. OpCo is governed by the Partnerships Act (Ontario) and its registered head office is in Toronto.

[8] In 1998, the member firms of the global networks of each of Coopers & Lybrand and Price Waterhouse agreed upon a business combination of the two franchises. To effect the transaction in Canada, substantially all of CLCA’s and CLCG’s business assets were sold to PricewaterhouseCoopers LLP (“PwC”), which entity combined the operations of the Coopers & Lybrand entities and Price Waterhouse entities, and the partners of CLCA and CLCG at that time became partners of PwC. Subsequent to the closing of the PwC transaction, CLCA continued for the purpose of winding up its obligations and CLCA and CLCG retained their partnership interests in OpCo. By 2006, all individual CLCA partners had resigned and been replaced by two corporate partners to ensure CLCA’s continued existence to deal with the continuing claims and obligations.

[9] Since 1998, OpCo has administered the wind up of CLCA and CLCG’s affairs, in addition to its own affairs, including satisfying outstanding legacy obligations, liquidating assets and administering CLCA’s defence in the Castor litigation. In conjunction with OpCo, 451 and 4519931 have overseen the continued wind up of CLCA’s affairs. The sole shareholders of 451 and 4519931 are two former CLCA partners. 451 and 4519931 have no assets or interests aside from their partnership interests in CLCA.

Castor Holdings litigation

[10] Commencing in 1993, 96 plaintiffs commenced negligence actions against CLCA and 311 of its individual partners claiming approximately \$1 billion in damages. The claims arose from financial statements prepared by Castor and audited by CLCA, as well as certain share

valuation letters and certificates for “legal for life” opinions. The claims are for losses relating to investments in or loans made to Castor in the period 1988 to 1991. A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

[11] Fifty-six claims have either been settled or discontinued. Currently, with interest, the plaintiffs in the Castor litigation collectively claim in excess of \$1.5 billion.

[12] Due to the commonality of the negligence issues raised in the actions, it was decided that a single case, brought by Peter Widdrington claiming damages in the amount of \$2,672,960, would proceed to trial and all other actions in the Castor litigation would be suspended pending the outcome of the Widdrington trial. All plaintiffs in the Castor litigation were given status in the Widdrington trial on the issues common to the various claims and the determination regarding common issues, including the issues of negligence and applicable law, was to be binding in all other cases.

[13] The first trial in the Widdrington action commenced in September 1998, but ultimately was aborted in 2006 due to the presiding judge’s illness and subsequent retirement. The new trial commenced in January 2008 before Madam Justice St. Pierre. A decision was rendered in April 2011 in which she held that Castor’s audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to Castor during that period. She noted that the overwhelming majority of CLCA’s partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.

[14] The decision in the Widdrington action was appealed to the Quebec Court of Appeal which on the common issues largely upheld the lower court’s judgment. The only common issue that was overturned was the nature of the defendant partners’ liability. The Quebec Court of Appeal held that under Quebec law, the defendant partners were severally liable. As such, each individual defendant partner is potentially and contingently responsible for his or her several

share of the damages suffered by each plaintiff in each action in the Castor litigation for the period that he or she was a partner in the years of the negligence.

[15] On January 9, 2014, the defendants' application for leave to appeal the Widdrington decision to the Supreme Court of Canada was dismissed.

[16] The Widdrington action has resulted in a judgment in the amount of \$4,978,897.51, inclusive of interest, a cost award in the amount of \$15,896,297.26 plus interest, a special fee cost award in the amount of \$2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.

[17] There remain 26 separate actions representing 40 claims that have not yet been tried. Including interest, the remaining plaintiffs now claim more than \$1.5 billion in damages. Issues of causation, reliance, contributory negligence and damages are involved in them.

[18] The Castor Litigation has given rise to additional related litigation:

- (a) Castor's trustee in bankruptcy has challenged the transfer in 1998 of substantially all of the assets used in CLCA's business to PwC under the provisions of Quebec's bulk sales legislation. As part of the PwC transaction, CLCA, OpCo and CLCG agreed to indemnify PwC from any losses that it may suffer arising from any failure on the part of CLCA, OpCo or CLCG to comply with the requirements of any bulk sales legislation applicable to the PwC transaction. In the event that PwC suffers any loss arising from the bulk sales action, it has the right to assert an indemnity claim against CLCA, OpCo and CLCG.
- (b) Certain of the plaintiffs have brought an action against 51 insurers of CLCA. They seek a declaration that the policies issued by the insurers are subject to Quebec law. The action would determine whether the insurance coverage is

costs-inclusive (i.e. defence costs and other expenses are counted towards the total insurance coverage) or costs-in-addition (i.e. amounts paid for the defence of claims do not erode the policy limits). The insurers assert that any insurance coverage is costs-inclusive and has been exhausted. If the insurers succeed, there will be no more insurance to cover claims. If the insurers do not succeed and the insurance policies are deemed to be costs-in-addition, the insurers may assert claims against CLCA for further premiums resulting from the more extensive coverage.

- (c) The claim against the insurers was set to proceed to trial in mid-January 2015 for approximately six months. CLCA is participating in the litigation as a mis-en-cause and it has all the rights of a defendant to contest the action and is bound by the result. As a result of the stay in the Initial Order, the trial has been put off.
- (d) There have been eight actions brought in the Quebec Superior Court challenging transactions undertaken by certain partners and parties related to them (typically a spouse) (the “Paulian Actions”).
- (e) There is a pending appeal to the Quebec Court of Appeal involving an order authorizing the examination after judgment in the Widdrington action of Mr. David W. Smith.

[19] The next trial to proceed against CLCA and the individual partners will be in respect of claims made by three German banks. It is not expected to start until at the least the fall of 2015 and a final determination is unlikely until 2017 at the earliest, with any appeals taking longer. It is anticipated that the next trial after the three German banks trial will be in respect of Chrysler’s claim. Mr. Woods, who acts for Chrysler, anticipates that it will not start until 2017 with a trial decision perhaps being given in 2019 or 2020, with any appeals taking longer. The remaining claims will not proceed until after the Chrysler trial.

[20] The fees incurred by OpCo and CLCA in the defence of the Widdrington action are already in excess of \$70 million. The total spent by all parties already amounts to at least \$150 million. There is evidence before me of various judges in Quebec being critical of the way in which the defence of the Widdrington action has been conducted in a “scorched earth” manner.

Individual partner defendants

[21] Of the original 311 defendant partners, twenty-seven are now deceased. Over one hundred and fifty are over sixty-five years of age, and sixty-five more will reach sixty-five years of age within five years. There is a dispute about the number of defendant partners who were partners of CLCA at the material time. CLCA believes that twenty-six were wrongly named in the Castor litigation (and most have now been removed), a further three were named in actions that were subsequently discontinued, some were partners for only a portion of the 1988-1991 period and some were named in certain actions but not others. Six of the defendant partners have already made assignments in bankruptcy.

Analysis

(i) Applicability of the CCAA

[22] Section 3(1) of the CCAA provides that it applies to a debtor company where the total claims against the debtor company exceed \$5 million. By virtue of section 2(1)(a), a debtor company includes a company that is insolvent. Chrysler contends that the applicant has not established that it is insolvent.

[23] The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define “insolvent”, the definition of “insolvent person” under the *Bankruptcy and Insolvency Act* is commonly referred to for guidance although the BIA definition is given an expanded meaning under the CCAA. See Holden, Morawetz & Sarra, *the 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell) at N§12 and *Re Stelco Inc.* (2004), 48

C.B.R. (4th) 299 (per Farley J.) ; leave to appeal to the C of A refused 2004 CarswellOnt 2936 (C.A.).

[24] The BIA defines “insolvent person” as follows:

“insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[25] The applicant submits that it is insolvent under all of these tests.

[26] The applicant 451 is a debtor company. It is a partner of CLCA and is liable as a principal for the partnership’s debts incurred while it is a partner.

[27] At present, CLCA’s outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately \$6.25 million (the “Pre-71 Entitlements”); (ii) \$16,026,189 payable to OpCo on account of a loan advanced by OpCo on October 17, 2011 to allow CLCA to pay certain defence costs relating to the Castor litigation; (iii) the Widdrington costs award in the amount of \$18,783,761.66, inclusive of interest as at December 1, 2014, which became due and payable to the plaintiff’s counsel on November 27, 2014; (iv) the special fee in the amount of \$2,675,000, inclusive of interest as at December 1, 2014, awarded to the plaintiff’s counsel in the Widdrington action; and (v) contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately \$1.5 billion.

[28] The only asset of the applicant 451 on its balance sheet is its investment of \$100 in CLCA. The applicant is a partner in CLCA which in turn is a partner in OpCo. At the time of the granting of the Initial Order, Ernst & Young Inc., the proposed Monitor, stated in its report that the applicant was insolvent based on its review of the financial affairs of the applicant, CLCA and OpCo.

[29] Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some \$39 million in realizable assets against liabilities of some \$21 million, leaving some \$18 million in what he said were liquid assets. Therefore he concluded that these assets of \$18 million are available to take care of the liabilities of 451.

[30] I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out amounts, one of some \$6.5 million owing to pre-1971 retired partners, and one of some \$16 million owing by CLCA to OpCo for defence costs funded by OpCo. He did not consider the contingent claims against the \$6.5 million under the indemnity provided to PWC, nor did he consider that the \$16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.

[31] This analysis also ignored the contingent \$1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Re Stelco, supra*, Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account. See also *Re Muscletech Research & Development Inc.* (2006), 19 C.B.R. (5th) 54 (per Farley J.).

[32] It is obvious in this case that if the litigation continues, the defence costs for which the applicant 451 will have liability alone will continue and will more than eat up whatever cash OpCo may have. As well, the contingent liabilities of CLCA in the remaining \$1.5 billion in

claims cannot be ignored just because CLCA has entered defences in all of them. The negligence of CLCA has been established for all of these remaining cases in the Widdrington test case. The term sheet provides that the claims of the German and Canadian banks, approximately \$720 million in total, and the claim of the Trustee of CLCA of approximately \$108 million, will be accepted for voting and distribution purposes in a plan of arrangement. While there is no evidence before me at this stage what has led to the decision of CLCA and its former partners to now accept these claims, I can only conclude that in the circumstances it was considered by these defendants that there was exceptional risk in the actions succeeding. I hesitate to say a great deal about this as the agreement in the term sheet to accept these claims for voting and distribution purposes will no doubt be the subject of further debate in these proceedings at the appropriate time.

[33] As stated, the balance sheet of the applicant 451 lists as its sole asset its investment of \$100 in CLCA. The notes to the financial statements state that CLCA was indebted to OpCo at the time, being June 30, 2014, for approximately \$16 million and that its only asset available to satisfy that liability was its investment in OpCo on which it was highly likely that there would be no recovery. As a result 451 would not have assets to support its liabilities to OpCo.

[34] For this reason, as well as the contingent risks of liability of CLCA in the remaining claims of \$1.5 billion, it is highly likely that the \$100 investment of the applicant 451 in CLCA is worthless and unable to fund the current and future obligations of the applicant caused by the CLCA litigation.

[35] I accept the conclusion of Ernst & Young Inc. that the applicant 451 is insolvent. I find that the applicant has established its insolvency at the time of the commencement of this CCAA proceeding.

(ii) Should an Initial Order be made and if so should it extend to CLCA?

[36] The applicant moved for a stay in its favour and moved as well to extend the stay to CLCA and all of the outstanding Castor litigation. I granted that relief in the Initial Order. Chrysler contends that there should be no stay of any kind. It has not expressly argued that if a stay is granted against the applicant it should not be extended to CLCA, but the tenor of its arguments would encompass that.

[37] I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Re Prizm Income Fund* (2011), 75 C.B.R. (5th) 213 per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 and has been followed in several cases, including *Canwest Publishing Inc.* (2010) 63 C.B.R. (5th) 115 per Pepall J. (as she then was) and *Re Calpine Energy Canada Ltd.* (2006), 19 C.B.R. (5th) 187 per Romaine J.

[38] The applicant 451's sole asset is its partnership interest in the CLCA partnership and its liabilities are derived solely from that interest. The affairs of the applicant and CLCA are clearly intertwined. Not extending the stay to CLCA and the Castor litigation would significantly impair the effectiveness of the stay in respect of 451. It would in fact denude it of any force at all as the litigation costs would mount and it would in all likelihood destroy any ability to achieve a global settlement of the litigation. CLCA is a necessary party to achieve a resolution of the outstanding litigation, and significant contributions from its interest in OpCo and from its former partners are anticipated under the term sheet in exchange for releases to be provided to them.

[39] Chrysler relies on the principle that if the technical requirements for a CCAA application are met, there is discretion in a court to deny the application, and contends that for several

reasons the equities in this case require the application to be met. It says that there is no business being carried on by the applicant or by CLCA and that there is no need for a CCAA proceeding to effect a sale of any assets as a going concern. It says there will be no restructuring of a business.

[40] Cases under the CCAA have progressed since the earlier cases such as *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 which expressed the purpose of the CCAA to be to permit insolvent companies to emerge and continue in business. The CCAA is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 at para. 33 (per Brown J. as he then was). There are numerous cases in which CCAA proceedings were permitted without any business being conducted.

[41] To cite a few, in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 54 the applicants sought relief under the CCAA principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the CCAA application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Re)*, 2013 QCCS 3777 arising out of the Lac-Mégant train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the CCAA proceedings. The CCAA proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp. (Re)* 2011 ONSC 7701 (Comm. List) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

[42] Chrysler contends, as stated in its factum, that the pith and substance of this case is not about the rescue of a business; it is to shield the former partners of CLCA from their liabilities in a manner that should not be approved by this court. Chrysler refers to several statements by judges beginning in 2006 in the Castor litigation who have been critical of the way in which the Widdrington test case has been defended, using such phrases as “a procedural war of attrition” and “scorched earth” strategies. Chrysler contends that now that the insurance proceeds have run out and the former partners face the prospect of bearing the cost of litigation which that plaintiffs

have had to bear throughout the 22-year war of attrition, the former partners have convinced the German and Canadian banks to agree to the compromise set out in the term sheet. To grant them relief now would, it is contended, reward their improper conduct.

[43] Chrysler refers to a recent decision in Alberta, *Alexis Paragon Limited Partnership (Re)*, 2014 ABQB 65 in which a CCAA application was denied and a receiver appointed at the request of its first secured creditor. In that case Justice Thomas referred to a statement of Justice Romaine in *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 ABQB 432 in which she stated that an applicant had to establish that it has acted and is acting in good faith and with due diligence. Justice Thomas referred to past failures of the applicant to act with due diligence in resolving its financial issues and on that ground denied the CCAA application. Chrysler likens that to the manner in which the Widdrington test case was defended by CLCA.

[44] I am not entirely sure what Justice Romaine precisely had in mind in referring to the need for an applicant to establish that “it has acted and is acting with good faith and with due diligence” but I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection.

[45] I do understand that need for an applicant to act in the CCAA process with due diligence and good faith, but I would be reluctant to lay down any fixed rule as to how an applicant’s actions prior to the CCAA application should be considered. I agree with the statement of Farley J. in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 57 that it is the good faith of an applicant in the CCAA proceedings that is the issue:

Allegations ... of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

[46] There is no issue as to the good faith of the applicant in this CCAA proceeding. I would not set aside the Initial Order and dismiss the application on the basis of the defence tactics in the Widdrington test case.

[47] The Castor litigation has embroiled CLCA and the individual partners for over 20 years. If the litigation is not settled, it will take many more years. Chrysler concedes that it likely will take at least until 2020 for the trial process on its claim to play out and then several more years for the appellate process to take its course. Other claims will follow the Chrysler claim. The costs have been enormous and will continue to escalate.

[48] OpCo has dedicated all of its resources to the defence of the Castor litigation and it will continue to do so. OpCo has ceased distributions to its partners, including CLCA, in order to preserve funds for the purpose of funding the defence of the litigation. If the Castor litigation continues, further legal and other costs will be incurred by OpCo and judgments may be rendered against CLCA and its partners. If so, those costs and judgments will have to be paid by OpCo through advances from OpCo to CLCA. Since CLCA has no sources of revenue or cash inflow other than OpCo, the liabilities of CLCA, and therefore the applicant, will only increase.

[49] If the litigation is not settled, CLCA's only option will be to continue in its defence of the various actions until either it has completely depleted its current assets (thereby exposing the defendant partners to future capital calls), or a satisfactory settlement or judicial determination has been reached. If no such settlement or final determination is achieved, the cost of the defence of the actions could fall to the defendant partners in their personal capacities. If a resolution cannot be reached, the amount that will be available for settlement will continue to decrease due to ongoing legal costs and other factors while at the same time, the damages claimed by the plaintiffs will continue to increase due to accruing interest. With the

commencement of further trials, the rate of decrease of assets by funding legal costs will accelerate.

[50] After a final determination had been reached on the merits in the Widdrington action, CLCA's board of directors created a committee comprised of certain of its members to consider the next steps in dealing with CLCA's affairs given that, with the passage of time, the defendant partners may ultimately be liable in respect of negligence arising from the Castor audits without a settlement.

[51] Over the course of several months, the committee and the defendant partners evaluated many possible settlement structures and alternatives and after conferring with counsel for various plaintiffs in the Castor litigation, the parties agreed to participate in a further mediation. Multiple attempts had earlier been made to mediate a settlement. Most recently, over the course of four weeks in September and October 2014, the parties attended mediation sessions, both plenary and individually. Chrysler participated in the mediation.

[52] Although a settlement could not be reached, the applicant and others supporting the applicant believe that significant progress was achieved in the mediation. In light of this momentum, the applicant and CLCA continued settlement discussions with certain plaintiffs willing to engage in negotiations. These discussions culminated with the execution of a term sheet outlining a plan of arrangement under the CCAA that could achieve a global resolution to the outstanding litigation.

[53] A CCAA proceeding will permit the applicant and its stakeholders a means of attempting to arrive at a global settlement of all claims. If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation.

[54] 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 is also intended to provide a structured environment for the negotiation

of compromises between a debtor company and its creditors for the benefit of both. 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. Without a stay, 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 would succeed. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 per Farley J.

[55] In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a possibility is the case of *Re Montreal, Maine & Atlantique Canada Co.* which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc., Re.*

[56] In this case, the term sheet that the applicant anticipates will form the basis of a proposed Plan includes, among other elements:

- (a) the monetization of all assets of CLCA and its partnership OpCo to maximize the net proceeds available to fund the plan, including all applicable insurance entitlements that are payable or may become payable, which proceeds will be available to satisfy the determined or agreed claims of valid creditors;
- (b) contributions from a significant majority of the defendant partners;
- (c) contributions from non-defendant partners of CLCA and CLCG exposed under the PwC indemnity;
- (d) contributions from CLCA's insurers and other defendants in the outstanding litigation;
- (e) the appointment of Ernst & Young Inc. as Monitor to oversee the implementation of the plan, including to assist with the realization and monetization of assets and

to oversee (i) the capital calls to be made upon the defendant partners, (ii) a claims process, and (iii) the distribution of the aggregate proceeds in accordance with the plan; and

- (f) provision to all parties who contribute amounts under the plan, of a court-approved full and final release from and bar order against any and all claims, both present and future, of any kind or nature arising from or in any way related to Castor.

[57] This term sheet is supported by the overwhelming number of creditors, including 13 German banks, 8 Canadian banks, over 100 creditors of Castor represented by the Trustee in bankruptcy of Castor and the Widdrington estate. It is also supported by the insurers. The plaintiffs other than Chrysler, representing approximately 71.2% of the face value of contingent claims asserted in the outstanding litigation against CLCA, either support, do not oppose or take no position in respect of the granting of the Initial Order. Chrysler represents approximately 28.8% of the face value of the claims.

[58] Counsel for the German and Canadian banks points out that it has been counsel to them in the Castor claims and was counsel for the Widdrington estate in its successful action. The German and Canadian banks in their factum agree that during the course of the outstanding litigation over the past 20 years, they have been subjected to a “scorched earth”, “war of attrition” litigation strategy adopted by CLCA and its former legal counsel. Where they seriously part company with Chrysler is that they vigorously disagree that such historical misconduct should prevent the CLCA group from using the CCAA to try to achieve the proposed global settlement with their creditors in order to finally put an end to this war of attrition and to enable all valid creditors to finally receive some measure of recovery for their losses.

[59] It is argued by the banks and others that if Chrysler is successful in defeating the CCAA proceedings, the consequence would be to punish all remaining Castor plaintiffs and to deprive them of the opportunity of arriving at a global settlement, thus exacerbating the prejudice which they have already suffered. Chrysler, as only one creditor of the CLCA group, is seeking to

impose its will on all other creditors by attempting to prevent them from voting on the proposed Plan; essentially, the tyranny of the minority over the majority. I think the banks have a point. The court's primary concern under the CCAA must be for the debtor and all of its creditors. While it is understandable that an individual creditor may seek to obtain as much leverage as possible to enhance its negotiating position, the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor. See *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266, at para 38, per O'Brien J.A.

[60] The German and Canadian banks deny that their resolve has finally been broken by the CLCA in its defence of the Castor litigation. On the contrary, they state a belief that due to litigation successes achieved to date, the time is now ripe to seek to resolve the outstanding litigation and to prevent any further dissipation of the assets of those stakeholders funding the global settlement. Their counsel expressed their believe that if the litigation continues as suggested by Chrysler, the former partners will likely end up bankrupt and unable to put in to the plan what is now proposed by them. They see a change in the attitude of CLCA by the appointment of a new committee of partners to oversee this application and the appointment of new CCAA counsel in whom they perceive an attitude to come to a resolution. They see CLCA as now acting in good faith.

[61] Whether the banks are correct in their judgments and whether they will succeed in this attempt remains to be seen, but they should not be prevented from trying. I see no prejudice to Chrysler. Chrysler's contingent claim is not scheduled to be tried until 2017 at the earliest, and it will likely still proceed to trial as scheduled if a global resolution cannot be achieved in the course of this CCAA proceeding. Further, since Chrysler has not obtained a judgment or settlement in respect of its contingent claim, the Initial Order has not stayed any immediate right available to Chrysler. The parties next scheduled to proceed to trial in the outstanding litigation who have appeared, the insurers and then the three German banks, which are arguably the most affected by the issuance of a stay of proceedings, have indicated their support for this CCAA proceeding and Initial Order, including the stay of proceedings.

[62] What exactly Chrysler seeks in preventing this CCAA application from proceeding is not clear. It is hard to think that it wants another 10 years of hard fought litigation before its claim is finally dealt with. During argument, Mr. Vauclair did say that Chrysler participated in the unsuccessful mediation and that it has been willing to negotiate. That remains to be seen, but this CCAA process will give it that opportunity.

[63] Chrysler raises issues with the term sheet, including the provision that the claims of the German and Canadian banks and the Trustee of Castor will be accepted but that the Chrysler claim will be determined in a claims process. Chrysler raises issues regarding the proposed claims process and whether the individual CLCA former partners should be required to disclose all of their assets. These issues are premature and can be dealt with later in the proceedings as required.

[64] Mr. Kent, who represents a number of former CLCA partners, said in argument that the situation cries out for settlement and that there are many victims other than the creditors, namely the vast majority of the former CLCA partners throughout Canada who had nothing to do with the actions of the few who were engaged in the Castor audit. The trial judge noted that the main CLCA partner who was complicit in the Castor Ponzi scheme hid from his partners his relationships with the perpetrators of the scheme.

[65] Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

1 Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

[66] At the conclusion of her decision, she stated:

3637 Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to

remember that litigating all the other files is only one of multiple options. Now that the litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

[67] In my view the CCAA is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the CCAA application is dismissed.

(iii) Should the stay be extended to the insurers?

[68] The applicant 451 moves as well to extend the stay to the insurers of CLCA. This is supported by the insurers. The trial against the insurers was scheduled to commence on January 12, 2015 but after the Initial Order was made, it was adjourned pending the outcome of the motion by Chrysler to set aside the Initial Order. Chrysler has made no argument that if the Initial Order is permitted to stand that it should be amended to remove the stay of the action against the insurers.

[69] Under the term sheet intended to form the basis of a plan to be proposed by the applicant, the insurers have agreed to contribute a substantial amount towards a global settlement. It could not be expected that they would be prepared to do so if the litigation were permitted to proceed against them with all of the costs and risks associated with that litigation. Moreover, it could well have an effect on the other stakeholders who are prepared to contribute towards a settlement.

[70] A stay is in the inherent jurisdiction of a court if it is in the interests of justice to do so. While many third party stays have been in favour of partners to applicant corporations, the principle is not limited to that situation. It could not be as the interests of justice will vary depending on the particulars of any case.

[71] In *Re Montreal, Maine & Atlantique Canada Co.*, Castonguay, J.C.S. stayed litigation against the insurers of the railway. In doing so, he referred to the exceptional circumstances and the multiplicity of proceedings already instituted and concluded it was in the interests of sound administration of justice to stay the proceedings, stating:

En raison des circonstances exceptionnelles de la présente affaire et devant la multiplicité des recours déjà intentés et de ceux qui le seront sous peu, il est dans l'intérêt d'une saine administration de la justice d'accorder cette demande de MMA et d'étendre la suspension des recours à XL.

[72] In my view, it is in the interests of justice that the stay of proceedings extend to the action against the insurers.

(iv) Should a creditors' committee be ordered and its fees paid by CLCA?

[73] The Initial Order provides for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the Trustee in bankruptcy of Castor. It also provides that CLCA shall be entitled to pay the reasonable fees and disbursements of legal counsel to the creditors' committee. Chrysler opposes these provisions.

[74] The essential argument of Chrysler is that a creditors' committee is not necessary as the same law firm represents all of the banks and the Trustee of Castor. Counsel for the banks and the Trustee state that the German bank group consists of 13 distinct financial institutions and the Canadian bank group consists of 8 distinct financial institutions and that there is no evidence in the record to the effect that their interests do not diverge on material issues. As for the Castor Trustee, it represents the interests of more than 100 creditors of Castor, including Chrysler, the German and Canadian bank groups, and various other creditors. They says that a creditors' committee brings order and allows for effective communication with all creditors.

[75] CCAA courts routinely recognize and accept *ad hoc* creditors' committees. It is common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a CCAA filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the CCAA proceedings. See Robert J. Chadwick & Derek R. Bulas, "*Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World*", in Janis P. Sarra, ed, *Annual Review of Insolvency Law 2011* (Toronto:Thomson Carswell) 119 at pp 120-121.

[76] Chrysler refers to the fact that it is not to be a member of the creditors' committee. It does not ask to be one. Mr. Meland, counsel for the two bank groups and for the Trustee of Castor said during argument that they have no objection if Chrysler wants to join the committee. If Chrysler wished to join the committee, however, it would need to be considered as to whether antagonism, if any, with other members would rob the committee of any benefit.

[77] Chrysler also takes exception to what it says is a faulty claims process proposed in the term sheet involving the creditors' committee. Whether Chrysler is right or not in its concern, that would not be a reason to deny the existence of the committee but rather would be a matter for discussion when a proposed claims process came before the court for approval.

[78] The creditors' committee in this case is the result of an intensely negotiated term sheet that forms the foundation of a plan. The creditors' committee was involved in negotiating the term sheet. Altering the terms of the term sheet by removing the creditors' committee could frustrate the applicant's ability to develop a viable plan and could jeopardize the existing support from the majority of claimants. I would not accede to Chrysler's request to remove the Creditors' committee.

[79] So far as the costs of the committee are concerned, I see this as mainly a final *cri de couer* from Chrysler. The costs in relation to the amounts at stake will no doubt be relatively minimal. Chrysler says it is galling to see it having to pay 28% (the size of its claim relative to the other claims) to a committee that it thinks will work against its interests. Whether the committee will

work against its interests is unknown. I would note that it is not yet Chrysler's money, but CLCA's. If there is no successful outcome to the CCAA process, the costs of the committee will have been borne by CLCA. If the plan is successful on its present terms, there will be \$220 million available to pay claims, none of which will have come from Chrysler. I would not change the Initial Order and deny the right of CLCA to pay the costs of the creditors' committee.

[80] Finally, Chrysler asks that if the costs are permitted to be paid by CLCA, a special detailed budget should be made and provided to Chrysler along with the amounts actually paid. I see no need for any particular order. The budget for these fees is and will be continued to be contained in the cash flow forecast provided by the Monitor and comparisons of actual to budget will be provided by the Monitor in the future in the normal course.

Conclusion

[81] The motion of Chrysler is dismissed. The terms of the Initial Order are continued.

Newbould J.

Date: January 12, 2015

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lemare Holdings Ltd. (Re)*,
2012 BCSC 1591

Date: 20121026
Docket: S124409
Registry: Vancouver

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

And:

**In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57, As Amended**

And:

**In the Matter of a Plan of Compromise or Arrangement of
Lemare Holdings Ltd., Lemare Lake Logging Ltd., Lone Tree
Logging Ltd., C.&E. Roadbuilders Ltd., Coast Dryland Services
Ltd., Dominion Log Sort Ltd., and Central Coast Industries Ltd.**

Petitioners

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Petitioners

on October 16, 2012:

on October 18 and 19, 2012:

K. Denhoff and D. Dahlke

M. Buttery and L. Williams

Counsel for Her Majesty The Queen in Right
of the Province of British Columbia

on October 16, 2012:

on October 18 and 19, 2012:

R. Payne and M. Weintraub

D. Hatter and S. Davis

Counsel for the Toronto-Dominion Bank and
TD Equipment Finance Canada Inc.:

R. Morse

Counsel for the Monitor:

M. Verbrugge

Place and Date of Hearing:

Vancouver, B.C.
October 16, 18 and 19, 2012

Place and Date of Judgment:

Vancouver, B.C.
October 26, 2012

INTRODUCTION

[1] On June 21, 2012, on the *ex parte* application of the petitioners, I granted an Initial Order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the CCAA) granting relief that included a stay of proceedings until the comeback hearing, which I set for July 20, 2012, and appointing Alvarez & Marsal Canada Inc. as monitor on behalf of the Court.

[2] On July 20, 2012, the petitioners sought an extension of the stay, and the pronouncement of a claims process order (CPO). Counsel for Her Majesty The Queen in Right of the Province of British Columbia (the Province) advised that they wished to apply to set aside the initial order, but were not ready to proceed. They asked for an adjournment. Unhappy with their delay, I denied the adjournment, but as things turned out, that is what happened anyway. What was understood at the time was that the Province and the petitioners were to discuss a means of dealing with the Province's claim within the CCAA process. They were unable to come to an agreement.

[3] On September 6, 2012, we reconvened to hear the Province's application, but the petitioners objected to the admissibility of certain evidence that the Province sought to adduce. Counsel for the Province argued that he was not in a position to deal with that objection notwithstanding that the petitioners had raised their concern as soon as the affidavits in question were delivered. Still unhappy with the delay, I nevertheless granted the adjournment given the basis of the objection, and I directed the petitioners to put their objection into the form of an application.

[4] On October 16, 2012, I heard the petitioners' application to exclude evidence. I gave my ruling at the end of the day with reasons to follow. On October 18 and 19, 2012, nearly four months after my Initial Order, I heard the Province's application for an order setting that order aside, or alternatively terminating the stay. I also heard the petitioners' application for a further stay and a claims process order.

[5] What follows are my reasons on all three applications.

BACKGROUND

[6] The petitioners, whom I shall describe collectively as Lemare, constitute an integrated forestry business located on northern Vancouver Island, where they are a major employer.

[7] For some considerable time, Lemare has been at loggerheads with the Province, particularly what is now styled the Ministry of Forests, Lands and Natural Resource Operations (MOF), over stumpage that the Province claims Lemare owes and has not paid due to wilful under- and non-reporting. Nothing in these reasons addresses the merits of that claim.

[8] Various aspects of that dispute, other than its merits, have occupied a significant amount of Court time over the last several years, the circumstances of which have given rise to considerable acrimony between the parties. On three separate occasions, this Court has quashed warrants obtained by the Province pursuant to which, variously, logs, documents, items, computer disks, drives and data files and other information were seized from Lemare, and declared the seizures unlawful. I did so myself in March of 2009. So did Mr. Justice Ehrcke in July of 2011 and Mr. Justice Affleck in February of 2012¹. Mr. Justice Affleck also struck out a civil claim alleging fraud that the Province had commenced against Lemare, on the basis that it was an abuse of process.

[9] At this point, there is not much trust left between the parties. Lemare feels persecuted. The Province feels cheated.

[10] In the meantime, Lemare went through a successful internal reorganization involving generational change that contributed to the viability of its core business. One cloud on the horizon was, and remains, a potential liability on the guarantee of a \$10 million loan used to fund a Retirement Compensation Arrangements Trust (RCA trust) for the former principal shareholder.

[11] Then, in the latter part of May 2012, the horizon clouded up considerably. Lemare received a proposal letter from Jason Kruger CA, Audit Supervisor with the

Forest Revenue Audit Program (FRAP) of the Income Taxation Branch, Ministry of Finance.

[12] This 10-page letter, dated May 23, 2012, supported by some 177 pages of documentation, proposed to adjust the total amount of stumpage payable by Lemare. A second proposal letter dated June 14, 2012, also supported by voluminous documentation, proposed the assessment of a further amount. Both letters proposed, in addition, the assessment of a penalty of 100% of the amounts said to be owing.

[13] The sum of the two proposed assessments against Lemare was \$4,996,837, plus 100% penalty, plus interest, yielding a total in excess of \$12,000,000.

[14] In these circumstances, Lemare appeared before me on June 21, 2012, without notice to any party other than its current operating lender, the Toronto-Dominion Bank (TD), asserting that it was insolvent within the meaning of the CCAA and that it required the Act's protection in order to facilitate a restructuring of its business enterprise and the continuation of its ability to carry on business. I granted the order.

THE APPLICATION TO EXCLUDE EVIDENCE

[15] The Province's application to set aside the Initial Order was based, as we shall see, principally on the argument that Lemare was not insolvent as at June 21, 2012, so that I had no jurisdiction under the CCAA to make the order.

[16] The Province also sought to rely on a number of alternative positions. Among them was the assertion that Lemare had not acted in good faith in its dealings with the Province. The Province filed affidavit material that included two paragraphs and a number of exhibits upon which it wished to rely in support of that assertion. Lemare advised the Province of its objection to the materials in question as soon as they were given copies of the affidavits, and before the affidavits were filed. The Province declined Lemare's invitation to withdraw the assertions.

[17] At the hearing on September 6, 2012, I, too, questioned the Province about withdrawing the two paragraphs in question on the ground that they appeared to be of marginal relevance given the principal basis of the Province's application, which was jurisdiction. The Province, however, wished to proceed on the full record. Hence the adjournment.

[18] The problem raised by Lemare was this. On July 7, 2011, Ehrcke J. quashed three search warrants and ordered the Province to return all items seized and all copies of such items to Lemare within 14 days, that time being intended to give the Province an opportunity to seize the items lawfully as it had indicated it could.

[19] For reasons that are not material, the time was extended until November 18, 2011. As the Province had by then neither re-seized the materials through lawful means nor returned all of them, Lemare returned before Ehrcke J. on March 26, 2012. At that time, Ehrcke J. ordered that his Order of July 7, 2011, be amended by replacing an earlier term with the following:

The [Province] shall not use the information from the items seized or any copies of such items against Lemare in any manner, including, but not limited to, in any Court proceeding, administrative proceeding, audit or assessment, unless the [Province has] obtained that information lawfully.

[20] On February 17, 2012, two representatives of MOF attended at Lemare's office and, pursuant to Ehrcke J.'s order of July 7, 2011, returned five cardboard boxes. At the same time, Mr. Kruger and a colleague from FRAP attended and demanded an inspection of the same five boxes pursuant to sections 142.2 and 142.21(a) of the *Forest Act*, R.S.B.C. 1996, c. 157, asserting that the boxes contained scaling records. Scaling records are among the documents required to be kept by Lemare for audit or inspection, and which a forest revenue official such as Mr. Kruger is entitled to inspect.

[21] Mr. Eric Dutcyvich of Lemare advised Mr. Kruger and his colleague that he required a reasonable amount of time to review the contents of the cardboard boxes to determine whether they contained any items that Lemare was required to produce.

[22] On March 8, 2012, Mr. Kruger and his colleague returned and again demanded to inspect the five boxes that had been returned on February 17. Mr. Dutcyvich asked them on what basis they maintained that the contents of those boxes were subject to inspection. He deposed that Mr. Kruger and his colleague acknowledged they had reviewed the contents of the boxes. The boxes were not turned over for inspection, but a number of other documents were made available.

[23] The impugned paragraphs of Mr. Kruger's affidavit initially read as follows (I ordered the underlined portion to be deleted at the conclusion of the hearing):

25. On February 17, 2012, forest revenue officials attended the offices of Lemare and attempted to conduct an inspection under s. 142.21 of the Forest Act of copied items that had been returned by MFLNR; Lemare refused to permit inspection of the returned items. Attached to my Affidavit as **Exhibit "C"** is a true copy of the February 17, 2012 inspection demand letter delivered to Lemare at the time of the inspection.

26. On March 8, 2012, forest revenue officials again attended the offices of Lemare to perform an inspection of the returned items. Lemare again refused to permit inspection. Attached to my Affidavit as **Exhibit "D"** is a true copy of the March 8, 2012 inspection demand letter delivered to Lemare at the time of the inspection.

[24] Lemare took the position that the entirety of those two paragraphs, together with portions of the inspection demand letters marked as Exhibits "C" and "D", and portions of the two proposal letters annexed to Mr. Kruger's affidavits, were inadmissible as contravening the prohibition ordered by Ehrcke J. on March 26, 2012. The two proposal letters had, of course, already been admitted into evidence in support of Lemare's application for the Initial Order.

[25] Lemare argued that all of the impugned portions were based on knowledge that Mr. Kruger had only because of his review of the unlawfully seized materials, without which he would not have had any basis for believing that they were subject to seizure. Accordingly, Lemare submitted, although Mr. Kruger was certainly in a position to make a demand for inspection, he could not state that Lemare had failed to comply, because he could only assert a failure to comply on the basis of knowledge he was not entitled to have. Instead, he would have to accept whatever answer Lemare gave to the demand.

[26] The Province argued that Mr. Justice Ehrcke's order only prevented its officers from reaching into the box, so to speak, and withdrawing information to use against Lemare. It did not prevent them from knowing that Lemare had information and documents that it ought to have disclosed, yet had failed to do so.

[27] The Province conceded that if it used information from the seized boxes to assert non-compliance on the part of Lemare, then it would run afoul of Ehrcke J.'s order. It pointed out, however, that if Lemare's position was correct, then Lemare would be entitled to lie in response to the demand, and the Province would be powerless to do anything about it even though it knew that Lemare's answer was false.

[28] I confess to finding the situation rather surreal – one, indeed, that would have excited the admiration of Lewis Carroll. The Province, forced to return copies of documents it seized unlawfully, gives them over only to attempt immediately to seize them again pursuant to its *Forest Act* powers. But those powers entitle it to the production only of certain items; in asserting that the boxes contained such items, it seemed to be relying on information it obtained unlawfully. On the other hand, for Lemare to argue that the Province is accordingly obliged to accept Lemare's denials on their face though knowing them to be untrue, was hardly reassuring.

[29] The fact nevertheless remains that a real dispute exists between the parties as to what Lemare is obliged to produce and what it is not. That dispute should be resolved on bases that do not include unlawful seizure.

[30] In the circumstances, I concluded that the underlined portions in the two paragraphs in Mr. Kruger's affidavit, as set out above, did indeed depend upon the use of information from the unlawfully seized boxes, and should therefore be redacted. Although the Province submitted that Mr. Kruger had other sources of information on which to base his demand, I did not find that argument persuasive given the affidavit evidence both of Mr. Kruger and Mr. Dutcyvich.

[31] Mr. Kruger was certainly entitled to tell me that forest revenue officials attended on February 17 and March 8, 2012, to perform an inspection. I expect he could also have noted that Lemare produced nothing in response to the demand, although it was too late to redraft the paragraphs, and any revision would invite a response. What, in my view, he could not say in the circumstances was that the items he sought to inspect, and which he deposed that Lemare refused to permit him to inspect, were the very items he had just returned. This is because his entitlement to demand to inspect the specific contents of the boxes (as opposed to documents generally) depended upon his knowing their contents. Without that information, Lemare's refusal was of no relevance. Had his affidavit referred generally to a demand to produce documents that the Province sought, rather than the specific contents of the five returned boxes, I would not have found it objectionable.

[32] Although some small portions of both the inspection demand letters and the proposal letters also asserted facts that depended upon knowledge of what was in the boxes of unlawfully seized documents, I ruled them admissible in full. I did so on the basis that they were hearsay documents admitted for the purpose of proving that the Province had issued them, and establishing the positions the Province had taken. The Province did not seek to admit them as proof of the truth of their contents.

THE FOREST ACT SCHEME

[33] Before turning to the two remaining applications, it is helpful to review the applicable provisions of the *Forest Act* under which the Province's claim arises.

[34] The Province submits, and I accept, that the *Forest Act* creates a comprehensive code for the calculation, assessment and collection of stumpage in British Columbia. The payment of stumpage is based on a self-reporting system that is subject to compliance reviews and enforcement through audits and assessments.

[35] The recovery of money required to be paid under the *Forest Act*, including assessed stumpage, is governed by Part 11, and provides (section 130(1)(b)) that the amount will bear interest, in the case of an assessment for stumpage, from the

date determined by the commissioner to be the date that the stumpage would have been due, and (section 130(1)(c)) may be recovered in Court as a debt due to the government.

[36] The assessment of stumpage falls under Part 11.1 of the *Forest Act*. Under section 142.51, if it appears to the commissioner, as is alleged here, that some or all of the Crown timber harvested was not reported in the scale, or was reported incorrectly, then the commissioner may make an estimate of the total amount of stumpage owing, and may assess the harvester or persons dealing in the timber harvested for the amount estimated. She may then assess the amount of interest payable on the amount assessed.

[37] Under section 142.61, the commissioner may assess a penalty that does not exceed 100% of the assessment if she is satisfied that the assessment is based upon the person's wilful contravention of the Act, or wilful provision of a false or deceptive statement. That was what was proposed here. Where the commissioner is satisfied that an assessment is based upon the person's contravention of the Act that is not wilful, she may assess a penalty that does not exceed 25% of the assessment.

[38] The practice of the FRAP, which carries out the assessment, is to provide foresters with an audit proposal letter in advance of the assessment, to which the forester is allowed 30 days to respond. The assessment will then follow. Thus, in this case, the Province provided the proposal letters of May 23 and June 14, 2012. No formal assessments were issued because of the intervention of the Initial Order's stay of proceedings.

[39] Once an assessment is issued, then by section 130(1)(d), the amount stated to be owing constitutes a lien in favour of the government against assets and chattels of the person owing the money, and has priority over all unsecured claims.

[40] That priority has not accrued to the Province because the stay prevented the proposed claim from becoming an assessment. Both Lemare and TD are anxious

that this remain the *status quo* in order to avoid the Province getting a leg up over other unsecured creditors.

[41] By section 142.81, evidence that an assessment has been made is proof, in the absence of evidence to the contrary, that the amount assessed is due and owing, and the onus of proving otherwise is on the person liable to pay the amount assessed. The Province places great emphasis on the advantages it stands to gain from this section, particularly given its belief that Lemare has been less than forthright in its disclosure. Moreover, unless varied on appeal, an amount assessed is valid and binding despite any error, defect or omission in the estimate or assessment or in procedure.

[42] Section 142.9 provides the person assessed the right to appeal either the assessment or any penalty to the Revenue Minister. An appeal does not operate as a stay. Under section 142.91, the Revenue Minister's decision may be appealed to this Court by way of petition, and the *Supreme Court Civil Rules* relating to petition proceedings apply. The appeal is a hearing *de novo*. Rule 18-3, governing appeals, does not apply.

[43] With this context in mind, I turn to consider the Province's application.

THE APPLICATION TO SET ASIDE THE INITIAL ORDER

[44] With respect to the Initial Order, the Province raises three issues. The first is whether Lemare met the criteria in subsection 3(1) of the CCAA so as to give the Court jurisdiction to proceed under that Act.

[45] The second issue, raised in the alternative, is whether the Court should decline to exercise its jurisdiction under the CCAA if that jurisdiction exists.

[46] The third is raised in the further alternative: if the Court has and chooses to exercise its CCAA jurisdiction, should it revise the terms of the stay of proceedings in order to permit an assessment to issue under Part 11.1 of the *Forest Act*?

1. Jurisdiction

[47] The Province submits that this Court lacked jurisdiction to make the Initial Order because the CCAA does not apply to the petitioners. The Province relies on subsection 3(1):

3. (1) This Act applies in respect of the debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[48] On the evidence, there is no doubt that the petitioners are affiliated companies, and that the total of claims against them is more than \$5,000,000. The issue, then, is whether they are "debtor companies". The CCAA defines "debtor company" as any company that is "bankrupt or insolvent". As none of the petitioners is bankrupt, the question turns on whether they are insolvent. That word is not defined in the CCAA.

[49] On June 21, 2012, I concluded that the test had been met. Since then, further evidence has been filed including an affidavit from a chartered accountant, Terrence MacDonald, and four reports from the monitor. Mr. MacDonald offers the opinion that it cannot be conclusively determined from the financial statements that were before me in June whether the petitioners are insolvent. It follows that the financial statements do not establish that the petitioners are not insolvent. What in my view did and still does establish that they are insolvent is the totality of the evidence. That view is supported by the monitor who has provided four reports and has raised no suggestion that this is not an appropriate case for relief under the CCAA. On the contrary, the monitor has very much supported the process, and advises that Lemare has set about it in good faith.

[50] The Province argues that I cannot rely on the amounts set out in its proposal letters as these were never crystallized as assessments and penalties. Consequently, the Province submits, they cannot be valued even as contingent claims, and the penalties cannot be taken into account at all because they do not

qualify even as a contingent obligation until the commissioner exercises her discretion to assess them.

[51] In the particular situation before me, I am not persuaded by that argument. These parties have been battling over the issue of stumpage for three years. Their respective positions have become quite clear. The Province's proposals are set out in great detail, together with all of the assumptions upon which they are based, the reasons for the conclusions to which the Province has come, and the facts, assumptions and reasoning for the imposition of penalties. All of this is supported by hundreds of pages of documents annexed to these letters. The penalties are proposed to be assessed at 100% instead of 25% on the basis of Lemare's alleged wilful misconduct. Three years of interaction has yielded no hint of any suggestion that the Province would ever consider softening that position. No such hint emerged from the proceedings before me. An assessment of stumpage and penalties in the amount proposed, on all of the evidence, was not a mere possibility. It was a near certainty.

[52] In these circumstances, the suggestion that the proposed amounts of assessed stumpage and penalties do not constitute a valuation of a claim in the absence of an assessment, and therefore do not constitute contingent claims, does not accord with reality. The valuation of the proposed claims could hardly be clearer.

[53] In this way, I find the situation is distinguishable from that considered by this Court in *Thow (Re)*, 2009 BCSC 1176, where an administrative penalty issued by the B.C. Securities Commission after bankruptcy, based on the bankrupt's prior conduct, was held not to be a claim provable in bankruptcy. Key to that decision was that the penalty could not have been imposed prior to the bankruptcy because at that time the commission had still to conduct an investigation, hold a hearing, make findings and reach a decision. In this case, however, there had been a lengthy investigation, findings had been made and conclusions drawn. All that was necessary to complete the evolution from proposal to assessment was the formality

of issuing it – see, for instance, *Re Harvey (Bankrupt)*, 2004 ABQB 773, and note also *Re Air Canada* (2006), 28 C.B.R. (5th) 317 (Ont. Sup. Ct. J.). Although it is true that Lemare had an opportunity to respond to the proposal, the Province had already heard everything Lemare had to say, and was singularly unimpressed.

[54] Accordingly, I am satisfied that both the proposed assessed stumpage and the proposed penalties qualify as contingent claims.

[55] The question remains as to whether the existence of these contingent claims renders Lemare insolvent. The Province submits that the petitioners do not meet the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA), because at the time of the initial order they were not unable to meet their obligations as they generally became due, and it could not be said that their property if fairly disposed of would not be sufficient to enable payment of all obligations due and accruing due.

[56] Although courts have generally had regard to the BIA definition of "insolvent person" when dealing with insolvency under the CCAA, the modern trend is to take into account the different objectives of the CCAA. These address the interests of a broader group of stakeholders, and include a more comprehensive process to preserve the debtor company as a going concern.

[57] Thus in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 21, the Supreme Court of Canada described the CCAA regime as a flexible, judicially supervised reorganization process that allows for creative and effective decisions. It noted that with reorganizations becoming increasingly complex:

[61] ...CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

...

[70] ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the

remedial purpose of the CCAA— avoiding the social and economic losses resulting from liquidation of an insolvent company.

[58] In *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.); leave to appeal refused: 2004 CarswellOnt 2936 (C.A.), the Court dealt with a submission, like the Province's here, that the Initial Order should be reversed on the ground that Stelco was not a "debtor company" because it was not "insolvent" as defined by the BIA.

[59] Mr. Justice Farley, whose views in this area do not bind me but are entitled to the highest respect, made the following observations, which I have taken the liberty of paraphrasing:

- *On timing:* the usual problem is leaving the application for an Initial Order too late. CCAA should be implemented at a stage prior to the company's death spiral. Thus objections in the reported cases have been based not on an absence of insolvency, but on the proposed plan being doomed to failure as coming too late. [Paras. 13-15]
- *On stakeholders:* these include not only the company and its creditors, but also its employees and their interest in a viable enterprise. Thus there is an emphasis on operational restructuring so that the emerging company will have the benefit of a long-term viable fix, to the advantage of all stakeholders. [Paras. 17-20]
- *On the test for insolvency:* given the time and steps involved in a reorganization, the condition of insolvency perforce requires an expanded meaning under the CCAA. What the debtor must do is meet the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in the context and within the purpose of that legislation. The BIA definition of insolvent person is

acceptable with the caveat that under the first branch (unable to meet obligations as they generally become due), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. Considering the notion of 'insolvent' contextually and purposively, the question is whether, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by Court authorization pursuant to a CCAA order. [Paras. 26 and 40]

[60] There is, of course, no precise and invariable formula. This is not a "cookie cutter" exercise. As Farley J. pointed out, the matter must be decided on the basis of credible evidence and common sense, employing a principled, purposive and contextual approach.

[61] The Province argues that the *Stelco* case is wrongly decided, or in the alternative, that it must be confined to its particular facts which are distinguishable from those before me. I consider it, with respect, to be correctly decided. While the facts are quite different, the principles are not.

[62] As I see this case, given the context of Lemare's operations, including the admittedly highly contingent liability for the RCA trust loan, the Province's proposal letters setting forth a fully articulated and documented claim for over \$12,000,000 that would, once formalized, lead to statutory lien rights, gave rise to a reasonably foreseeable expectation of a looming liquidity crisis that would deprive Lemare of the ability to pay its debts as they generally became due without the benefit of a stay. Thus this Court had jurisdiction. Having regard to the interests of the stakeholders, including the Province, other unsecured creditors, Lemare, its employees, and the North Island economy to which Lemare is such a contributor, the situation cries out

for the protection of the CCAA. To delay action until Lemare had been fatally wounded would have served the interests of no one.

2. Discretion

[63] The careful reader may discern from the preceding paragraph that I do not agree with the Province's alternative submission that if this Court has CCAA jurisdiction it should decline to exercise it.

[64] The Province argued first that I should not accept as credible Lemare's plea of insolvency due to the proposed assessments when Lemare has vigorously contested them. Having found that the assessment of stumpage and penalties in the amount proposed was a near certainty, and given the single-mindedness with which the Province has pursued its claims against Lemare, I do not find this argument persuasive. Lemare is entitled to dispute claims, which is one of the reasons that a CCAA Court normally provides for a claims process.

[65] The Province then argues that there is no pressing need for Lemare to restructure. I disagree, as indicated above. As counsel for TD points out, the prospect of Lemare obtaining financing to deal with its liability is vanishingly small. Moreover, that the *Forest Act* provides Lemare with appeal rights likely to occupy a good deal of time, first to the Minister and then to this Court, does not relieve the pressure, particularly when those appeals do not stay the claims.

[66] The Province submits that its response cannot be known. It may well reduce the claims, or voluntarily stay its claims during the appeal process, or come to some agreement with Lemare about repayment that would relieve these pressures. I do not doubt the sincerity of counsel, but given the history of acrimony between the parties, this is at best speculation. It would be unfair either to expect such accommodation from the Province, or to require Lemare to order its affairs as if it were forthcoming. If the Province should indeed decide to alter its position in a manner that significantly changes Lemare's financial prospects, then that can be taken into account through subsequent applications. The process is a flexible one.

[67] The Province next asserts that since its claim is in connection with the harvesting of Crown timber, a public resource, it would be an injustice and contrary to the public interest to thwart the statutory scheme, particularly the commissioner's entitlement to rely on assumptions and place the onus of proof on Lemare.

[68] The public interest, I think, cuts both ways. The public certainly has an interest in the Crown recovering stumpage and penalties owed to it. The public also has an interest in seeing enterprises such as these, being major employers and economic contributors, continue in business. I agree with the Province, particularly in view of past dealings between the parties, that in this case both the public interest and fairness support maintaining its statutory advantages concerning the ability to rely upon assumptions, and putting the onus of proof upon Lemare. These, however, may be adequately addressed in the claims process part of this proceeding.

[69] The Province then turns to the nature of its dispute with Lemare, relying on its allegation of wilful misconduct. This, it submits, is not appropriate for determination through a CCAA claims process, and relies in particular on subparagraphs 19(2)(c) and (d) of the CCAA:

19. (2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

...

- (c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
- (d) any debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation, other than a debt or liability of the Company that arises from an equity claim....

[70] These are issues that arise at a later time in this process, when a proposed compromise or arrangement falls to be considered. The Province argues, however,

that its penalty claim will be caught by these provisions and therefore, as a matter of discretion, the CCAA process should not be initiated.

[71] I am not presently convinced that either subparagraph will prove to be applicable, although I do not decide that issue. It was not fully argued. For present purposes, I do not see this contingency tipping the balance of all of the other factors and interests that must be weighed, and accordingly I decline to refuse CCAA protection because of it.

[72] I take the same view of the Province's final point, which is that FRAP proposes to assess portions of the assessments against Lemare against two of its principals, who are also licensees. These total some \$563,000. Although no proposal letters have yet been issued in this regard, the Province argues that they give rise to the risk of duplicative proceedings as they will be dealt with under the *Forest Act*, and may lead to inconsistent results.

[73] I do not see that the possibility that the Province will proceed in this way alters the balance, with or without the other factors argued by the Province.

[74] It follows that, having found that this Court has jurisdiction under the CCAA, I decline as a matter of discretion to refuse to exercise that jurisdiction.

3. The Scope and Effect of the Stay

[75] The Province accepts that, pursuant to section 11.02 of the CCAA, a stay can properly prevent the Revenue Minister from taking enforcement action under section 130 of the *Forest Act* in order to collect an amount owing pursuant to an assessment. The Province argues, however, that the exception set out in section 11.1(2) means that it cannot be stayed from making an assessment or taking any steps to obtain information relevant to the proposed assessment.

[76] According to section 11.1(2):

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the

regulatory body, other than the enforcement of a payment ordered by the regulatory body or the Court.

[77] On the evidence, it is clear that the Province has already carried out its investigation. The only step left was to review any response to the proposal letters forthcoming from Lemare, which Lemare has indicated that it waives, viewing it as an exercise in futility.

[78] For the reasons discussed above, I have concluded that the proposed assessments and penalties set out in the proposal letters qualify as contingent claims. They are therefore claims that may be dealt with by a compromise or arrangement under section 19(1), subject to s. 19(2). I further conclude that under the *Forest Act* scheme, in the circumstances of this case, the issuing of an assessment, which gives rise to lien rights and recovery rights, constitutes a step in "the enforcement of a payment ordered by the regulatory body" within the meaning of section 11.1(2) of the CCAA. What we are concerned with here are the financial consequences of past actions, not the regulation of ongoing conduct. See, for instance, *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1261, 68 C.B.R. (5th) 1. If I had concluded otherwise, then the situation would likely have qualified for the exception set out in section 11.1(3).

[79] Finally, the Province submits that if the other relief it seeks is denied, it would nevertheless be just and equitable to lift or amend the stay of proceedings in order to permit the commissioner to make an assessment against Lemare, thus crystallizing the claim in relation to both stumpage and penalty. Mr. Hatter assured me that in seeking this, the Province was in no way attempting to gain a priority advantage in relation to other unsecured creditors.

[80] I propose to consider this aspect of the matter in relation to Lemare's application for a claims process order.

[81] The application to set aside or terminate the Initial Order is dismissed.

THE APPLICATION FOR A CLAIMS PROCESS ORDER

[82] Lemare has submitted a CPO in what is a substantially standard form. One portion that departs from standard terms deals with claims by the Province:

CROWN CLAIMS

29. In the event the Crown wishes to assert a Crown Claim against the Petitioners and/or any Director and/or any Officer, the Crown shall file and serve on the relevant parties an application before the Court prior to the Claims Bar Date setting out the amount of the Crown Claim, the basis therefore and any other information necessary for the Court to determine the Crown Claim ("**Adjudication Application**").
30. The Petitioners and/or any Directors and/or any Officers, as applicable, shall file an application response to any Adjudication Application within 15 days from the Claims Bar Date.
31. Any Adjudication Application shall be heard as soon as practicable by the Court, and any party may apply for directions setting a date therefore [sic].
32. If the Crown fails to file a Crown Claim as provided herein, or as the Court may otherwise direct it shall:
 - (a) be and is hereby forever barred, stopped and enjoined from asserting or enforcing any Crown Claim against any of the Petitioners and/or any of the Directors and/or Officers and all such Crown Claim(s) shall be forever extinguished;
 - (b) not be permitted to vote on any Plan, if applicable, on account of such Crown Claim(s);
 - (c) not be permitted to participate in any distribution under any Plan from the proceeds of any sale of the Petitioners' assets, or otherwise, on account of such Crown Claim(s); and
 - (d) not be entitled to receive further notice in respect of these CCAA proceedings.
33. If the Petitioners fail to respond to the Adjudication Application as provided herein, or the Court may otherwise direct, the Crown Claim(s) as set out in the adjudication application shall be Allowed Claims.
34. The hearing of an Adjudication Application shall be heard as if it were an appeal to the Court under Section 142.9(1) [sic] of the *Forest Act*, R.S.B.C. 1996, c. 157, and all onuses or other evidentiary standards contained in the said Act shall apply to the hearing of the Adjudication Application.

[83] “Crown Claim” is defined as meaning “any claim of the Crown relating to unpaid stumpage or any other claim pursuant to the *Forest Act*...”

[84] I agree with the submissions of Mr. Verbrugge on behalf of the monitor that what I have to consider is whether these sections accomplish the goals of the CCAA with fairness to the Province. This requires a balancing of the need to deal with the Province's claim and all others within the CCAA proceedings to protect everyone equally and allow the company to survive, with the Province's ability to quantify its claim and preserve its advantages concerning the onus of proof.

[85] The Province submits that to accomplish this, it is necessary to carve out of the claims process the entire assessment and appeal process from the *Forest Act*. This would contemplate the commissioner making her assessment and assessing a penalty under sections 142.51 and 142.61, Lemare appealing to the Minister under section 142.9, and then appealing further to this Court by way of petition under section 142.91. Only then would whatever is left of the Province's claim be submitted to the claims process under these CCAA proceedings.

[86] With respect, that seems to me to be an enormously cumbersome procedure. It would add very little to the notion of fairness while detracting greatly from an orderly, timely process that preserves the goals of the CCAA. All that the Province really loses by what is proposed in the CPO is the rather time-consuming step of an appeal by Lemare to the Minister. That is no prejudice to the Province. Whether under the CPO or the *Forest Act*, the matter ultimately ends up in this Court. The sooner that happens, the better.

[87] I also agree with Mr. Verbrugge that fairness does not require a modification of the stay to permit the Province to proceed to an assessment. It is for the Province to crystallize its claim, as it is for any creditor with a contingent claim. I am satisfied that within the claims process, appropriate provision can be made to facilitate this crystallization in a manner that preserves to the Province the ability to take full advantage of the onus and proof provisions that it would have under the *Forest Act* process.

[88] In these circumstances, I am inclined to direct that sections 29 and 34 of the draft CPO be modified so that they read as follows:

29. In the event the Crown wishes to assert a Crown Claim against the Petitioners and/or any Director and/or any Officer, the Crown shall file and serve on the relevant parties an application before the Court prior to the Claims Bar Date ("**Adjudication Application**"). The Adjudication Application shall be in the form of an assessment as if made under sections 142.51 through 142.61 of the *Forest Act*, R.S.B.C. 1996, c. 157, and will constitute proof, in the absence of evidence to the contrary, that the amounts assessed are due and owing. The onus of proving otherwise shall be on the Petitioners.

...

34. The hearing of an Adjudication Application shall proceed as if it were an appeal under section 142.9(1) of the *Forest Act*, taken to the Court instead of the revenue minister, directly from assessments made under sections 142.51 through 142.61 of the said *Act* as set out in the Adjudication Application pursuant to section 29 of this Order, and subject to the further direction of the Court.

[89] Because this wording was not the subject of any discussion or submissions during the hearing, the parties have leave to return before me for further brief submissions concerning this modification if they find it necessary to do so.

[90] There are two other modifications that the Province submits should be made, with which submission I agree. The first is to paragraph 19(a) of the draft CPO, which deals with creditors who do not file a Proof of Claim within the time limited, and goes on to provide that any such person:

- (a) be and is forever barred, stopped and enjoined from asserting or enforcing any Claim against any of the Petitioners and/or any of the Directors and/or Officers and all such Claims shall be forever extinguished.

[91] Although this is hardly unusual wording, the Province points out, and I agree, that the extinguishment of claims properly occurs at the later Plan and Sanction Order stage, and should not properly be part of the CPO. What the CPO can properly accomplish is preventing creditors who have not submitted claims in accordance with the process from asserting or enforcing any claim. Accordingly,

paragraphs 19(a) and 32(a) should be amended by striking out the words "and all such [Crown] Claims shall be forever extinguished".

[92] The Province also objects, properly, to the overly broad definition and treatment of directors and officers. Accordingly the definition of "Directors/Officers Claim" in Schedule "B" to the draft CPO will be amended by deleting the words "or in any other capacity" from the end of the definition. This will limit the definition to claims against directors or officers in their capacity as such.

[93] Apart from these modifications, the form of the draft CPO is satisfactory. The stay is extended until November 30, 2012.

[94] I remind the parties that the interpretation of the CPO and the administration of the claims process remain subject to the provisions of the CCAA.

"GRAUER, J."

¹ *Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests and Range*, 2009 BCSC 909 and 2009 BCSC 902; *Lemare Lake Logging Limited v. British Columbia (Forests and Range)*, 2011 BCSC 903; *British Columbia v. Lemare Lake Logging Ltd.*, 2012 BCSC 193. See also *Lemare Lake Logging Limited and Arsenault v. Minister of Forests and Range*, unreported, 23 November 2010, B.C. Prov. Ct. Vancouver No. 209979-1.

CITATION: Lydian International Limited (Re), 2019 ONSC 7473
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2019-12-24

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF
LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES
CORPORATION AND LYDIAN U.K. CORPORATION LIMITED**

Applicants

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Elizabeth Pillon, Sanja Sopic, and Nicholas Avis*, for the Applicants

Pamela Huff, for Resource Capital Fund VI L.P.

Alan Merskey, for OSISKO Bermuda Limited

D.J. Miller, for Alvarez & Marsal Canada Inc. proposed Monitor

David Bish, for ORION Capital Management

Bruce Darlington, for ING Bank N.V./ABS Svensk Exportkredit (publ)

HEARD and DETERMINED: December 23, 2019

REASONS RELEASED: December 24, 2019

ENDORSEMENT

Introduction

[1] Lydian International Limited (“Lydian International”), Lydian Canada Ventures Corporation (“Lydian Canada”) and Lydian UK Corporation Limited (“Lydian UK”, and collectively, the “Applicants”) apply for creditor protection and other relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

[2] The Applicants are part of a gold exploration and development business in south central Armenia (the “Amulsar Project”). The Amulsar Project is directly owned and operated by Lydian Armenia CJSC (“Lydian Armenia”), a wholly-owned subsidiary of the Applicants.

[3] As set out in the affidavit of Edward A. Sellers sworn December 22, 2019 (the “Sellers Affidavit”), the Applicants have been experiencing and continue to experience liquidity issues due to blockades of the Amulsar Project and other external factors. The Sellers Affidavit details such activities and Mr. Sellers deposes that these activities have prevented Lydian Armenia and its employees, contractors and suppliers from accessing, constructing and ultimately operating the Amulsar Project.

[4] Mr. Sellers states that the lack of progress at the Amulsar Project has prevented the Lydian Group (as that term is defined below) from generating any positive cash flow and has also triggered defaults on certain of the Lydian Group’s obligations to its lenders which, if enforced, the Lydian Group would be unable to satisfy.

[5] The Lydian Group has operated under forbearance agreements in respect of these defaults since October 2018, but the most recent forbearance agreement expired on December 20, 2019.

[6] The Applicants contend that they now require immediate protection under the CCAA for the breathing room they require to pursue remedial steps on a time sensitive basis.

[7] The Applicants intend to continue discussions with their lenders and other stakeholders, including the Government of Armenia (“GOA”). The Applicants also intend to continue evaluating potential financing and/or sale options, all with a view to achieving a viable path forward.

The Applicants

[8] Lydian International is a corporation continued under the laws of the Bailiwick of Jersey, Channel Islands, from the Province of Alberta pursuant to the *Companies (Jersey) Law 1991*. Lydian International was originally incorporated under the *Business Corporations Act*, R.S.A. 2000, c. B-9 (Alberta) on February 14, 2006 as “Dawson Creek Capital Corp.”, and subsequently became Lydian International on December 12, 2007.

[9] Lydian International’s registered office is located in Jersey. On June 12, 2019, Lydian International shareholders approved its continuance under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, but this continuance has yet to be implemented.

[10] Lydian International has two types of securities listed on the Toronto Stock exchange: (1) ordinary shares and (2) warrants that expired in 2017.

[11] Lydian Canada is a direct, wholly owned subsidiary of Lydian International. Lydian Canada is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (British Columbia) and has a registered head office in Toronto. Its registered and records office is located in British Columbia.

[12] Lydian UK is a corporation incorporated in the United Kingdom and is a direct, wholly-owned subsidiary of Lydian Canada with a head office located in the United Kingdom. Lydian UK has no material assets in the UK.

[13] Lydian International and Lydian UK have assets in Canada in the form of deposits with the Bank of Nova Scotia in Toronto.

[14] The Applicants are part of a corporate group (the “Lydian Group”) with a number of other subsidiaries ultimately owned by Lydian International. Other than the Applicants, certain of the Lydian Group’s subsidiaries are Lydian U.S. Corporation (“Lydian US”), Lydian International Holdings Limited (“Lydian Holdings”), Lydian Resources Armenia Limited (“Lydian Resources”) and Lydian Armenia, a corporation incorporated under the laws of the Republic of Armenia. Together, Lydian U.S., Lydian Holdings, Lydian Resources and Lydian Armenia are the “Non-Applicant” parties.

[15] The Applicants submit that due to the complete integration of the business and operations of the Lydian Group, an extension of the stay of proceedings over the Non-Applicant parties is appropriate.

[16] The Applicants contend that the Lydian Group is highly integrated and its business and affairs are directed primarily out of Canada. Substantially all of its strategic business affairs, including key decision-making, are conducted in Toronto and Vancouver.

[17] Further, all the Applicants and Non-Applicant Parties are borrowers or guarantors of the Lydian Group’s secured indebtedness. The Lydian Group’s loan agreements are governed primarily by the laws of Ontario.

[18] Finally, the Lydian Group’s forbearance and restructuring efforts have been directed out of Toronto.

[19] The Lydian Group is focused on constructing the Amulsar Project, its wholly-owned development stage gold mine in Armenia. The Amulsar Project was funded by a combination of equity and debt capital and stream financing. The debt and stream financing arrangements are secured over substantially all the assets of Lydian Armenia and Lydian International in the shares of various groups of the Lydian Group.

[20] The Applicants contend that time is of the essence given the Applicants’ minimal cash position and negative cash flow.

Issues

[21] The issues for consideration are whether:

- (a) the Applicants meet the criteria for protection under the CCAA;

- (b) the CCAA stay should be extended to the Non-Applicant Parties;
- (c) the proposed monitor, Alvarez & Marsal Canada Inc. (“A&M”) should be appointed as monitor;
- (d) Ontario is the appropriate venue for this proceeding;
- (e) this court should issue a letter of request of the Royal Court of Jersey;
- (f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and
- (g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

Law and Analysis

[22] Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

[23] Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to “ordinary course” relief.

[24] Section 11.001 provides:

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[25] The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments “limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players.”

[26] In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing “shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that

period”. The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

[27] Following the granting of the initial order, a number of developments can occur, including:

- (a) notification to all stakeholders of the CCAA application;
- (b) stabilization of the operation of debtor companies;
- (c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;
- (d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;
- (e) negotiations of DIP facilities and DIP Charges;
- (f) negotiations of Administration Charges;
- (g) negotiation of Key Employee Incentives Programs;
- (h) negotiation of Key Employee Retention Programs;
- (i) consultation with regulators;
- (j) consultation with tax authorities;
- (k) consideration as to whether representative counsel is required; and
- (l) consultation and negotiation with key suppliers.

[28] This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

[29] Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a “comeback” hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

[30] The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

[31] In my view, this is consistent with the objectives of the amendments which include the requirement for “participants in an insolvency proceeding to act in good faith” and “improving participation of all players”. It may also result in more meaningful comeback hearings.

[32] It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

[33] For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

[34] I am satisfied that Lydian Canada meets the CCAA definition of “company” and is eligible for CCAA protection.

[35] I have also considered whether the foreign incorporated companies are “companies” pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an “incorporated company” either “having assets or doing business in Canada”.

[36] In *Cinram International Inc., (Re)*, 2012 ONSC 3767, 91 C.B.R. (5th) 46, I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of “company” under the CCAA.

[37] In this case, both Lydian International and Lydian UK meet the definition of “company” because both corporations have assets in and do business in Canada.

[38] In my view the Applicants are each “debtor companies” under the CCAA. The Applicants are insolvent and have liabilities in excess of \$5 million. I am satisfied that the Applicants are eligible for CCAA protection.

[39] The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corporation (Re)*, 2012 ONSC 2063, at paras. 5, 18, and 31; *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.); and *Target Canada Co. (Re)*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 49-50.

[40] I am also satisfied that it is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

[41] With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada’s registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK

have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

[42] I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

Administration Charge

[43] The Applicants seek a charge on their assets in the maximum amount of US \$350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

[44] Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

[45] The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

[46] In *Canwest Publishing Inc.*, (Re), 2010 ONSC 222, 63 C.B.R.(5th) 115, Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

- (a) the size and complexity of business 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.

[47] It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

[48] I am satisfied that the Administration Charge in the limited amount of US \$350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

D & O Charge

[49] The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of \$200,000 (the “D & O Charge”).

[50] The Applicants maintain Directors’ and Officers’ liability insurance (the “D & O Insurance”) which provides a total of \$10 million in coverage.

[51] The D & O Insurance is set to expire on December 31, 2019.

[52] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

[53] In *Jaguar Mining Inc., (Re)*, 2014 ONSC 494, 12 C.B.R. (6th) 290, I set out a number of factors to be considered in determining whether to grant a directors’ and officers’ charge:

- (a) whether notice has been given to the secured creditors likely to be affected by the charge;
- (b) whether the amount is appropriate;
- (c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and
- (d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors’ or officers’ gross negligence or willful misconduct.

[54] Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

Extension of the Stay of Proceedings

[55] The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

[56] The Applicants submit that I am authorized to grant a stay extension immediately after granting the initial order because section 11.02(2) of the CCAA does not provide a minimum waiting time before an applicant can seek a stay extension. The Applicants reference recent decisions where courts have scheduled hearings within two or three days after the granting of an initial order. Reference is made to *Clover Leaf Holdings Company (Re)*, 2019 ONSC 6966 and *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV-19-00632079-00CL. In *Clover Leaf*, the stay extension for 36 days and additional relief including authorization for DIP financing was granted three days after the initial order and in *Wayland*, the stay extension was granted two days after the initial order.

[57] I acknowledge that, in this case, it may be challenging for the Applicants to return to court at or near the end of the 10-day initial stay period due to the year-end holidays. I also acknowledge that the offices of many of the parties involved in these proceedings may not be open during the holidays.

[58] However, the statutory maximum 10-day stay as referenced in s. 11.02(1) expires on January 2, 2020 and the courts are open on that day.

[59] As noted above, absent exceptional circumstances, I do not believe that it is desirable to entertain motions for supplementary relief in the period immediately following the granting of an initial order.

[60] It could very well be that circumstances existed in both *Clover Leaf* and *Wayland* that justified the stay extension and the ancillary relief being granted shortly after the initial order.

[61] However, in this case, I have not been persuaded on the evidence that it is necessary for the stay extension to be addressed prior to January 2, 2020 and I decline to do so.

Disposition

[62] The initial order is granted with a Stay Period in effect until January 2, 2020. In view of the holiday schedules of many parties, the following procedures are put in place. The Applicants can file a motion returnable on January 2, 2020, requesting that the stay be extended to January 23, 2020. Any party that wishes to oppose the extension of the stay to January 23, 2020 is required to notify the Applicant, A & M and the Commercial List Office of their intention to do so no later than 2:00 p.m. on December 30, 2019. In the event that the requested stay extension is unopposed, there will be no need for counsel to attend on the return of the motion. I will consider the motion based on the materials filed.

[63] If any objections are received by 2:00 p.m. on December 30, 2019, the hearing on January 2, 2020 will address the opposed extension request. Any further relief will be considered at the Comeback Motion on January 23, 2020.

Chief Justice Geoffrey B. Morawetz

Date: December 24, 2019

CITATION: Clover Leaf Holdings Company, Re., 2019 ONSC 6966
COURT FILE NO.: CV-19-631523-00CL
DATE: 20191204

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 CLOVER LEAF HOLDINGS COMPANY, CONNORS
BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD.,
6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY
AND CONNORS BROS. SEAFOODS COMPANY

BEFORE: HAINEY J.

COUNSEL: *Kevin Zych, Sean Zweig and Mike Shakra* for the Applicants

Marc Wasserman and Martino Calvaruso for the Monitor

Natasha MacParland for FCF Co. Ltd.

Peter Rubin for Wells Fargo

Jeremy Opolsky for Lion Capital

Robert Chadwick and Christopher Armstrong for Terms Lenders

HEARD: November 25, 2019

ENDORSEMENT

Overview

[1] On November 22, 2019, the applicants (“Clover Leaf”), obtained an initial order pursuant to the *Companies Creditors Arrangement Act* R.S.C. 1985, c. C-36 as amended (“*CCAA*”) which appointed Alvarez & Marsal Canada Inc. as Monitor and stayed all proceedings against the applicants, their officers, directors and the Monitor until December 2, 2019.

[2] On November 25, 2019 the applicants sought an amended and restated order to supplement the limited relief obtained pursuant to the initial order. I granted the order and indicated that I would provide a more detailed endorsement. This is my endorsement.

Facts

[3] The applicants are the Canadian affiliates of Bumble Bee Foods, an international seafood supplier based in the United States (“Bumble Bee”).

[4] The applicants operate the Clover Leaf business in Ontario, New Brunswick and Nova Scotia. They have approximately 650 employees in Canada. The Clover Leaf business has long been associated with well-known brands of canned seafood products in Canada.

[5] While the Clover Leaf business in Canada is cash flow positive and profitable, the balance sheet of the Bumble Bee group, including the applicants, has suffered extreme financial pressures primarily due to extensive litigation against Bumble Bee in the United States.

[6] As a result, the Bumble Bee group has filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (“Chapter 11 proceedings”) and the U.S. Bankruptcy Court has granted certain First Day Orders in those proceedings.

[7] The applicants are seeking similar relief in these proceedings to stabilize and protect their business in order to complete a comprehensive and coordinated restructuring of Clover Leaf in Canada and Bumble Bee in the United States. This will include an asset sale of each of their respective businesses (“Sale Transaction”). This outcome is the result of extensive consideration of various options and consultations with Bumble Bee’s secured lenders in an attempt to restructure the business.

Applicants’ Position

[8] The applicants submit that this CCAA proceeding is in the best interests of their stakeholders and will result in their business being conveyed on a going concern basis with minimal disruption. The breathing room afforded by the CCAA and Chapter 11 proceedings, and the other relief sought, will allow the applicants to continue operations in the ordinary course, maintaining the stability of their business and operations, and preserving the value of their business while the Sale Transaction is implemented.

[9] Although the applicants are party to a stalking horse asset purchase agreement, they are not seeking any relief in connection with it or the Sale Transaction at this stage. The applicants will return to court for that relief at a later date. They are, instead, only seeking the limited relief required at this time.

Issues

[10] I must determine the following issues:

- a) Is the relief sought on this application consistent with the amendments to the CCAA which came into effect on November 1, 2019?
- b) Should I extend the stay of proceedings to December 31, 2019?
- c) Should I approve the proposed DIP financing and grant the DIP charge?
- d) Should I grant the administration charge and the directors' charge?
- e) Should I approve the KEIP and the KEIP charge, and grant a sealing order?
- f) Should I authorize the applicants to pay their ordinary course pre-filing debts? and
- g) Should I grant the intercompany charge?

Analysis

The New CCAA Amendments

[11] In determining this application I must consider the amendments made to the CCAA that came into force on November 1, 2019.

[12] Section 11.001 of the CCAA provides as follows:

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[13] The purpose of this new section of the CCAA is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process.

[14] The applicants submit that the relief sought on this application is limited to what is reasonably necessary in the circumstances for the continued operation of their business. Further relief, including approval of the Sale Transactions and related bidding procedures, will not be sought until a later date on reasonable notice to a broader group of stakeholders.

[15] I am satisfied that the relief sought on this motion is reasonably necessary for the continued operation of the applicants for the period covered by the order sought to allow them to take the next steps toward a smooth transition of their business to a new owner for the following reasons:

- (a) Prior to initiating insolvency proceedings here and in the United States the applicants conducted a thorough assessment of their options and consulted with all their major creditors before arriving at the proposed Sale Transaction;
- (b) The applicants' stakeholder such as employees, customers and suppliers who have not yet been consulted about these CCAA proceedings will not be prejudiced by the order sought. In fact, in my view, they will suffer prejudice if the order is not granted;
- (c) The applicants have the support of their secured creditors who are expected to suffer a shortfall if the Sale Transaction closes;
- (d) The applicants are not the cause of these insolvency proceedings; and
- (e) The applicants are only seeking relief that is reasonably necessary to take the next steps toward a smooth transition to a new owner.

[16] For these reasons, I have concluded that the relief sought is consistent with the new amendments to the CCAA.

[17] I will now consider whether it is appropriate to grant certain of the specific terms of the amended and restated initial order.

Stay of Proceedings

[18] The applicants seek to extend the stay of proceedings to December 31, 2019.

[19] I am satisfied that the stay of proceedings should be extended as requested for the following reasons:

- (a) The applicants have acted and are acting in good faith with due diligence;
- (b) The stay of proceedings requested is appropriate to provide the applicants with breathing room while they seek to restore their solvency and emerge from these CCAA proceedings on a going-concern basis;
- (c) Without continued protection under the CCAA and the support of their lenders the stability and value of the applicants' business will quickly deteriorate and will be unable to continue to operate as a going-concern;
- (d) If existing or new proceedings are permitted to continue against the applicants, they will be destructive to the overall value of their business and jeopardize the proposed Sale Transaction; and
- (e) The Monitor supports the requested extension of the stay of proceedings.

DIP Financing

[20] The applicants submit that the proposed DIP financing should be approved for the following reasons:

- (a) The proposed DIP financing is reasonably necessary for the continued operation of Clover Leaf in the ordinary course of business during the period covered by the order sought within the meaning of s. 11.2(5) of the *CCAA*. It is also consistent with the existing jurisprudence that DIP financing should be granted “to keep the lights on” and should be limited to terms that are reasonably necessary for the continued operation of the company; and
- (b) The proposed DIP financing is reasonably necessary to allow the applicants to maintain liquidity and preserve the enterprise value of their business while the Sale Transaction is being pursued. The proposed DIP financing will be used to honour commitments to employees, customers and trade creditors.

[21] I am satisfied for these reasons that the requirements of s. 11.2(5) of the *CCAA* are satisfied.

[22] In this case, the applicants are not borrowers under the proposed DIP financing but they are proposed to be guarantors. The applicable jurisprudence has established the following factors which should be considered to determine the appropriateness of authorizing a Canadian debtor to guarantee a foreign affiliate’s DIP financing:

- (a) The need for additional financing by the Canadian debtor to support a going concern restructuring;
- (b) The benefit of the breathing space afforded by *CCAA* protection;
- (c) The lack of any financing alternatives to those proposed by the DIP lender;
- (d) The practicality of establishing a stand-alone solution for the Canadian debtor;
- (e) The contingent nature of the liability of the proposed guarantee and the likelihood that it will be called upon;
- (f) Any potential prejudice to the creditors of the Canadian entity if the request is approved; and
- (g) The benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied.

[23] I have concluded that I should approve the proposed DIP financing and the proposed DIP charge for the following reasons:

- (a) Because of its current financial circumstances, the Bumble Bee Group cannot obtain alternative financing outside of the Chapter 11 and CCAA proceedings;
- (b) The applicants' liquidity is dependent on the secured lenders providing the proposed DIP financing;
- (c) The proposed DIP financing is necessary to maintain the ongoing business and operations of the Bumble Bee Group, including the applicants;
- (d) While the proposed DIP financing is being provided by the applicants' existing secured lenders rather than new third-party lenders, eleven third-party lenders were solicited with no viable proposal being received. In my view, this demonstrates that the proposed DIP financing represents the best available DIP financing option in the circumstances;
- (e) The proposed DIP financing will preserve the value and going concern operations of the applicant's business, which is in the best interests of the applicants and their stakeholders;
- (f) Because the DIP lenders are the existing secured lenders, they are familiar with the applicants' business and operations which will reduce administrative costs that would otherwise arise with a new-third party DIP lender;
- (g) Protections have been included in the amended and restated initial order to minimize any prejudice to the applicants and their stakeholders;
- (h) The amount of the proposed DIP Financing is appropriate having regard to the applicants' cash-flow statement; and
- (i) The Monitor supports the proposed DIP financing and its report confirms that the applicants will have sufficient liquidity to operate their business in the ordinary course.

Payment of Pre-Filing Obligations

[24] To preserve normal course business operations, the applicants seek authorization to continue to pay their suppliers of goods and services, honour rebate, discount and refund programs with their customers and pay employees in the ordinary course consistent with existing compensation arrangements.

[25] The court has broad jurisdiction to permit the payment of pre-filing obligations in a CCAA proceeding. In granting authority to pay certain pre-filing obligations, courts have considered the following factors:

- (a) Whether the goods and services are integral to the applicants' business;

- (b) The applicants' need for the uninterrupted supply of the goods or services;
- (c) The fact that no payments will be made without the consent of the Monitor;
- (d) The Monitors' support and willingness to work with the applicants to ensure that payments in respect of pre-filing liabilities are appropriate;
- (e) Whether the applicants have sufficient inventory of the goods on hand to meet their needs; and
- (f) The effect on the debtors' ongoing operations and ability to restructure if they are unable to make pre-filing payments.

[26] I am satisfied that it is critical to the operation of their business that the applicants preserve key relationships. Any disruption in the services proposed to be paid could jeopardize the value of their business and the viability of the Sale Transaction. The authority in the proposed amended and restated initial order to pay pre-filing obligations is appropriately tailored and responsive to the needs of the applicants and is specifically provided for in the applicants' cash flows and in the DIP budget. In particular, the payments are limited to those necessary to preserve critical relationships with employees, suppliers, and customers, to ensure the stability and continued operation of the applicants' business and will only be made with the consent of the Monitor. The relief sought is consistent with orders in other CCAA cases.

[27] Further, in keeping with the requirements in s. 11.001 of the CCAA the contemplated payments are all reasonably necessary to the continued operation of the applicants' business so that there will be no disruption in services provided to the applicants and no deterioration in their relationships with their suppliers, customers and employees.

KEIP and KEIP Charge

[28] I have also concluded that the KEIP and KEIP charge should be approved because of the following:

- (a) The KEIP was developed in consultation with AlixPartners, Bennett Jones LLP and with the involvement of the Monitor. The Monitor is supportive of the KEIP. The secured creditors also support the KEIP charge;
- (b) The KEIP is reasonably necessary to retain key employees who are necessary to guide the applicants through the CCAA proceedings and the Sale Transaction;
- (c) The KEIP is incentive-based and will only be earned if certain conditions are met; and
- (d) The amount of the KEIP, and corresponding KEIP charge, is reasonable in the circumstance.

[29] In approving the KEIP and KEIP charge pursuant to s. 11 of the CCAA I have determined that the terms and scope of the KEIP have been limited to what is reasonably necessary at this time in accordance with s. 11.001 of the CCAA.

[30] As the KEIP contains personal confidential information about the applicants' employees, including their salaries, I am granting a sealing order pursuant to s. 137(2) of the *Courts of Justice Act*, RSO 1990, c. C. 43. This will prevent the risk of disclosure of this personal and confidential information.

Intercompany Charge

[31] I am also granting the requested Intercompany Charge to preserve the status quo between all entities within the Bumble Bee group to protect the interest of creditors against individual entities within the group. The Monitor supports the charge which ranks behind all the other court-ordered charges.

Administrative Charge

[32] I am also granting an administration charge in the amount of \$1.25 million to secure the professional fees and disbursements of the Monitor, its counsel and the applicants' counsel for the following reasons:

- (a) The beneficiaries of the administration charge have, and will continue to, contribute to these CCAA proceedings and assist the applicants with their business;
- (b) Each beneficiary of the administration charge is performing distinct functions and there is no duplication of roles;
- (c) The quantum of the proposed charge is reasonable having regard to administration charges granted in other similar CCAA proceedings;
- (d) The secured creditors support the administrative charge; and
- (e) The Monitor supports the administrative charge.

Directors' Charge

[33] Finally, I am granting a directors' charge in the amount of \$2.3 million to secure the indemnity of the applicants' directors and officers for liabilities they may incur during these CCAA proceedings for the following reasons:

- (a) The directors and officers may be subject to potential liabilities in connection with the CCAA proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

- (b) The applicants' liability insurance policies provide insufficient coverage for their officers and directors;
- (c) The directors' charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;
- (d) The directors' charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the *CCAA* proceedings and does not cover willful misconduct or gross negligence;
- (e) The applicants will require the active and committed involvement of its directors and officers, and their continued participation is necessary to complete the Sale Transaction;
- (f) The amount of the directors' charge has been calculated based on the estimated potential exposure of the directors and officers and is appropriate given the size, nature and employment levels of the applicants; and
- (g) The calculation of the directors' charge has been reviewed with the Monitor and the Monitor supports it.

Conclusion

[34] For these reasons the amended and restated initial order is granted.

[35] I thank counsel for their helpful submissions.

HAINES J.

Date: December 4, 2019

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DATE: 20050331
DOCKET: M32289

COURT OF APPEAL FOR ONTARIO

GOUDGE, FELDMAN AND BLAIR, J.J.A.

IN THE MATTER OF THE
COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C., c. C-36,
AS AMENDED AND IN THE MATTER
OF A PROPOSED PLAN OF
COMPROMISE OR ARRANGEMENT
WITH RESPECT TO STELCO INC.,
AND OTHER APPLICANTS LISTED
IN SCHEDULE "A"
APPLICATION UNDER THE
COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c.
C-36 AS AMENDED

-) Jeffrey S. Leon and Richard B. Swan, for
-) the appellants, Michael Woollcombe and
-) Roland Keiper
-)
-) Kenneth T. Rosenberg and Robert A.
-) Centa, for the respondent United
-) Steelworkers of America
-)
-) Murray Gold and Andrew J. Hatnay, for
-) the respondent Retired Salaried
-) Beneficiaries of Stelco Inc., CHT Steel
-) Company Inc., Stelpipe Ltd., Stelwire
-) Ltd. And Welland Pipe Ltd.
-)
-) Michael C.P. McCreary and Carrie L.
-) Clynick, for USWA Locals 5328 and
-) 8782
-)
-) John R. Varley, for the Active Salaried
-) Employee Representative
-)
-) Michael Barrack, for Stelco Inc.
-)
-) Peter Griffin, for the Board of Directors
-) of Stelco Inc.
-)
-) K. Mahar, for the Monitor
-)
-) David R. Byers, for CIT Business Credit,
-) Agent for the DIP Lender
-)
-) **Heard: Heard: March 18, 2005**

Application for Leave to Appeal, and if leave be granted, an appeal from the order of Farley J. dated February 25, 2005 removing the applicants as directors of Stelco Inc., reported at: [2005] O.J. No. 729.

R. A. BLAIR J.A.:

PART I -- INTRODUCTION

[1] Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the *Companies' Creditors Arrangement Act*¹ on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies – Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. – which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (“the Board”) has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

After careful consideration, and given potential recoveries at the end of the company’s restructuring process, the Board responded favourably to the requests by making the appointments announced today.

¹ R.S.C. 1985, c. C-36, as amended.

Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability – exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation – as opposed to their own best interests as shareholders – in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal

of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

PART II – ADDITIONAL FACTS

[11] Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

[12] Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

[13] Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

[14] In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

[15] On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of \$125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

[16] A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process

Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

[17] Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

[18] On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

[19] At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.

18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

[20] In order to ensure that the appellants understood their duties as potential Board members and, particularly that “they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole”, Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions “included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters”. Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

- a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;
- b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
- c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing – and satisfied “that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business” – the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it “appropriate, just, necessary and reasonable to declare” those appointments “to be of no force and effect” and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge’s rationale is found in the following passage from his reasons (at para. 23):

In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on

behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be “neutral”. They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

PART III – LEAVE TO APPEAL

[23] Because of the “real time” dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants’ motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are “serious and arguable grounds that are of real and significant interest to the parties”: *Country Style Food Services Inc. (Re)*, (2002) 158 O.A.C. 30; [2002] O.J. No. 1377 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

- a) whether the point on appeal is of significance to the practice;
- b) whether the point is of significance to the action;
- c) whether the appeal is *prima facie* meritorious or frivolous;
- d) whether the appeal will unduly hinder the progress of the action.

[25] Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) – (c) are met in the circumstances, and as such, leave should be granted. The issue of the court’s jurisdiction

to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

PART IV– THE APPEAL

The Positions of the Parties

[27] The appellants submit that,

- a) in exercising its discretion under the CCAA, the court is not exercising its “inherent jurisdiction” as a superior court;
- b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,
- c) even if there is jurisdiction, the motion judge erred:
 - (i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
 - (ii) by rejecting the application of the “business judgment” rule to the unanimous decision of the Board to appoint two new directors; and,
 - (iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be

neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194, at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group – particular investment funds that have acquired Stelco shares during the CCAA itself – have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see *Olympia & York Development Ltd. v. Royal Trust* (1993), 12 O.R. (3d) 500 (Gen. Div.); *Re Ivaco Inc.*, (2004), 3 C.B.R. (5th) 33, at para.15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to

the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786 (Sup. Ct.), at para. 11. See also, *Re Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.), at p. 320; *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Royal Oak Mines Inc. (Re)* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd. (Re)* (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 27-28. In *Halsbury's Laws of England*, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines, supra*, inherent jurisdiction is “not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play” (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc. (Re)*, [2005] O.J. No. 251 (Sup. Ct.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company’s creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335 (B.C.C.A.), (2003) 43 C.B.R. (4th) 187 at para. 46, that:

. . . the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. . . . This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,² rather than the integrity of their own process.

[37] As Jacob observes, in his article “The Inherent Jurisdiction of the Court”, *supra*, at p. 25:

The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise.

² The reference is to the decisions in *Dyle, Royal Oak Mines, and Westar*, cited above.

There is a distinction, however – difficult as it may be to draw – between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period “on such terms as it may impose”.³ Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion – in spite of its considerable breadth and flexibility – does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

[40] The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

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

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

³ See paragraph 43, *infra*, where I elaborate on this distinction.

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial
application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Burden of proof on
application

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection

(4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff, supra*, at para 5, "to make order[s] 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". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of

the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corporation Limited v. Banking Service Corporation Limited* (1923), 23 O.W.N. 138 (Ont. H.C.); *Stephenson v. Vokes* (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.⁴ The specific power *to remove* directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court – where it finds that oppression as therein defined exists – to “make any interim or final order it thinks fit”, including (s. 241(3)(e)) “an order appointing directors in place of or in addition to all or any of the directors then in office”. This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722.

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, *and removal* of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative “gap” to fill. See *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, *supra*, at p. 480; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

[49] At paragraph 7 of his reasons, the motion judge said:

The board is charged with the standard duty of “manage[ing], [sic] or supervising the management, of the business and affairs of the corporation”: s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to

⁴ It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual. [emphasis added]

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power – which the courts are disinclined to exercise in any event – except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

[52] The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[53] The CBCA is legislation that “makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them”. Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, *supra*. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada"⁵:

SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention*. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation*. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be *a measure of last resort*. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy

⁵ Dennis H. Peterson, *Shareholder Remedies in Canada* (Markham: LexisNexis – Butterworths – Looseleaf Service, 1989) at 18-47.

the oppressive conduct without a receiver or receiver-manager. [emphasis added]

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the *Hollinger* situation would “significantly impede” the interests of the public shareholders and that those directors were “motivated by putting their interests first, not those of the company” (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors – in which capacity they participated over two days in the bid consideration exercise – in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants “may well conduct themselves beyond reproach”. However, he simply decided there was a risk – a reasonable apprehension – that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about “maximizing shareholder value”; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge’s opinion that Clearwater and Equilibrium – the shareholders represented by the appellants on the Board – had a “vision” that “usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation”, as a result of which the appellants would approach their directors’ duties looking to liquidate their shares on the basis of a “short-term hold” rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that “the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach”.

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the “statutory fiduciary duty” obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the “duty of care” obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: *Peoples Department Stores Inc (Trustee of) v. Wise*, [2004 S.C.J. No. 64 (S.C.C.) at paras. 42-49.

[60] In *Peoples* the Supreme Court noted that “the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders” (para.

43), but also accepted “as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment” (para. 42). Importantly as well – in the context of “the shifting interest and incentives of shareholders and creditors” – the court stated (para. 47):

In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a “better” corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

[62] The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

[63] There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Limited* (2003), 63 O.R. (3d) 78 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

[64] The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

[65] The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings – and courts in general – will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples, supra*, at para. 67:

Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making . . .

[66] In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.⁶

[67] McKinlay J.A then went on to say:

There can be no doubt that on an application under s. 234⁷ the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain “feel” for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*,

⁶ Or, I would add, unpopular with other stakeholders.

⁷ Now s. 241.

supra, *Sammi Atlas Inc. (Re)* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.); *Olympia & York Developments Ltd. (Re)*, *supra*; *Re Alberta Pacific Terminals Ltd.* (1991), 8 C.B.R. (4th) 99 (B.C.S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

[69] Here, the motion judge was alive to the “business judgment” dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

With respect I do not see the present situation as involving the “management of the business and affairs of the corporation”, but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

[70] I do not see the distinction between the directors’ role in “the management of the business and affairs of the corporation” (CBCA, s. 102) – which describes the directors’ overall responsibilities – and their role with respect to a “quasi-constitutional aspect of the corporation” (i.e. in filling out the composition of the board of directors in the event of a vacancy). The “affairs” of the corporation are defined in s. 1 of the CBCA as meaning “the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate”. Corporate governance decisions relate directly to such relationships and are at the heart of the Board’s business decision-making role regarding the corporation’s business *and* affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court’s knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

[71] This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board’s

decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

[72] The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion – not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction – a jurisdiction which feeds the creativity that makes the CCAA work so well – in order to address fairness and process concerns along the way. This case relates only to the court’s exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

[73] In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to “borrow the concept of reasonable apprehension of bias . . . with suitable adjustments for the nature of the decision making involved” (para. 8). He stressed that “there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual ‘bias’ or its equivalent” (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to “pursue efforts to maximize shareholder value at Stelco”, and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants – including the respondents in this case – but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, “persons are assumed to act in good faith unless proven otherwise”. With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

PART V – DISPOSITION

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woolcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

“R.A. Blair J.A.”

“I agree S.T. Goudge J.A.”

“I agree K.N. Feldman J.A.”

RELEASED: March 31, 2005

**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 NORTEL NETWORKS CORPORATION,
NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL
CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION AND NORTEL NETWORKS TECHNOLOGY
CORPORATION**

APPLICANTS

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

BEFORE: MORAWETZ J.

COUNSEL: Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al

**Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel
Networks Corporation and Nortel Networks Limited**

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

**M. Starnino, for the Superintendent of Financial Services and
Administrator of PBGF**

S. Philpott, for the Former Employees

K. Zych, for Noteholders

**Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors
LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin
Patterson Opportunities Partners (Cayman) III L.P.**

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

**HEARD &
DECIDED:**

JUNE 29, 2009

ENDORSEMENT

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the “Bidding Procedures”) described in the affidavit of Mr. Riedel sworn June 23, 2009 (the “Riedel Affidavit”) and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the “Monitor”) (the “Fourteenth Report”). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the “U.S. Court”) approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the “Sale Agreement”) among Nokia Siemens Networks B.V. (“Nokia Siemens Networks” or the “Purchaser”), as buyer, and Nortel Networks Corporation (“NNC”), Nortel Networks Limited (“NNL”), Nortel Networks, Inc. (“NNI”) and certain of their affiliates, as vendors (collectively the “Sellers”) in the form attached as Appendix “A” to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the “stalking horse” bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix “B” to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the “Joint Hearing”) was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access (“CMDA”) business Long-Term Evolution (“LTE”) Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel’s 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is \$650 million.

BACKGROUND

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel’s business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel’s filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company’s assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the “Business”) and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue “going concern” sales for Nortel’s various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel’s management considered:

- (a) the impact of the filings on Nortel’s various businesses, including deterioration in sales; and

- (b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

- (a) the Business operates in a highly competitive environment;
- (b) full value cannot be realized by continuing to operate the Business through a restructuring; and
- (c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a “stalking horse” bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the “UCC”) and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, “MatlinPatterson”) as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court’s jurisdiction extends to authorizing sale of the debtor’s business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as “skeletal in nature”. It has also been described as a “sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest”. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. (“ATB Financial”).

[30] The jurisprudence has identified as sources of the court’s discretionary jurisdiction, *inter alia*:

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order “on such terms as it may impose”; and

- (c) the inherent jurisdiction of the court to “fill in the gaps” of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court’s jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the “overarching policy” of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or “the whole economic community”:

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor’s stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra, Re PSINet, supra, Re Consumers Packaging, supra, Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra, at para. 3.*

[39] In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the “old company” is not

feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is “not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a “restructuring”...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA’s fundamental purpose”. That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the “restructuring” contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged...

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a “niche” in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the “restructuring” will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The “fundamental purpose” of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary...

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole “economic community”?
- (c) do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel’s proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
- (g) the value of the Business is likely to decline over time.

[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the “stalking horse” bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 2063
COURT FILE NO.: CV-12-9667-00CL
DATE: 20120402

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 SINO-FOREST CORPORATION, Applicant

BEFORE: MORAWETZ J.

COUNSEL: Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for the Applicant

E. A. Sellers for the Sino Forest Corporation Board of Directors

Derrick Tay and Jennifer Stam for the Proposed Monitor, FTI Consulting Canada, Inc.

R. J. Chadwick, B. O'Neill and C. Descours for the Ad Hoc Noteholders

M. Starnino for counsel in the Ontario class action

P. Griffin for Ernst & Young

Jim Grout and Hugh Craig for the Ontario Securities Commission

Scott Bomhof for Credit Suisse, TD and the underwriter defendants in the Canadian class action

HEARD: MARCH 30, 2012

ENDORSED: MARCH 30, 2012

REASONS: APRIL 2, 2012

ENDORSEMENT

OVERVIEW

[1] The Applicant, Sino-Forest Corporation (“SFC”), moves for an Initial Order and Sale Process Order under the *Companies’ Creditors Arrangement Act* (“CCAA”).

[2] The factual basis for the application is set out in the affidavit of Mr. W. Judson Martin, sworn March 30, 2012. Additional detail has been provided in a pre-filing report provided by the proposed monitor, FTI Consulting Canada Inc. (“FTI”).

[3] Counsel to SFC advise that, after extensive arm’s-length negotiations, SFC has entered into a Support Agreement with a substantial number of its Noteholders, which requires SFC to pursue a CCAA plan as well as a Sale Process.

[4] Counsel to SFC advises that the restructuring transactions contemplated by this proceeding are intended to:

- (a) separate Sino-Forest’s business operations from the problems facing SFC outside the People’s Republic of China (“PRC”) by transferring the intermediate holding companies that own the “business” and SFC’s inter-company claims against its subsidiaries to a newly formed company owned primarily by the Noteholders in compromise of their claims;
- (b) effect a Sale Process to determine whether anyone will purchase SFC’s business operations for an amount of consideration acceptable to SFC and its Noteholders, with potential excess being made available to Junior Constituents;
- (c) create a structure that will enable litigation claims to be pursued for the benefit of SFC’s stakeholders; and
- (d) allow Junior Constituents some “upside” in the form of a profit participation if Sino-Forest’s business operations acquired by the Noteholders are monetized at a profit within seven years from Plan implementation.

[5] The relief sought by SFC in this application includes:

- (i) a stay of proceedings against SFC, its current or former directors or officers, any of SFC’s property, and in respect of certain of SFC’s subsidiaries with respect to the note indentures issued by SFC;
- (ii) the granting of a Directors’ Charge and Administration Charge on certain of SFC’s property;
- (iii) the approval of the engagement letter of SFC’s financial advisor, Houlihan Lokey;

- (iv) the relieving of SFC of any obligation to call and hold an annual meeting of shareholders until further order of this court; and
- (v) the approval of sales process procedures.

FACTS

[6] SFC was formed under the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B-16, and in 2002 filed articles of continuance under the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 (“CBCA”).

[7] Since 1995, SFC has been a publicly-listed company on the TSX. SFC’s registered office is in Mississauga, Ontario, and its principal executive office is in Hong Kong.

[8] A total of 137 entities make up the Sino-Forest Companies: 67 PRC incorporated entities (with 12 branch companies), 58 BVI incorporated entities, 7 Hong Kong incorporated entities, 2 Canadian entities and 3 entities incorporated in other jurisdictions.

[9] SFC currently has three employees. Collectively, the Sino-Forest Companies employ a total of approximately 3,553 employees, with approximately 3,460 located in the PRC and approximately 90 located in Hong Kong.

[10] Sino-Forest is a publicly-listed major integrated forest plantation operator and forest productions company, with assets predominantly in the PRC. Its principal businesses include the sale of standing timber and wood logs, the ownership and management of forest plantation trees, and the complementary manufacturing of downstream engineered-wood products.

[11] Substantially all of Sino-Forest’s sales are generated in the PRC.

[12] On June 2, 2011, Muddy Waters LLC published a report (the “MW Report”) which, according to submissions made by SFC, alleged, among other things, that SFC is a “near total fraud” and a “ponzi scheme”.

[13] On the same day that the MW Report was released, the board of directors of SFC appointed an independent committee to investigate the allegations set out in the MW Report.

[14] In addition, investigations have been launched by the Ontario Securities Commission (“OSC”), the Hong Kong Securities and Futures Commissions (“HKSF”) and the Royal Canadian Mounted Police (“RCMP”).

[15] On August 26, 2011, the OSC issued a cease trade order with respect to the securities of SFC and with respect to certain senior management personnel. With the consent of SFC, the cease trade order was extended by subsequent orders of the OSC.

[16] SFC and certain of its officers, directors and employees, along with SFC’s current and former auditors, technical consultants and various underwriters involved in prior equity and debt

offerings, have been named as defendants in eight class action lawsuits in Canada. Additionally, a class action was commenced against SFC and other defendants in the State of New York.

[17] The affidavit of Mr. Martin also points out that circumstances are such that SFC has not been able to release Q3 2011 results and these circumstances could also impact SFC's historical financial statements and its ability to obtain an audit for its 2011 fiscal year. On January 10, 2012, SFC cautioned that its historic financial statements and related audit reports should not be relied upon.

[18] SFC has issued four series of notes (two senior notes and two convertible notes), with a combined principal amount of approximately \$1.8 billion, which remain outstanding and mature at various times between 2013 and 2017. The notes are supported by various guarantees from subsidiaries of SFC, and some are also supported by share pledges from certain of SFC's subsidiaries.

[19] Mr. Martin has acknowledged that SFC's failure to file the Q3 results constitutes a default under the note indentures.

[20] On January 12, 2012, SFC announced that holders of a majority in principal amount of SFC's senior notes due 2014 and its senior notes due 2017 agreed to waive the default arising from SFC's failure to release the Q3 results on a timely basis.

[21] The waiver agreements expire on the earlier of April 30, 2012 and any earlier termination of the waiver agreements in accordance with their terms. In addition, should SFC fail to file its audited financial statements for its fiscal year ended December 31, 2011 by March 30, 2012, the indenture trustees would be in a position to accelerate and enforce the approximately \$1.8 billion in notes.

[22] The audited financial statements for the fiscal year that ended on December 31, 2011 have not yet been filed.

[23] Mr. Martin also deposes that, although the allegations in the MW Report have not been substantiated, the allegations have had a catastrophic negative impact on Sino-Forest's business activities and there has been a material decline in the market value of SFC's common shares and notes. Further, credit ratings were lowered and ultimately withdrawn.

[24] Mr. Martin contends that the various investigations and class action lawsuits have required, and will continue to require, that significant resources be expended by directors, officers and employees of Sino-Forest. This has also affected Sino-Forest's ability to conduct its operations in the normal course of business and the business has effectively been frozen and ground to a halt. In addition, SFC has been unable to secure or renew certain existing onshore banking facilities and has been unable to obtain offshore letters of credit to facilitate its trading business. Further, relationships with the PRC government, local government, and suppliers have become strained, making it increasingly difficult to conduct any business operations.

[25] As noted above, following arm's-length negotiations between SFC and the Ad Hoc Noteholders, the parties entered into a Support Agreement which provides that SFC will pursue a CCAA plan on the terms set out in the Support Agreement in order to implement the agreed upon restructuring transaction.

APPLICATION OF THE CCAA

[26] SFC is a corporation continued under the CBCA and is a "company" as defined in the CCAA.

[27] SFC also takes the position that it is a "debtor company" within the meaning of the CCAA. A "debtor company" includes a company that is insolvent.

[28] The issued and outstanding convertible and senior notes of SFC total approximately \$1.8 billion. The waiver agreements with respect to SFC's defaults under the senior notes expire on April 30, 2012. Mr. Martin contends that, but for the Support Agreement, which requires SFC to pursue a CCAA plan, the indenture trustees under the notes would be entitled to accelerate and enforce the rights of the Noteholders as soon as April 30, 2012. As such, SFC contends that it is insolvent as it is "reasonably expected to run out of liquidity within a reasonable proximity of time" and would be unable to meet its obligations as they come due or continue as a going concern. See *Re Stelco* [2004] O.J. No. 1257 at para. 26; leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336; and *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (S.C.J.) at paras. 12 and 32.

[29] For the purposes of this application, I accept that SFC is a "debtor company" within the meaning of the CCAA and is insolvent; and, as a CBCA company that is insolvent with debts in excess of \$5 million, SFC meets the statutory requirements for relief under the CCAA.

[30] The required financial information, including cash-flow information, has been filed.

[31] I am satisfied that it is appropriate to grant SFC relief under the CCAA and to provide for a stay of proceedings. FTI Consulting Canada, Inc., having filed its Consent to act, is appointed Monitor.

THE ADMINISTRATION CHARGE

[32] SFC has also requested an Administration Charge. Section 11.52 of the CCAA provides the court with the jurisdiction to grant an Administration Charge in respect of the fees and expenses of FTI and other professionals.

[33] I am satisfied that, in the circumstances of this case, an Administration Charge in the requested amount is appropriate. In making this determination I have taken into account the complexity of the business, the proposed role of the beneficiaries of the charge, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge and the position of FTI.

[34] In this case, FTI supports the Administration Charge. Further, it is noted that the Administration Charge does not seek a super priority charge ranking ahead of the secured creditors.

THE DIRECTORS' CHARGE

[35] SFC also requests a Directors' Charge. Section 11.51 of the CCAA provides the court with the jurisdiction to grant a charge in favour of any director to indemnify the director against obligations and liabilities that they may incur as a director of the company after commencement of the CCAA proceedings.

[36] Having reviewed the record, I am satisfied that the Directors' Charge in the requested amount is appropriate and necessary. In making this determination, I have taken into account that the continued participation of directors is desirable and, in this particular case, absent the Directors' Charge, the directors have indicated they will not continue in their participation in the restructuring of SFC. I am also satisfied that the insurance policies currently in place contain exclusions and limitations of coverage which could leave SFC's directors without coverage in certain circumstances.

[37] In addition, the Directors' Charge is intended to rank behind the Administration Charge. Further, FTI supports the Directors' Charge and the Directors' Charge does not seek a super priority charge ranking ahead of secured creditors.

[38] Based on the above, I am satisfied that the Directors' Charge is fair and reasonable in the circumstances.

THE SALE PROCESS

[39] SFC has also requested approval for the Sale Process.

[40] The CCAA is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent company. It has been held that a sale by a debtor, which preserves its businesses as a going concern, is consistent with these objectives, and the court has the jurisdiction to authorize such a sale under the CCAA in the absence of a plan. See *Re Nortel Networks Corp.*, [2009] O.J. No. 3169 (S.C.J.) at paras. 47-48.

[41] The following questions may be considered when determining whether to authorize a sale under the CCAA in the absence of a plan (See *Re Nortel Networks Corp.*, *supra* at para. 49):

- (i) Is the sale transaction warranted at this time?
- (ii) Will the sale benefit the “whole economic community”?
- (iii) Do any of the debtors’ creditors have a *bone fide* reason to object to the sale of the business?
- (iv) Is there a better alternative?

[42] Counsel submits that as a result of the uncertainty surrounding SFC, it is impossible to know what an interested third party might be willing to pay for the underlying business operations of SFC once they are separated from the problems facing SFC outside the PRC. Counsel further contends that it is only by running the Sale Process that SFC and the court can determine whether there is an interested party that would be willing to purchase SFC’s business operations for an amount of consideration that is acceptable to SFC and its Noteholders while also making excess funds available to Junior Constituents.

[43] Based on a review of the record, the comments of FTI, and the support levels being provided by the Ad Hoc Noteholders Committee, I am satisfied that the aforementioned factors, when considered in the circumstances of this case, justify the approval of the Sale Process at this point in time.

ANCILLARY RELIEF

[44] I am also of the view that it is impractical for SFC to call and hold its annual general meeting at this time and, therefore, I am of the view that it is appropriate to grant an order relieving SFC of this obligation.

[45] SFC seeks to have FTI authorized, as a formal representative of SFC, to apply for recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including as “foreign main proceedings” in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code. Counsel contends that such an order is necessary to facilitate the restructuring as, among other things, SFC faces class action lawsuits in New York, the notes are governed by New York law, the indenture trustees are located in New York and certain of the SFC subsidiaries may face proceedings in foreign jurisdictions in respect of certain notes issued by SFC. In my view, this relief is appropriate and is granted.

[46] SFC also requests an order approving:

- (i) the Financial Advisor Agreement; and
- (ii) Houlihan Lokey’s retention by SFC under the terms of the agreement.

[47] Both SFC and FTI believe that the quantum and nature of the remuneration provided for in the Financial Advisor Agreement is fair and reasonable and that an order approving the Financial Advisor Agreement is appropriate and essential to a successful restructuring of SFC.

This request has the support of parties appearing today and, in my view, is appropriate in the circumstances and is therefore granted.

DISPOSITION

[48] Accordingly, the relief requested by SFC is granted and orders shall issue substantially in the form of the Initial Order and the Sale Process Order included the Application Record.

MISCELLANEOUS

[49] SFC has confirmed that it is bound by the Support Agreement and intends to comply with it.

[50] The come-back hearing is scheduled for Friday, April 13, 2012. The orders granted today contain a come-back clause. The orders were made on extremely short notice and for all practical purposes are to be treated as being made *ex parte*.

[51] The scheduling of future hearings in this matter shall be coordinated through counsel to the Monitor and the Commercial List Office.

[52] Finally, it would be helpful if counsel could also file materials on a USB key in addition to a paper record.

MORAWETZ J.

Date: April 2, 2012

CITATION: Nortel Networks Corporation (Re), 2010 ONSC 1304
COURT FILE NO.: 09-CL-7950
DATE: 20100318

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 NORTEL NETWORKS CORPORATION, NORTEL
NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION,
NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL
NETWORKS TECHNOLOGY CORPORATION, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Fred Myers, J. Carfagnini and C. Armstrong, for Ernst & Young, Inc., Monitor

Derrick Tay, Alan Merskey and Suzanne Wood, for the Applicants

Adam Hirsh, for the Board of Directors of Nortel Networks Limited and Nortel
Networks Corporation

Arthur O. Jacques, for Nortel Canadian Continuing Employees

Kevin Zych, for Informal Noteholder Group

John Marshall and James Szunski, for The Pensions Regulator (U.K.)

Mark Zigler, for the Former and Disabled Canadian Employees

William Burden and David Ward, for the UK Pension Trustee and the Pension
Protection Fund

M. Starnino, for the Pension Benefit Guarantee Fund

Alex MacFarlane, for the Unsecured Creditors' Committee

HEARD: FEBRUARY 25, 2010

RELEASED: FEBRUARY 26, 2010

REASONS: MARCH 18, 2010

ENDORSEMENT

INTRODUCTION

[1] Ernst & Young, Inc., in its capacity as Monitor of the Applicants (the “Monitor”) brings this motion for an order:

- (a) validating short service;
- (b) declaring that the purported exercise of rights and the commencement of proceedings against the Applicants, Nortel Networks Corporation and Nortel Networks Limited, by The Pensions Regulator under the *Pensions Act 2004* (U.K.) amount to breaches of paragraphs 14 and 15 of the Initial Order;
- (c) authorizing, directing and requiring the Applicants and the Monitor to refrain from participating in any proceedings commenced by The Pensions Regulator in breach of the Initial Order; and
- (d) declaring that the for the purposes of these proceedings all acts taken by the U.K. Pensions Regulator in the purported exercise of rights and in commencing any proceedings against any of the Applicants, without the consent of those Applicants and the Monitor or without leave of this court having been first obtained, are null and void and should be given no force or effect in these proceedings nor otherwise recognized as creating or forming the basis of any valid or enforceable rights, remedies or claims against the Applicants or any of their assets, property or undertaking in Canada.

[2] The motion was heard on February 25, 2010.

[3] On February 26, 2010, the Record was endorsed: “The Stay applies. The relief requested in (a), (b) and (d) of the Notice of Motion is granted. No order in respect of (c). Reasons will follow”.

[4] These are those reasons.

FACTS

[5] Paragraphs 14 and 15 of the Initial Order, granted January 14, 2009, provide as follows:

14. THIS COURT ORDERS that until and including February 13, 2009 or such later date as this Court may order (the “Stay Period”), no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”) shall be commenced, or continued against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the affected Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in

respect of the affected Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the affected Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

[6] The Pensions Regulator (“The Pensions Regulator”) is the body charged with the enforcement of certain provisions of the *Pensions Act 2004* (U.K.) (the “U.K. Statute”).

[7] The U.K. Statute’s objectives include protecting the benefits of employees in work-based pension schemes and promoting proper administration of those schemes. Under s. 96 of the U.K. Statute, the Regulator may determine whether or not to take regulatory action, which includes, *inter alia*, determining whether the applicable pension is underfunded, quantifying the deficit and holding the employer or a related party responsible for such deficit. The Determinations Panel, an internal group, determines whether the regulatory functions should be exercised.

[8] On August 24, 2009, The Pensions Regulator advised the Administrators of the Nortel Networks UK Limited (“NNUK”) (the “Administrators”) Pension Plan that it was considering issuing a warning notice, a mandatory step towards issuing a financial support direction (“FSD”). A warning notice sets out the grounds for the potential issuance of an FSD, which is a direction requiring a party to put financial supports in place for an underfunded pension scheme. Any company that is an associate of or is otherwise connected with an employer may be issued an FSD.

[9] On September 4, 2009, The Pensions Regulator wrote to Nortel Networks Corporation (“NNC”) advising that it was considering issuing a warning notice seeking an FSD against NNC and other members in the Nortel Group.

[10] On September 16, 2009, NNC wrote to The Pensions Regulator advising that because of the stay issued by this court under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”), it could not consider individual potential claims.

[11] On January 11, 2010, The Pensions Regulator issued a warning notice to NNC, NNI and 27 other companies in the Nortel Group (the “Notice”). The Notice was sent to Nortel Networks Limited (“NNL”) and NNC in Canada.

[12] The Pensions Regulator informed NNL and NNC that they had until March 1, 2010 to make submissions under the U.K. Statute, failing which default proceedings would be taken. The court was advised that the issuance of an FSD is subject to time limits and that the decision to issue an FSD must occur no more than two years after the “relevant time.” The relevant time is designated by The Pensions Regulator in this case as June 30, 2008, such that any decision to issue an FSD in respect of this matter must be made by June 30, 2010.

ISSUE

[13] By issuing the Notice, did The Pensions Regulator contravene the stay granted in the Initial Order?

POSITIONS OF THE PARTIES

[14] Counsel to the Monitor submits that the issuance of the Notice constitutes the commencement of an enforcement process by a tribunal that is stayed by paragraph 14 of the Initial Order and an assertion of rights by a governmental body that is stayed by paragraph 15 of the Initial Order.

[15] The Monitor takes the position that the Notice is effectively a pleading required under the U.K. Statute to enable The Pensions Regulator to make an FSD under the U.K. Statute. Such a determination would cause foreign affiliates of NNUK, including NNL and NNC, to become liable to provide financial support for the pension plan maintained by NNUK.

[16] The Monitor contends that in the Notice, The Pensions Regulator purports to exercise rights under the U.K. Statute including, without limitation, the commencement of proceedings to require NNL and NNC to pay up to £2.1 billion (approximately CDN\$4 billion) to fund the deficit in NNUK’s pension plan. The Pensions Regulator also exercises purported statutory rights, such as deeming certain facts for the purposes of the U.K. Statute and demanding a response by a time limit under threat of default proceedings. Counsel submits that these exercises of rights without consent or leave are stayed by paragraphs 14 and 15 of the Initial Order.

[17] Counsel to the Monitor further submits that if The Pensions Regulator is allowed to proceed under the Notice and the process described therein, the result would be extremely prejudicial to the Applicants’ ongoing restructuring efforts and to their creditors generally because:

- i. Management is fully engaged in the restructuring process and the Applicants cannot afford to sacrifice the time and resources required to participate in the complex process envisaged in the Notice.
- ii. The restructuring would be disrupted and the progress already made therein, including the international efforts to negotiate the Allocation Protocol under the

IFSA, would be threatened by The Pension Regulator's proceedings or its efforts to make determinations therein.

- iii. This Court is the proper forum for proceedings to determine the validity of and resolve all claims against the Applicants at an appropriate time and in an appropriate manner.

[18] Regarding forum, the Monitor submits that the issues put forth by The Pensions Regulator can only be properly determined under the CCAA. The NNUK Pension Trust Limited (the "Trustee") and the U.K. Pension Protection Fund (the "PPF") filed proofs of claim in accordance with the October 7, 2009 Claims Process Order (the "Claims Process Order"). The Trustee and the PPF claim "in the amount to be determined to be owing to [the Trustee and the PPF] pursuant to the Financial Support Direction Proceedings undertaken pursuant to the provisions of the [Pension Act]". Counsel to the Monitor submits that the filing under the Claims Procedure Order expressly raises the issues in the Notice.

[19] The Monitor submits that there are extensive issues of fact and law for resolution in those proceedings. Moreover, there are issues as to whether any FSD determination can or ought to be recognized as a proper claim under the CCAA. Counsel submits that these are substantial issues upon which determination may or may not be required depending on the outcome of the Allocation Protocol negotiations, and regardless of when such issues may be resolved, there are issues that have been raised in these proceedings by the parties having the economic interest in the FSD claims and who have appeared before this Court and have filed proofs of claims under the Claims Process Order. Counsel argues that it is not efficient, reasonable or appropriate for the Applicants to proceed with massive litigation now in a severely compressed timeframe before a foreign tribunal with an expressed interest in benefiting one group of creditors.

[20] At the very least, the Monitor submits that the Notice, having been issued in breach of the stay, should be declared null and void and of no force or effect due to the court's power to compel observance of its orders and to fulfill the purpose of the CCAA.

[21] The Monitor also seeks a direction that it refrain from engaging in the proceedings commenced by The Pensions Regulator due to the prejudice caused by a diversion of resources.

[22] The Applicants substantially adopt the Monitor's characterization of the Notice and the prejudice it would cause the parties.

[23] The Applicants support the Monitor's request for an order declaring that any findings or claims emanating from the Notice and the associated process be null and void, and not recognizable or enforceable in this proceeding.

[24] The position of the Monitor is also supported by counsel to the Noteholders, the Unsecured Creditors' Committee, the Former Disabled Canadian Employees and the Nortel Continuing Canadian Employees.

[25] Counsel to the PPGF and the Board of Directors of NNL and NNC took no position.

[26] The motion was opposed by counsel on behalf of The Pensions Regulator, which responds only to one of the heads of relief sought in the Monitor's Notice of Motion: whether the activities of The Pensions Regulator are a breach of paragraphs 14 and 15 of the Initial Order. The Pensions Regulator submits that the issue is whether this court has jurisdiction to make the order sought by the Monitor in relation to The Pensions Regulator.

[27] The Pensions Regulator further submits that if this Court does have such jurisdiction, it should not be exercised in this case in any event.

[28] Regarding the assertion by the Monitor and Applicants that the Notice is a pleading, Counsel for The Pensions Regulator took the position that that the Notice provides a standard procedure for determining, internally, whether The Pensions Regulator should commence proceedings to exercise its statutory powers (the "Standard Procedure").

[29] Counsel to The Pensions Regulator submits that pursuant to the Notice, the Determinations Panel will consider exercising its powers to issue an FSD and that these powers have not yet been exercised and may never be exercised. A determination in this regard will not be made until the responding parties to the Notice have had an opportunity to make representations and those representations have been considered by the Determinations Panel pursuant to the Standard Procedure set out at sections 96(2)(b) and (c) of the U.K. Statute.

[30] Counsel further submitted that the FSD powers which The Pensions Regulator is considering exercising will not result in additional *ex post facto* claims in the proceedings under the CCAA as the Monitor has alleged, as the activities of the Determinations Panel will not result in making The Pensions Regulator a creditor of the Applicants.

[31] Counsel to The Pensions Regulators submits this court does not have jurisdiction to make, and/or ought not to make, the order sought by the Monitor for the following reasons:

- (a) The Initial Order is of no effect in the UK;
- (b) The Monitor has not sought to enforce the Initial Order in the UK by way of an application for a recognition order;
- (c) Although it is speculative to predict whether a UK court would make a recognition order enforcing the Initial Order in the UK, a number of factors suggest that any such recognition would not stay the regulatory proceedings;
- (d) The blanket request for aid and recognition in the Initial Order does not eliminate the need for an application for a recognition order and the inquiry by the UK court that would be triggered thereby; and

[32] Counsel further submits that this court lacks the jurisdiction to make an order under the CCAA that purports to have an inherent effect in a foreign state.

[33] Counsel to the Trustee of the NNUK Pension Plan also opposed the making of any order. In particular, counsel submitted that an FSD could assist this court in CCAA proceedings, as the Panel making the determination has expertise and operates in a similar legal system as Canada.

LAW AND ANALYSIS

[34] The CCAA stay of proceedings has been described as “the engine that drives a broad and flexible statutory scheme”: see *Re Stelco Inc.*, 2005 CarswellOnt 1188 at para 36 (C.A.).

[35] This court had the jurisdiction to make the Orders in paragraphs 14 and 15 of the Initial Order. Subsection 11(3) (with respect to initial applications) and subsection 11(4) (with respect to subsequent applications such as extensions of the initial stay) of the CCAA expressly empower the Court to make an order staying “any action, suit or proceeding” against the company on such terms as it may impose.

[36] The court retains the ability to control its own process including litigation against CCAA debtors and claims procedures within a CCAA process. To ensure its effectiveness, s. 11, and in particular “proceedings” has been broadly interpreted to cover both judicial and extra-judicial proceedings which could prejudice an eventual arrangement.

[37] In *Re Woodward's Ltd.*, (1993) 17 C.B.R. (3d) 236 (B.C.S.C.), the court found that “if a step must be taken vis-a-vis the insolvent company” for the creditor to enforce its rights, that step was a proceeding (at para. 27). The B.C. court looked to Black’s Law Dictionary’s definition of “proceeding” to base its finding:

"proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding.

[38] In *Meridian Development Inc. v. Toronto Dominion Bank*, (1984) 52 C.B.R. (N.S.) 109 (Alta Q.B.), Wachowich J. provided a helpful analysis of the breadth of the definition of “proceeding” at para 27:

... I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of "proceeding" could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors are being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to restrict the term "proceedings" to those necessarily involving a court or court official, because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act ... (i)n the absence of a clear indication from Parliament of an intention to restrict proceedings" to "proceedings which involve either a court or court official", I cannot find that the term should be so restricted. Had Parliament intended to so restrict the term, it would

have been easy to qualify it by saying for instance "proceedings before a court or tribunal".

[39] It has also been established that the term "proceeding" may refer to any procedural step that is part of a larger proceeding. Delivery of a certificate to the debtor company as a prerequisite to drawing on a letter of credit has been stayed as a proceeding against a CCAA debtor: see *Re Woodward's Ltd.*, *supra*, at paras 26-27.

[40] It seems to me that, even though the Notice may be described as a warning shot across the bow, the effect of the Notice in this case is something far more significant. It clearly puts the Applicants and the Monitor on notice that there is a substantial claim that is being considered in the CCAA proceedings. At the present time, the claim as filed by the U.K. Pension Trustee makes reference to the FSD which may very well flow from the activities being undertaken by The Pensions Regulator. Having already set out the parameters of this claim in the proof of claim, the claim has to be considered a contingent claim in the CCAA proceedings. In my view, the issuance of the Notice is another step on the road to crystallizing the contingent claim.

[41] The issuance of an FSD is a remedy created by a statute of the United Kingdom. Regardless of whether the U.K. Statute purports to extend its reach beyond the borders of the U.K., the Notice, naming the Applicants, NNC and NNL, as "target companies" affects these entities which are clearly within the jurisdiction of this Court. Moreover, The Pensions Regulator purported to deliver the Notice to NNL and NNC by sending it to them in Canada in purported compliance with the U.K. Statute. In my view, The Pensions Regulator took steps in Canada in respect of a proceeding. In this context, The Pensions Regulator is, in my view, a person affected by the Initial Order, with which it must comply when it takes any proceedings in Canada.

[42] The Pensions Regulator did not obtain the consent of NNC and NNL or the Monitor, and did not obtain the leave of this court, before taking steps in Canada which affected NNC and NNL. In my view, the delivery of the Notice in Canada was in breach of the Initial Order. It follows that any continuation of these proceedings in Canada and attempted enforcement of rights in Canada will also be in breach of the Initial Order.

[43] As such, section (b) of the relief requested by the Monitor should be granted.

[44] It also follows that for the purposes of the CCAA proceedings, the actions taken by The Pensions Regulator, are null and void in Canada and are to be given no force or effect in these CCAA proceedings. Accordingly, section (d) of the requested relief should also be granted.

[45] Having made this determination, in my view, it is not necessary to consider the arguments outlined at [17]. The points raised in [17] may be relevant to any motion to lift the stay, but that issue is not before the court.

[46] The Monitor also requested an order authorizing, directing or requiring the Applicants and the Monitor to refrain from participating in any proceedings commenced by The Pensions Regulator. In my view, it is not necessary to comment further and provide directions with

respect to a proceeding which, on its face, is null and void. The UK proceedings operate under UK law, and I decline to make a declaration on their legitimacy or to provide direction to the Monitor and the Applicants on their obligations to attend.

[47] An order shall issue to give effect to the foregoing.

MORAWETZ J.

Date: March 18, 2010

In the Matter of the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended and in the Matter of a
Proposed Plan of Compromise or Arrangement with respect to
Stelco Inc., and other Applicants listed in Schedule "A"
Application under the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

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

75 O.R. (3d) 5
[2005] O.J. No. 1171
Docket: M32289

Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
March 31, 2005

Corporations -- Directors -- Removal of directors --
Jurisdiction of court to remove directors -- Restructuring
supervised by court under Companies' Creditors Arrangement Act
-- Supervising judge erring in removing directors based on
apprehension that directors would not act in best interests of
corporation -- In context of restructuring, court not having
inherent jurisdiction to remove directors -- Removal of
directors governed by normal principles of corporate law and
not by court's authority under s. 11 of Companies' Creditors
Arrangement Act to supervise restructuring -- Companies'
Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors
-- Jurisdiction of court to remove directors -- Restructuring
supervised by court under the Companies' Creditors Arrangement

Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set

aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of

its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority 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. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. The powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of

apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc.

(Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); Ivaco Inc. (Re), [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (sub nom. Olympia & York Dev. v. Royal Trust Co.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] [page8] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Stephenson v. Vokes (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as am.], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 20 [as am.]

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Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --),

Jacob, I.H., "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28

Peterson, D.H., Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis--Butterworths, 1989)

Sullivan, R., Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002)

APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and Richard B. Swan, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and Robert A. Centa, for respondent United Steelworkers of America.

Murray Gold and Andrew J. Hatnay, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

The judgment of the court was delivered by

BLAIR J.A.: --

Part I -- Introduction

[1] Stelco Inc. and four of its wholly-owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act (the "CCAA") [See Note 1 at the end of the document] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies -- Clearwater Capital Management Inc. and Equilibrium Capital Management Inc. -- which, respectively, hold approximately 20 per cent of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (the "Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in

being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40 per cent of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.

Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their [page10] experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco (the "Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability -- exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as "the bare knuckled arena" of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation -- as opposed to their own best interests as shareholders -- in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as the "Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse. [page11]

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal and order the reinstatement of the applicants to the Board.

Part II -- Additional Facts

[11] Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected 11 directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

[12] Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of 20 directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

[13] Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

[14] In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids and report on the bids to the court.

[15] On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a [page12]capital proposal to Stelco. The proposal involved the raising of \$125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase

substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

[16] A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

[17] Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately five per cent as at November 19, to 14.9 per cent as at January 25, 2005, and finally to approximately 20 per cent on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

[18] On February 1, 2005, Messrs. Keiper and Woollcombe and other representatives of Clearwater and Equilibrium met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this

view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20 per cent of the company's common shares.

[page13]

[19] At paras. 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40 per cent of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.

18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

[20] In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed

that:

- (a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;
- (b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
- (c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing -- and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" -- the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but [pagel4] because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the

Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III -- Leave to Appeal

[23] Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc. (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point is of significance to the action;
- (c) whether the appeal is prima facie meritorious or frivolous;
- (d) whether the appeal will unduly hinder the progress of the action.

[25] Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on [page15] which there is

little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision-making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

Part IV -- The Appeal

The Positions of the Parties

[27] The appellants submit that,

- (a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;
- (b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,
- (c) even if there is jurisdiction, the motion judge erred:
 - (i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
 - (ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,
 - (iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and

therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the [page16] ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Re Algoma Steel Inc.*, [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 72 of the factum of the Retired Salaried Beneficiaries:

The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group -- particular investment funds that have acquired Stelco shares during the CCAA itself -- have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception

of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see *Re Olympia & York Development Ltd.* (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); *Re Ivaco Inc.*, [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17] Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List)); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the

statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --), vol. 37, at para. 14, the concept is described as follows:

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in *Royal Oak Mines*, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc. (Re)* (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the docuemnt], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", *supra*, at p. 25:

The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to

control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end fo the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The section 11 discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion -- in spite of its considerable breadth and flexibility -- does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the Canada Business Corporation Act, R.S.C. 1985, c. C-44 ("CBCA"), and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

[40] The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

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

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Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1); [page20]
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

- (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

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Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
- (b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at p. 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions [page21]made by directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff*, supra, at para. 5, "to make order[s] 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". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in

conducting what are in substance the company's restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. Ltd. v. Banking Service Corp. Ltd.*, [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); *Stephenson v. Vokes*, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: [page22] CBCA, ss. 106(3) and 111 [See Note 4 at the end of the document]. The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court -- where it finds that oppression as therein defined exists -- to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other

applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, supra, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re)*, supra; and *Richtree Inc. (Re)*, supra.

[49] At para. 7 of his reasons, the motion judge said:

The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in [page23] the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power -- which the courts are disinclined to exercise in any event -- except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The oppression remedy gateway

[52] The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[53] The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority. [page24]

The level of conduct required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

Director removal is an extraordinary remedy and certainly should be imposed most sparingly. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada". [See Note 5 at the end of the document]

SS. 18.172 Removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. By tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.

(Emphasis added)

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark,

however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors -- in which capacity they participated over two days in the bid consideration exercise -- in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk -- a reasonable apprehension -- that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future. [page25]

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium -- the shareholders represented by the appellants on the Board -- had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They

are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, at paras. 42-49.

[60] In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well -- in the context of "the shifting interest and incentives of shareholders and creditors" -- the court stated (para. 47):

In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in [page26]its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs. Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

[62] The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over 14 months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

[63] There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

[64] The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The business judgment rule

[65] The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings -- and courts in general -- will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, supra, at para. 67:

Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ... [page27]

[66] In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.), at p. 320 O.R., this

court adopted the following statement by the trial judge, Anderson J.:

Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [See Note 6 at the end of the document]

[67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

There can be no doubt that on an application under s. 234 [See Note 7 at the end of the document] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, supra; *Sammi Atlas Inc. (Re)*, [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); *Olympia & York Developments Ltd. (Re)*, supra; *Re Alberta Pacific Terminals Ltd.*, [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

[69] Here, the motion judge was alive to the "business

judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a [page28] situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

[70] I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) -- which describes the directors' overall responsibilities -- and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e., in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 2 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

[71] This is not to say that the conduct of the Board in

appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

[72] The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion -- not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and [page29] flexible supervisory jurisdiction -- a jurisdiction which feeds the creativity that makes the CCAA work so well -- in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The reasonable apprehension of bias analogy

[73] In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual bias or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and

responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40 per cent of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably [page30]prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable

apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V -- Disposition

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

Order accordingly.

[page31]

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: The reference is to the decisions in Dyle, Royal Oak Mines and Westar, cited above.

Note 3: See para. 43, *infra*, where I elaborate on this decision.

Note 4: It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

Note 5: Dennis H. Peterson, *Shareholder Remedies in Canada*, looseleaf (Markham: LexisNexis -- Butterworths, 1989), at 18-47.

Note 6: Or, I would add, unpopular with other stakeholders.

Note 7: Now s. 241.

ONTARIO COURT (GENERAL DIVISION)

COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36; and

IN THE MATTER OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c.C.43; and

IN THE MATTER OF A 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)

Applicants

Heard December 24, 1992

Counsel: Alfred Apps, Robert Harrison and Melissa J. Kennedy for the applicants

L Crozier for the Royal Bank of Canada

R.C. Heintzman for the Bank of Montreal

93015 057

J. Hodgson, Susan Lundy and James Hilton for Canada Trustco Mortgage Corporation

Jay Schwartz for Citibank Canada

Steven Golick for Peat Marwick Thorne Inc., proposed monitor

John Teolis for the Fuji Bank Canada

Robert Thorton for certain of the advisory boards

FARLEY J.:

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.

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 issued 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 lender 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.

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 maybe 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.S.C.T.D.)). The court will be concerned when major creditors

have not been alerted even in the most minimal fashion (Re Inducon Development Corporation (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p.310). The application was either supported or not opposed.

"Instant" debentures are now well recognized and respected by the courts: see Re United Maritime Fisherman Co-Op (1988), 67 C.B.R. (N.S.) 44, at pp.55-6, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 at pp.165-6; Re Stephanie's Fashions ltd. (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) at pp.250-1; 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. 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.

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; in Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., [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; Meridian Developments Inc. v. Nu-West Group Ltd., [1984] 5 W.W.R. 215 at pp.219-20; Norcen Energy Resources v. Oakwood Petroleum Limited, et al. (1988), 72 C.B.R. (N.S.) 1, 63 Alta L.R. (2d) 361 (Alta., Q.B.), at pp.12-13 (C.B.R.); Re Quintette Coal Limited (1990), 2 C.B.R.(3d) 303 (B.C.C.A), at pp.310-1, affirming Quintette Coal

Limited v. Nippon Steel Corporation et al. (1990) 2 C.B.R. (3d) 291, 47 B.C.L.R. 193 (B.C.S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.); Elan, supra at p.307 (O.R.); Fine's Flowers v. Creditors of Fine's Flowers (1992), 7 O.R. (3d) 193 (Gen. Div.), at p.199 and "Re-Organizations under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947), 25 Cdn. Bar Rev. 587 at p.592.

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 Elan, supra at pp. 297 and p.316; Stephanie's, supra, at pp.251-2 and Ultracare, 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, 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, supra, at pp.108-110; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (B.C.C.A.), at pp.315-318, (C.B.R.) and Stephanie's, supra, at pp.251-2.

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 Chef Ready, supra, at p.318 and Re Assoc.

Investors of Can. Ltd. (1987), 67 C.B.R. (N.S.) 237 at pp.245; rev'd on other grounds at (1988), 71 C.B.R. 72. 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 Assoc. Investors, supra, at p.318; Re Amirault Co. (1951), 32 C.B.R. 1986, [1951] 5 D.L.R. 203 (N.S.S.C.) at pp.187-8 (C.B.R.).

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.

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 or 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.

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 affects 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, supra at pp.12-7 (C.B.R.) and Quintette, supra, at pp.296-8 (B.C.S.C.) and pp.312-4 (B.C.C.A.) and Meridian, 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 Chef Ready, 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.

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 Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Qué. S.C. in Bankruptcy) at pp.290-1 and Quintette, supra, at pp.311-2 (B.C.C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see Re Northland Properties Limited et al. (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 In Re Nathan Feifer et al. v. Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Qué. C.A.)). 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 Corporation (1992), 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, supra, at pp.312-4 (B.C.C.A.).

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 In the Matter of the Proposal of Norman Slavik, unreported, [1992] B.C.J. No. 341. 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:

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.

It appears to me that Dickson J. in International Donut Corp. v. 050863 N.B. Ltd., unreported, [1992] N.B.J. No. 339 (N.B.Q.B.T.D.) was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated:

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).

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 at pp.4-7.

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 (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, Chap. C.43, which provides as follows:

s.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 discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), [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 Rule 6.01(1), is an example of the latter. The power to stay judicial and

extra-judicial proceedings under s.11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

...

The Power to Stay in the Context of CCAA Proceedings:

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

In this respect it has been observed that the CCAA 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 (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 at p.113 (B.C.C.A.).

Gibbs J.A. continued with this comment:

To the extent that a general principle can be extracted from the new 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. 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 et al. v. Rank et al., [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that the Judicature Act 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 et al. v. Township of Bosanquet (1974) 5 O.R. (2d) 53 (H.C.) and Canada Systems Group

(Est) Ltd. v. Allendale Mutual Insurance Co. (1982) 29 C.P.C. 60
(H.C.) at pp.65-6.

Montgomery J. in Canada Systems, supra, at pp.65-6 indicated:

Goodman J. (as he then was) in McCordic v. Bosanguet (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, [1972] 1 W.L.R. 326 (sub nom. Lane v. Willis; Lane v. Beach) (C.A.).

...

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.'

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-a-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. 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.

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. Depburn, Limited Partnerships, De Boo (1991), at p.1-2 and 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.

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.

It appears that the preponderance of case law supports the contention that a partnership including a limited partnership is not a separate legal entity. See Lindley on Partnership, 15th ed. (1984), at p.33-5; Seven Mile Dam Contractors v. R. in Right of British Columbia (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 E. Milne, (1985) 23 Alta. Law Rev. 345, at p.350-1. 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] 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.

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.524-5. 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-a-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.

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.

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

JM
FARCOY
Jan 6/92

THE STAY

4. THIS COURT ORDERS that each of the Applicants shall remain in possession of its property, assets and undertaking and of the property, assets and undertaking of the Limited Partnerships in

which they hold a direct interest (collectively the "Property") until March 15, 1993 (the "Stay Date") and shall be authorized, but not required, to make payment to Conventional Mortgage Creditors and to trade creditors incurred in the ordinary course prior to this Order including, without limitation, fees owing to professional advisors, wages, salaries, employee benefits, crown claims, unremitted source deductions in respect of income tax payable, Canada Pension Plan contributions payable, unemployment insurance contributions payable, realty taxes, and other taxes, if any, owing to any taxing authority and shall continue to carry on its business in the ordinary course, except as otherwise specifically authorized or directed by this Order, or as this Court may in future authorize or direct.

5. THIS COURT ORDERS that without in any way restricting the generality of paragraph 4 hereof, each of the Applicants, whether on behalf of a Limited Partnership or otherwise, be and is hereby authorized and empowered, subject to the existing rights of Creditors and any security granted in their favour, to:
- (a) borrow such additional sums as it may deem necessary,
 - (b) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order provided that such additional security expressly states that it ranks subsequent in priority to all then existing security including all floating charges, whether crystallized or uncrystallized,
 - (c) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order which may rank ahead of existing security if the consent is obtained of all secured creditors having an interest in the collateral in respect of which the additional security is granted to the granting of the additional security, and

- (d) dispose of any of its Property subject, however, to the terms of any security affecting same, provided that no disposition of any Property charged in favour of any secured lender shall be made unless such secured lender consents to such disposition and to the manner in which the proceeds derived from such disposition are distributed,

the whole on at least three (3) business days' prior notice to all of the Senior Creditors and the Monitor and on such terms as to notice to any other affected creditor as this Court may direct, but nothing in this Order shall prevent any Applicant, whether on behalf of a Limited Partnership or otherwise, from borrowing further funds or granting further security against the Londonderry Mall substantially in accordance with any existing agreements in order to fund the project completion and leasing costs of the Londonderry Mall and nothing in this Order shall prevent any Senior Creditor from advancing further funds to any of the Applicants or the Limited Partnerships under any existing security, subject to the existing rights of such Senior Creditor and any subordinate creditor including pursuant to any postponements or subordinations as may be extant in respect thereof.

6. THIS COURT ORDERS that, until the Stay Date, the General Partner Company and LUPC shall cause the monthly interest and, as applicable, amortization owing by LUPC under CT1 and CT3, but not the arrears thereof, to be paid as and when due and to cause LUPC to perform all of its obligations to CT in respect of CT2 under its existing arrangement in respect of the segregation and application of the net operating income of the Northgate Mall.
7. THIS COURT ORDERS that, subject to paragraphs 4 and 6 and to subparagraph 5(d) hereof, the Applicants and Limited

Partnerships be and are hereby directed, until further Order of this Court:

- (a) to make no payments, whether of capital, interest thereon or otherwise, on account of amounts owing by the Applicants to the Affected Creditors, as defined in the Plan, as of this date; and
- (b) to grant no mortgages, charges or other security upon or in respect of the Property other than for the specific purpose of borrowing new funds as provided for in paragraph 5 hereof.

but nothing in this Order shall prevent the General Partner Company or LUPC from making payments to Senior Creditors of interest and/or principal in accordance with existing agreements and nothing in this Order shall prevent the General Partner Company or the Limited Partnerships from making any funded monthly interest payments for loans secured against the Londonderry Mall.

- 8. THIS COURT ORDERS that until the Stay Date, the existing collateral position of Creditors in respect of marketable securities loans or credit facilities shall be frozen as at the date of this Order and all margin requirements in respect of such loans or credit facilities shall be suspended.
- 9. THIS COURT ORDERS that the Applicants shall be authorized to continue to retain and employ the agents, servants, solicitors and other assistants and consultants currently in its employ with liberty to retain such further assistants and consultants as they acting reasonably deem necessary or desirable in the ordinary course of their business or for the purpose of carrying out the terms of this Order or, subject to the approval of this Court.

10. THIS COURT ORDERS that, subject to paragraph 13 hereof, until the Stay Date or further Order of this Court:

- (a) any and all proceedings taken or that may be taken by any of the Creditors, any other creditors, customers, clients, suppliers, lessors (including ground lessors), tenants, co-tenants, governments, limited partners, co-venturers, partners or by any other person, firm, corporation or entity against or in respect of any of the Applicants or the Property, as the case may be, whether pursuant to the *Bankruptcy and Insolvency Act*, S.C. 1992, c. 27, the *Winding up Act*, R.S.C. 1985, c. W-11 or otherwise shall be stayed and suspended;
- (b) the right of any person, firm, corporation or other entity to take possession of, foreclose upon or otherwise deal with any of the Property, or to continue such actions or proceedings if commenced prior to the date of this Order, is hereby restrained;
- (c) the right of any person, firm, corporation or other entity to commence or continue realization in respect of any encumbrance, lien, charge, mortgage, attornment of rents or other security held in relation to the Property, including the right of any Creditor to take any step in asserting or perfecting any right against any Applicant or Limited Partnership, is hereby restrained, but the foregoing shall not prevent any Creditor from effecting any registrations with respect to existing security granted or agreed to prior to the date of this Order or from obtaining any third party consents in relation thereto;
- (d) the right of any person, firm, corporation or other entity to assert, enforce or exercise any right, option or remedy available to it under any agreement with any of the Applicants or in respect of any of the Property, as the case

may be, arising out of, relating to or triggered by the making or filing of these proceedings, or any allegation contained in these proceedings including, without limitation, the making of any demand, the sending of any notice or the issuance of any margin call is hereby restrained;

- (e) no suit, action or other proceeding shall be proceeded with or commenced against any of the Applicants or in respect of any of the Property, as the case may be;
- (f) all persons, firms, corporations and other entities are restrained from exercising any extra-judicial right or remedy against any of the Applicants or in respect of any of the Property, as the case may be;
- (g) all persons, firms, corporations and other entities are restrained from registering or re-registering any of the Property which constitutes securities into the name of such persons, firms, corporations or other entities or their nominees, the exercise of any voting rights attaching to such securities, any right of distress, repossession, set off or consolidation of accounts in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation as at the date hereof; and
- (h) notwithstanding paragraph 9(g) hereof, a Creditor may set off against its indebtedness to an Applicant, as the case may be, pursuant to any existing interest rate swap agreement any corresponding indebtedness of such Applicant, as the case may be, to such Creditor under the same interest rate swap agreement,

but nothing in this Order shall prevent suppliers of goods and services involved in completing the construction of the Londonderry Mall from commencing or continuing with any

construction lien claims they may have in relation to the Londonderry Mall and nothing in this Order shall prevent the Bank of Montreal ("BMO") and the Applicants from continuing to operate the existing bank accounts of the Applicants and of the Limited Partnerships maintained with BMO, in the same manner as those bank accounts were operated prior to the date of this Order including any rights of set off in relation to monies deposited therein and nothing in this Order shall prevent CIBC from realizing upon its security in respect of CIBC1 and nothing in this Order shall prevent or affect either FB or CT in the enforcement of the security it holds on the Sutton Place Hotel and the Carleton Place Hotel, respectively.

11. THIS COURT ORDERS that no Creditor shall be under any obligation to advance or re-advance any monies after the date of this Order to any of the Applicants or to any of the Limited Partnerships, as the case may be, provided, however, that cash placed on deposit by any Applicant with any Creditor from and after this date, whether in an operating account or otherwise and whether for its own account or for the account of a Limited Partnership, shall not be applied by such Creditor, other than in accordance with the terms of this Order, in reduction or repayment of amounts owing as of the date of this Order or which may become due on or before the Stay Date or in satisfaction of any interest or charges accruing in respect thereof.

12. THIS COURT ORDERS that all persons, firms, corporations and other entities having agreements with an Applicant or with a Limited Partnership, as the case may be, whether written or oral, for the supply or purchase of goods and/or services to such Applicant or Limited Partnerships, as the case may be, including, without limitation, ground leases, commercial leases, supply contracts, and service contracts, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such agreements without the written consent of such Applicant or Limited Partnership, as the case may be, or with the leave of

this Court. All persons, firms, corporations and other entities are hereby restrained until further order of this Court from discontinuing, interfering or cutting off any utility (including telephone service at the present numbers used by any of the Applicants or Limited Partnerships, as the case may be, whether such telephone services are listed in the name of one or more of such Applicants or Limited Partnerships, as the case may be, or in the name of some other person), the furnishing of oil, gas, water, heat or electricity, the supply of equipment or other services so long as such Applicant or Limited Partnerships, as the case may be, pays the normal prices or charges for such goods and services received after the date of this Order, as the same become due in accordance with such payment terms or as may be hereafter negotiated by such Applicant or Limited Partnerships, as the case may be, from time to time. All such persons, firms, corporations or other entities shall continue to perform and observe the terms and conditions contained in any agreements entered into with an Applicant or Limited Partnerships, as the case may be, and, without further limiting the generality of the foregoing, all persons, firms, corporations and other entities including tenants of premises owned or operated by any of the Applicants or Limited Partnerships, as the case may be, be and they are hereby restrained until further order of this Court from terminating, amending, suspending or withdrawing any agreements, licenses, permits, approvals or supply of services and from pursuing any rights or remedies arising thereunder.

13. THIS COURT ORDERS that, upon the failure by any of the Applicants to perform their obligations pursuant to this Order, any Creditor affected by such failure may, on at least one day's notice to each of the Applicants and to all Senior Creditors and the Monitor, bring a motion to have the provisions of paragraphs 10, 11 or 12 of this Order set aside or varied, either in whole or in part.

14. THIS COURT ORDERS that from 9:00 o'clock a.m. on December 24, 1992 to the time of the granting of this Order, any act or action taken or notice given by any Creditors receiving such Notice of Application in furtherance of their rights to commence or continue realization, will be deemed not to have been taken or given, as the case may be, subject to the right of such Creditors to further apply to this Court in respect of such act or action or notice given, provided that the foregoing shall not apply to prevent any Creditor who, during such period, effected any registrations with respect to security granted prior to the date of this Order or who obtained third party consents in relation thereto.
15. THIS COURT ORDERS that all floating charges granted by any of the Applicants prior to the date of this Order, whether granted on behalf of any of the Limited Partnerships or otherwise, shall be crystallized, and shall be deemed to be crystallized, effective for all purposes immediately prior to the granting of this Order.
16. THIS COURT ORDERS that the Applicants shall be entitled to take such steps as may be necessary or appropriate to discharge any construction, builders, mechanics or similar liens registered against any of their property including, without limitation, the posting of letters of credit or the making of payments into Court, as the case may be, and no lender to any Applicant shall be prevented from doing likewise or from making such protective advances as may be necessary or appropriate, in which case such lender, in respect of such advances, shall be entitled to the benefit of any existing security in its favour as of the date of this Order in accordance with its terms.
17. THIS COURT ORDERS that the Applicants on or before January 1, 1993, shall provide the Senior Creditors with projections as to the monthly general, administrative and restructuring ("GAR") costs for the months of January, February and March, 1993, together with a cash-flow projection for LUPC for the period

commencing on January 1, 1993 through to April 30, 1993 inclusive.

18. THIS COURT ORDERS that, notwithstanding the terms of this Order, the gross operating cash flow generated during the period commencing on the date of this Order to and until the Stay Date (the "Interim Period") by the Londonderry Mall shall be reserved and expended on the property in accordance with existing agreements, but all property management or other similar fees payable to any Applicant shall continue to be paid therefrom subject to the terms of any existing loan agreements affecting same.

ONTARIO COURT (GENERAL DIVISION)

COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, R.S.C.
1985, c.C-36; and

IN THE MATTER OF THE COURTS OF
JUSTICE ACT, R.S.O. 1990, c.C.43;
and

IN THE MATTER OF A 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)

Applicants

REASONS FOR JUDGMENT

FARLEY J.

JANUARY 6, 1993

37p

Citation: In the Matter of Doman
Industries et al
2003 BCSC 376

Date: 20030307
Docket: L023489
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Tysoe
Pronounced in Chambers
March 7, 2003

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

AND

**IN THE MATTER OF THE *COMPANY ACT*
R.S.B.C. 1996, c. 62**

AND

**IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*
R.S.C. 1985, c. C-44**

AND

**IN THE MATTER OF THE *PARTNERSHIP ACT*
R.S.B.C. 1996, c. 348**

AND

**IN THE MATTER OF DOMAN INDUSTRIES LIMITED,
ALPINE PROJECTS LIMITED
DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED
DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN
INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN – WESTERN
LUMBER LTD., EACOM TIMBER SALES LTD.,
WESTERN FOREST PRODUCTS LIMITED
WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and
QUATSINO NAVIGATION COMPANY LIMITED**

PETITIONERS

Counsel for the Petitioners: M.A. Fitch, Q.C.,
S. Martin and
R. Millar

Counsel for the Ad Hoc Committee
of Senior Secured Noteholders: G. Morawetz,
R. Chadwick and
J.J.L. Hunter, Q.C.

Counsel for Wells Fargo,
National Association: J.F. Dixon

Counsel for Herb Doman: G.K. Macintosh, Q.C.
and R.P. Sloman

Counsel for Her Majesty the
Queen in Right of British
Columbia: D.J. Hatter
and R. Butler

Counsel for Attorney General of
Canada: R.D. Leong

Counsel for CIT Business Credit
Canada Inc.: W.C. Kaplan, Q.C.
and P.L. Rubin

Counsel for the Monitor, KMPG
Inc.: J.I. McLean

Counsel for Brascan Financial,
Merrill Lynch and Oppenheimer
Funds: D.I. Knowles, Q.C.,
M. BATTERY and
I. Nordholm

Counsel for Toronto Dominion
Asset Management Inc., TD
Securities Inc. and Tordom
Company: P. Macdonald
and G. Gehlen

Counsel for Petro-Canada: K. Zimmer

Counsel for Pulp, Paper &
Woodworkers of Canada, Locals
3 and 8: W. Skelly

[1] There are two competing motions before the Court in these proceedings under the ***Companies Creditors Arrangement Act***, R.S.C. 1985, c. C-36, as amended (the "***CCAA***"). The first is a motion of the Petitioners (the "Doman Group") for an order authorizing the calling of creditor meetings to consider a plan of compromise or arrangement prepared by the Doman Group (the "Reorganization Plan" or the "Plan"). The second motion is an application by a group of secured creditors called the Ad Hoc Committee of Senior Secured Noteholders (the "Senior Secured Noteholders Committee") for numerous orders, including orders relating to the invalidity of the Reorganization Plan, allowing the Senior Secured Noteholders to vote on the Plan and authorizing the Senior Secured Noteholders Committee to file its own secured creditor Plan.

[2] One of the arguments which the Senior Secured Noteholders Committee wished to advance related to the constitutionality of the Court varying the terms of a contract in the absence of enabling provincial legislation. The Senior Secured Noteholders Committee applied to adjourn all of the applications so that the necessary notice for constitutional questions to the Attorneys General of British Columbia and Canada could expire. I refused the adjournment on the basis that the constitutional question can be argued upon the expiry

of the notice periods if it is still necessary to do so. Accordingly, my rulings at this stage are subject to the constitutional challenge by the Senior Secured Noteholders Committee and nothing I say in these Reasons for Judgment should be construed as a determination of the constitutional validity of such rulings.

[3] The Doman Group has the following four principal types of creditors:

- (a) the Senior Secured Noteholders which are owed US\$160 million and who hold security over most, but not all, of the fixed assets of the Doman Group;
- (b) the Unsecured Noteholders which are owed US\$513 million;
- (c) the lender which provides the Doman Group with an operating line of credit and which holds security against its current assets; and
- (d) unsecured trade creditors which are owed in the range of \$20 to \$25 million.

[4] The Reorganization Plan seeks to compromise only the indebtedness of the Unsecured Noteholders and the unsecured trade creditors. It is proposed that the unsecured trade

creditors will be paid in full up to an aggregate ceiling or cap amount of \$23.5 million. The Reorganization Plan provides that the Unsecured Noteholders are to receive US\$112,860,000 Junior Secured Notes plus 85% of the shares in the Doman Group (with the existing shareholders retaining the remaining 15% of the shares). The Junior Secured Notes are to be secured in second position against the assets subject to the security of the Senior Secured Noteholders.

[5] The Senior Secured Notes were issued pursuant to a Trust Indenture dated as of June 18, 1999 (the "Trust Indenture"). The principal amount of the Senior Secured Notes is due on July 1, 2004. The Doman Group is in default of the payment of the interest due on the Senior Secured Notes but it is intended that the overdue interest be paid upon implementation of the Reorganization Plan. The Trust Indenture has the usual types of events of default, including the commencement of proceedings under the **CCAA**, non-payment of principal or interest on indebtedness owed by the Doman Group to the Senior Secured Noteholders or to other parties and the failure to remedy a breach of any of the provisions of the Trust Indenture within 30 days after notice of the breach has been given to the Doman Group. It also has the usual provision enabling the Trustee under the Trust Indenture or a

specified percentage of the holders of the Senior Secured Notes to accelerate payment of the indebtedness upon the occurrence of an event of default and to thereby make all monies owing on the notes to be immediately due and payable.

[6] Sections 4.13 and 4.16 of the Trust Indenture are also relevant to the present applications. Section 4.13 reads as follows:

(a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired, or any income or profits therefrom or assign or convey any right to receive income therefrom, except Permitted Liens (provided that Liens on Note Collateral or any portion thereof shall be governed by clause (b) of this Section 4.13) unless (i) in the case of Liens securing Indebtedness which is subordinated to the Notes and the Guarantees, the Notes and the Guarantees are secured by a Lien on such property, assets, income, profits or rights that is senior in priority to such Liens and (ii) in all other cases, the Notes and the Guarantees are equally and ratably secured.

(b) The Company shall not, and shall not permit of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired that constitutes Note Collateral, any income or profits from any Note Collateral or to assign or convey any right to receive income from any Note Collateral, except for Permitted Note Collateral Liens.

Section 4.16 reads, in part, as follows:

Upon the occurrence of a Change of Control, each Holder of Notes shall have the right to require the Company to repurchase all or any part (equal to U.S. \$1,000 or an integral multiple thereof) of such Holder's Notes pursuant to the offer described below (the "Change of Control offer") at an offer price in cash equal to 101% of the aggregate principal amount thereof plus accrued and unpaid interest, if any, and Liquidated Damages, if any, to the date of purchase (the "Change of Control Payment"). Within 10 days following any Change of Control, the Company shall mail a notice to each Holder stating: (1) that the Change of Control offer is being made pursuant to the covenant entitled "Change of Control" and that all Notes tendered will be accepted for payment; (2) the purchase price and the purchase date, which will be no earlier than 30 days nor later than 40 days from the date such notice is mailed and which shall be the same date as the Change of Control Payment Date with respect to the 1994 Notes and the 1997 Notes (the "Change of Control Payment Date"); ...

On the Change of Control Payment Date, the Company shall, to the extent lawful, (1) accept for payment Notes or portions thereof tendered pursuant to the Change of Control Offer, (2) deposit with the Paying Agent an amount equal to the Change of Control Payment in respect of all Notes or portions thereof so tendered and (3) deliver or cause to be delivered to the Trustee the Notes so accepted ...

[7] The Reorganization Plan does not seek to compromise the indebtedness owed to the Senior Secured Noteholders. However, the Senior Secured Noteholders maintain that they are affected or prejudiced by the Reorganization Plan. They point to sections 4.12, 6.2 and 6.3 of the Reorganization Plan, the relevant portions of which read as follows:

4.12 Waiver of Defaults and Permanent Injunction

From and after the Effective Date:

- (a) all Creditors and other Persons (including Unaffected Creditors) shall be deemed to have waived any and all defaults of the Doman Entities then existing or previously committed by the Doman Entities or caused by the Doman Entities, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Doman Entities, including a default under a covenant relating to any other affiliated or subsidiary company of Doman other than the Doman Entities, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded;

- (b) a permanent injunction shall be pronounced on the terms of the Final Order against Creditors and all other Persons (including Unaffected Creditors) having contractual relationships with any of the Doman Entities with respect to the exercise of any right or remedy contained in the instruments evidencing such contractual relationships or at law generally, which might otherwise be available to such Creditors or other Persons as a result of the filing of the CCAA Proceedings, the content of the Plan, implementation of the Plan, any action taken by the Doman Entities or any third party pursuant to the Plan or the Final Order either before or after the Plan Implementation Date, or any other matter whatsoever relating to the CCAA Proceedings, the Plan, or the transactions contemplated by the Plan; and

- (c) the Doman Entities may in all respects carry on as if the defaults, non-compliance, rights and remedies referred to in this section 4.12 had not occurred.

6.2 Effect of Final Order:

In addition to sanctioning the Plan, the Final Order shall, among other things:

...

- (f) confirm that all executory contracts, security agreements and other contractual relationships to which the Doman Entities are parties are in full force and effect notwithstanding the CCAA Proceeding or this Plan and its attendant compromises, and that no Person party to such an executory contract, security agreement or other contractual relationship shall be entitled to terminate or repudiate its obligation under such contract or agreement, or to the benefit of any right or remedy, by reason of the commencement of the CCAA Proceeding or the content of the Plan, the Change of control of Doman resulting from the Plan, the compromises extended under the Plan, the issuance of the Junior Secured Notes, or any other matter contemplated under the Plan or the Final Order; and
- (g) confirm and give effect to the waivers, permanent injunctions and other provisions contemplated by section 4.12 of the Plan.

6.3 Conditions Precedent to Implementation of Plan:

The implementation of this Plan shall be conditional upon the fulfilment of the following conditions:

(a) ***Court Approval***

Pronouncement of the Final Order by the Court on the terms contemplated by Section 6.2 and otherwise acceptable to the Doman Entities.

The term "Unaffected Creditors" used in Section 4.12 includes the Senior Secured Noteholders.

[8] The application of the Doman Group is relatively limited in scope because it simply seeks authorization to hold creditor meetings to consider the Reorganization Plan.

However, it is common ground that I should not authorize the holding of the creditor meetings if the Reorganization Plan cannot be sanctioned by the Court following the holding of the creditor meetings or if the implementation of the Reorganization Plan is contingent on the Court granting an order which it has no jurisdiction to make or would not otherwise make.

[9] Counsel for the Doman Group submitted that the sole issue is whether the Court has the jurisdiction to grant a stay under s. 11(4) of the **CCAA** in the form of the permanent injunction specified under clause (b) of the Section 4.12 of the Reorganization Plan. I do not agree. In particular, clause (a) of Section 4.12 purports to bind Unaffected Creditors, which include the Senior Secured Noteholders, by deeming them to have waived all defaults under instruments between them and the Doman Group. I agree with the counsel for the Senior Secured Noteholders Committee that creditors of debtor company under the **CCAA** cannot be bound by the

provisions of a plan of compromise or arrangement if they have not been given the opportunity to vote on it: see ***Menegon v. Philip Services Corp.***, [1999] O.J. No. 4080 (Q. L.) (Ct. Jus.) at para. 38. It would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan when I know that this Court would refuse to sanction it on the basis that it purports to bind parties who were not given the opportunity to vote on it.

[10] However, my conclusion in this regard does not mean that I should accede to the request of the Senior Secured Noteholders Committee for the right to vote on the Reorganization Plan. In view of the submission made by the counsel for the Doman Group that the Plan was not intended to affect the rights of the Senior Secured Noteholders, I believe that the Doman Group should first be given the opportunity to propose a revised Reorganization Plan which does not include reference to Unaffected Creditors in clause (a) of Section 4.12 or any other provision which purports to bind parties who are not given the opportunity to vote on the Plan.

[11] I next turn my attention to clause (b) of Section 4.12, which is the provision upon which I believe counsel for the Doman Group is relying to prevent Senior Secured Noteholders from acting on their security following the

implementation of the Reorganization Plan. Although the permanent injunction contemplated in this clause is mentioned in the Reorganization Plan, it is not, strictly speaking, part of the Plan. Rather, the granting of the injunction is a condition precedent in the implementation of the Plan. The result of this distinction is that the Plan itself does not purport to bind the Senior Secured Noteholders in this regard and they are not entitled to vote on the Plan. Thus, the question becomes whether the Court has the jurisdiction to grant such an injunction because, if it does not have the jurisdiction, there would be no point in convening creditor meetings to consider a plan containing a condition precedent which cannot be fulfilled.

[12] The Court is given the power to grant stays of proceedings by s. 11(4) of the **CCAA**, which reads as follows:

(4) A court may, on an application in respect of a company other than an initial application, make an order on such term as it may impose,

- (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[13] Since the re-emergence of the **CCAA** in the 1980s, the Courts have utilized the stay provisions of the **CCAA** in a variety of situations for a purpose other than staying creditors from enforcing their security or otherwise preventing creditors from attempting to gain an advantage over other creditors. One of the seminal decisions is **Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.**, (1988) 72 C.B.R. (N.S.) 1 (Alta Q.B.), where the Court stayed the ability of a joint venture partner of a debtor company from relying on the insolvency of the debtor company to replace it as the operator under a petroleum operating agreement.

[14] Two other prominent examples are **Re T. Eaton Co.** (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) and **Re Playdium Enterprises Corp.** (2001), 31 C.B.R. (4th) 302, as supplemented at 31 C.B.R. (4th) 309 (Ont. Sup. Ct. Jus.). In the **T. Eaton** case, tenants in shopping centres in which Eaton's was also a tenant were prevented during the restructuring period from terminating their leases on the basis of co-tenancy clauses in their leases requiring anchor stores such as Eaton's to stay open. In the **Playdium** decision, the Court approved an assignment of an agreement in conjunction with a sale in a

failed **CCAA** proceeding where the other party to the agreement, which had a contractual right to consent to an assignment, was objecting to the assignment. As the Court in the **Playdium** case relied on s. 11(4) of the **CCAA**, I assume that the Order prevented the other party to the agreement from terminating the assigned agreement as a result of the failure to obtain its consent to the assignment. I was also referred to my decision in **Re Woodward's Ltd.** (1993), 17 C.B.R. (3d) 236, where I relied on the inherent jurisdiction of the court to stay the calling on letters of credit issued by third parties at the instance of the debtor company.

[15] The law is clear that the court has the jurisdiction under the **CCAA** to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in **Playdium**:

In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

[16] Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it. The decision in *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179 is an example of a permanent stay being granted in respect of a creditor of the restructuring company.

[17] Accordingly, it is my view that the court does have the jurisdiction to grant a permanent stay preventing the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on events of default existing prior to or during the restructuring period to accelerate the repayment of the indebtedness owing under the Notes. It may be that the

court would decline to exercise its jurisdiction in respect of monetary defaults but this point is academic in the present case because the Doman Group does intend to pay the overdue interest on the Notes upon implementation of the Reorganization Plan.

[18] The second issue is whether the court has the jurisdiction to grant a permanent stay to prevent the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on a breach of Section 4.13 of the Trust Indenture to accelerate payment of the indebtedness owed on the Notes. The potential breach under Section 4.13 would be occasioned by the Doman Group granting second ranking security to the Unsecured Noteholders upon the implementation of the Reorganization Plan. I use the term "potential breach" because counsel for the Doman Group takes the position that the granting of this security would not contravene the provisions of Section 4.13.

[19] I have decided that I should decline to make a determination of this issue because I did not receive the benefit of detailed submissions on the interpretation of Section 4.13 and the defined terms used in that Section. Counsel for the Doman Group simply argued that the wording was circular or ambiguous and noted that the definition of

Permitted Indebtedness could include a refinancing of the Unsecured Notes. Counsel for the Senior Secured Noteholders Committee took the position, without elaboration, that Section 4.13 would be breached if the proposed security were to be granted. If the granting of the security would not contravene Section 4.13, then it would not be necessary for the court to grant a permanent stay preventing the acceleration of the indebtedness owing on the Notes as a result of the granting of the security and the issue would be academic. In my opinion, it is not appropriate for me to decide a potentially academic issue and I decline to do so.

[20] The third issue is whether the court has the jurisdiction to effectively stay the operation of Section 4.16 of the Trust Indenture. Although I understand that there is an issue as to whether the giving of 85% of the equity in the Doman Group to the Unsecured Noteholders as part of the reorganization would constitute a change of control for the purposes of the current version of the provincial forestry legislation, counsel for the Doman Group conceded that it would constitute a Change of Control within the meaning of Section 4.16.

[21] The language of s. 11(4) of the **CCAA**, on a literal interpretation, is very broad and the case authorities have

held that it should receive a liberal interpretation in view of the remedial nature of the **CCAA**. However, in my opinion, a liberal interpretation of s. 11(4) does not permit the court to excuse the debtor company from fulfilling its contractual obligations arising after the implementation of a plan of compromise or arrangement.

[22] In my view, there are numerous purposes of stays under s. 11 of the **CCAA**. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganize or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs. An additional purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it may focus on restructuring its financial affairs. As I have observed above, a further purpose is to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the

restructuring period. All of these purposes are to facilitate a debtor company in restructuring its financial affairs. On the other hand, it is my opinion that Parliament did not intend s. 11(4) to authorize courts to stay proceedings in respect of defaults or breaches which occur after the implementation of the reorganization or restructuring plan, even if they arise as a result of the implementation of the plan.

[23] In the present case, the obligation of the Doman Group to make an offer under Section 4.16 of the Trust Indenture does not arise until ten days after the Change of Control. The Change of Control will occur upon the implementation of the Reorganization Plan, with the result that the obligation of the Doman Group to make the offer does not arise until a point in time after the Reorganization Plan has been implemented. This is a critical difference in my view between this case and the authorities relied upon by the counsel for the Doman Group.

[24] Section 11(4) utilizes the verbs "staying", "Restraining" and "prohibiting". These verbs evince an intention of protecting the debtor company from the actions of others, including creditors and non-creditors, while it is endeavouring to reorganize its financial affairs. This

wording is not intended, in my view, to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement. In the context of this case, the Doman Group is endeavouring to rely on s. 11(4) to relieve itself of the obligation to make an offer to repurchase the Senior Secured Notes upon a Change of Control. In my opinion, this goes beyond any liberal interpretation of s. 11(4).

[25] Counsel for Doman Group submitted that the proposed injunction is no more than a restriction upon an acceleration clause. Even if that is the case, it is an acceleration clause which does not become operative until after the restructuring has been completed. It is not a provision which the Senior Secured Noteholders are entitled to enforce as a result of an event of a default or breach occurring or existing prior to or during the restructuring period.

[26] There is no doubt that courts have power under s. 11(4) to interfere with the contractual relations during the restructuring period. It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.

[27] Counsel for the Doman Group also submitted that the court has the inherent jurisdiction to restrain the Doman Group from making the offer under Section 4.16 of the Trust Indenture, much in the same way as I exercised the court's inherent jurisdiction in *Woodward's*, prior to the enactment of s. 11.2 of the *CCAA*, to restrain third parties from calling on letters of credit issued by a financial institution at the instance of the debtor company. The court has the inherent jurisdiction during the restructuring period to "fill in gaps" in the *CCAA* or to "flesh out the bare bones" of the *CCAA* in order to give effect to its objects: see *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) at p. 93 and *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. Jus.) at p. 110. In my view, the Doman Group is not asking the court to fill in gaps in the *CCAA* during the restructuring period. Rather, it is asking the court to go beyond the type of stay contemplated by Parliament when it enacted s. 11(4) of the *CCAA*.

[28] In the event that I am mistaken and the court does have the jurisdiction to grant a stay in respect of the operation of Section 4.16 of the Trust Indenture, I would exercise my discretion against the granting of such a stay on the basis of the current circumstances. The absence of a

permanent injunction in relation to Section 4.16 will not necessarily frustrate the restructuring efforts of the Doman Group. Apart from any compromise which may be negotiated between the Doman Group and the Senior Secured Noteholders, it is far from a certainty that the Senior Secured Noteholders will accept an offer made by the Doman Group under Section 4.16 to purchase the Notes at 101% of their face value. Indeed, counsel for the Doman Group suggested that in light of the 12% interest rate applicable to the Notes and prevailing interest rates, the Noteholders would not want to accept the offer of a 1% premium because they would not be able to reinvest the funds at an interest rate as high as 11%. Counsel went so far as to characterize the right of repurchase and associated premium as "illusory benefits". In addition, it may be possible for the Doman Group to restructure its financial affairs in a fashion which does not involve a Change of Control while the Senior Secured Notes are outstanding. Finally, the Doman Group has not made any effort to negotiate an accommodation with the Senior Secured Noteholders.

[29] Although I have agreed with the reasoning of Spence J. at para. 32 of the *Playdium* decision, I should not be interpreted as agreeing with the correctness of the conclusion in *Playdium*. I have some reservations with respect to its

conclusion but, as **Playdium** is clearly distinguishable from the present case, it is not necessary for me to decide whether or not it should be followed.

[30] For these reasons, I conclude that the court does not have the jurisdiction to grant the permanent injunction contemplated by Section 4.12 (b) of the Reorganization Plan, at least as it relates to Section 4.16 of the Trust Indenture. Hence, it would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan in its present form because the condition precedent contained in section 6.3(a) of the Plan cannot be satisfied. I dismiss the application of the Doman Group, with liberty to re-apply in respect of a revised Reorganization Plan.

[31] In addition to seeking an order allowing them to vote on the Reorganization Plan, the Senior Secured Noteholder Committee applied for an order authorizing it to file a secured creditor plan of arrangement or compromise and an order directing the Doman Group to pay all of its costs.

[32] The form of the proposed secured creditor plan was attached to one of the affidavits. In essence, it includes the terms upon which the Senior Secured Noteholders represented by the Committee are prepared to waive breaches of the Trust Indenture occasioned by the restructuring of the

Doman Group and to amend the Trust Indenture to allow the restructuring. One of these terms is the payment of a fee equal to 3% of the face value of the Senior Secured Notes (approximately US\$5 million).

[33] I am not prepared to allow the Senior Secured Noteholders Committee to file its own plan. If such a plan were filed and approved by the Senior Secured Noteholders, they would accomplish the same thing which they are complaining that the Doman Group was endeavouring to achieve through the permanent injunction; namely, a unilateral variation of the terms of the Trust Indenture without the agreement of the other party to the Trust Indenture. Such a plan may also have the effect of giving the Senior Secured Noteholders a veto power in respect of the Doman Group's restructuring.

[34] The Senior Secured Noteholders Committee has not demonstrated a basis for the requested order that the Doman Group should pay all of its costs. The committee was presumably formed so that the Noteholders could act to protect or advance their own interests. It is not a committee requested by the Doman Group or constituted by the Court. The Noteholders may be entitled to some or all of such costs pursuant to the provisions of the Trust Indenture but that

issue is not before me. As to the costs of these applications in the context of the *Rules of Court*, there has been divided success and I direct that each party bear own costs.

[35] I dismiss the applications of the Committee for an order in relation to a secured creditor plan and an order in relation to its costs.

[36] If the Senior Secured Noteholders Committee still wishes to pursue the constitutional question, arrangements for a hearing may be made through Trial Division. However, as I am not granting the application of the Doman Group for an order authorizing the calling of creditor meetings to consider the Reorganization Plan in its present form, it would seem to me that any such hearing should await the issuance of a revised form of the Plan.

"D.F. Tysoe, J."
The Honourable Mr. Justice D.F. Tysoe

CITATION: First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299
COURT FILE NO.: CV-12-9617-00CL
DATE: 20120226

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc., Applicants

BEFORE: D. M. Brown J.

COUNSEL: J. Birch and D. Ward, for the Applicants

P. Huff and C. Burr, for the proposed Monitor, Grant Thornton Limited

D. Bish, for the Independent Directors

B. Empey, for Investment Industry Regulatory Organization of Canada

J. Grout, for the Ontario Securities Commission

R. Oliver, for Kenaidan Contracting Limited

J. Dietrich, the proposed Representative Counsel for the investors

E. Garbe, for Structform International Limited

N. Richter, for Gilbert Steel Limited

M. Sanford, for Janick Electrick Limited

M. Konyukhova, for Midland Loan Services Inc.

C. Prophet, for the Canadian Imperial Bank of Commerce

HEARD: February 23, 2012

REASONS FOR DECISION

I. Overview: CCAA Initial Order

[1] On Thursday, February 23, 2012, I granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, in respect of the Applicants. These are my Reasons for that decision.

II. The applicant corporations

[2] The Applicants are members of the First Leaside group of companies. They are described in detail in the affidavit of Gregory MacLeod, the Chief Restructuring Officer of First Leaside Wealth Management ("FLWM"), so I intend only refer in these Reasons to the key entities in the group. The parent corporation, FLWM, owns several subsidiaries, including the applicant, First Leaside Securities Inc. ("FLSI"). According to Mr. MacLeod, the Group's operations centre on FLWM and FLSI.

[3] FLSI is an Ontario investment dealer that manages clients' investment portfolios which, broadly speaking, consist of non-proprietary Marketable Securities as well as proprietary equity and debt securities issued by First Leaside (the so-called "FL Products"). All segregated Marketable Securities are held in segregated client accounts with Penson Financial Services Canada Inc.

[4] First Leaside designed its FL Products to provide investors with consistent monthly distributions. First Leaside acts as a real estate syndicate, purchasing real estate through limited partnerships with a view to rehabilitating the properties for lease at higher rates or eventual resale. First Leaside incorporated special-purpose corporations to act as general partners in the various LPs it set up. The general partners of First Leaside's Canadian LPs – i.e. those which own property in Canada – are applicants in this proceeding. First Leaside also seeks to extend the benefits of the Initial Order to the corresponding LPs.

[5] First Leaside has two types of LPs: individual LPs that acquire and operate a single property or development, and aggregator LPs that hold units of multiple LPs. Investors have invested in both kinds of LPs. In paragraph 49 of his affidavit Mr. MacLeod detailed the LPs within First Leaside. While most First Leaside LPs hold interests in identifiable properties, for a

few, called “Blind Pool LPs”, clients invest funds without knowing where the funds likely were to be invested. Those LPs are described in paragraph 51 of Mr. MacLeod’s affidavit.

[6] The applicant, First Leaside Finance Inc. (“FL Finance”), acted as a “central bank” for the First Leaside group of entities.

III. The material events leading to this application

[7] In the fall of 2009 the Ontario Securities Commission began investigating First Leaside. In March, 2011, First Leaside retained the proposed Monitor, Grant Thornton Limited, to review and make recommendations about First Leaside’s businesses. Around the same time First Leaside arranged for appraisals to be performed of various properties.

[8] Grant Thornton released its report on August 19, 2011. For purposes of this application Grant Thornton made several material findings:

- (i) There exist significant interrelationships between the entities in the FL Group which result in a complex corporate structure;
- (ii) Certain LPs have been a drain on the resources of the Group as a result of recurring operating losses and property rehabilitation costs; and,
- (iii) The future viability of the FL Group was contingent on its ability to raise new capital:

“If the FL Group was restricted from raising new capital, it would likely be unable to continue its operations in the ordinary course, as it would have insufficient revenue to support its infrastructure, staffing costs, distributions, and to meet their funding requirements for existing projects.”

[9] As a result of the report First Leaside hired additional staff to improve accounting resources and financial planning. Last November the Board appointed an Independent Committee to assume all decision-making authority in respect of First Leaside; the Group’s founder, David Phillips, was no longer in charge of its management.

[10] FLSI is regulated by both the OSC and the Investment Industry Regulatory Organization of Canada (“IIROC”). In October, 2011, IIROC issued FLSI a discretionary early warning level 2 letter prohibiting the company from reducing capital and placing other restrictions on its activities. At the same time the OSC told First Leaside that unless satisfactory arrangements were made to deal with its situation, the OSC almost certainly would take regulatory action, including seeking a cease trade order.

[11] First Leaside agreed to a voluntary cease trade, retained Grant Thornton to act as an independent monitor, informed investors about those developments, and made available the August Grant Thornton report.

[12] Because the cease trade restricted First Leaside's ability to raise capital, the Independent Committee decided in late November to cease distributions to clients, including distributions to LP unit holders, interest payments on client notes/debts, and dividends on common or preferred shares.

[13] In December the Independent Committee decided to retain Mr. MacLeod as CRO for First Leaside and asked him to develop a workout plan, which he finalized in late January, 2012. Mr. MacLeod deposed that the downturn in the economy has resulted in First Leaside realizing lower operating income while incurring higher operational costs. In his affidavit Mr. MacLeod set out his conclusion about a workout plan:

After carefully analyzing the situation, my ultimate conclusion was that it was too risky and uncertain for First Leaside to pursue a resumption of previous operations, including the raising of capital. My recommendation to the Independent Committee was that First Leaside instead undertake an orderly wind-down of operations, involving:

- (a) Completing any ongoing property development activity which would create value for investors;
- (b) Realizing upon assets when it is feasible to do so (even where optimal realization might occur over the next 12 to 36 months);
- (c) Dealing with the significant inter-company debts; and,
- (d) Distributing proceeds to investors.

Mr. MacLeod further deposed:

[T]he best way to promote this wind-down is through a filing under the CCAA so that all issues – especially the numerous investor and creditor claims and inter-company claims – can be dealt with in one forum under the supervision of the court.

The Independent Committee approved Mr. MacLeod's recommendations. This application resulted.

IV. Availability of CCAA

A. The financial condition of the applicants

[14] According to Mr. MacLeod, First Leaside has over \$370 million in assets under management. Some of those, however, are Marketable Securities. First Leaside is proposing that clients holding Marketable Securities (which are held in segregated accounts) be free to transfer them to another investment dealer during the CCAA process. As to the value of FL Products, Mr. MacLeod deposed that "it remains to be determined specifically how much value will be realized for investors on the LP units, debt instruments, and shares issued by the various First Leaside entities."

[15] First Leaside's debt totals approximately \$308 million: \$176 million to secured creditors (mostly mortgagees) and \$132 million to unsecured creditors, including investors holding notes or other debt instruments.

[16] Mr. MacLeod summarized his assessment of the financial status of the First Leaside Group as follows:

[S]ince GTL reported that the aggregate value of properties in the First Leaside exceeded the value of the properties, there will be net proceeds remaining to provide at least some return to subordinate creditors or equity holders (i.e., LP unit holders and corporation shareholders) in many of the First Leaside entities. The recovery will, of course, vary depending on the entity. At this stage, however, it is fair to conclude that there is a material equity deficit both in individual First Leaside entities and in the overall First Leaside group.

[17] In his affidavit Mr. MacLeod also deposed, with respect to the financial situation of First Leaside, that:

- (i) The cease trade placed severe financial constraints on First Leaside as almost every business unit depended on the ability of FLWM and its subsidiaries to raise capital from investors;
- (ii) There are immediate cash flow crises at FLWM and most LPs;
- (iii) FLWM's cash reserves had fallen from \$2.8 million in November, 2011 to \$1.6 million at the end of this January;
- (iv) Absent new cash from asset disposals, current cash reserves would be exhausted in April;
- (v) At the end of December, 2011 Ventures defaulted by failing to make a principal mortgage payment of \$4.25 million owing to KingSett;
- (vi) Absent cash flow from FLWM a default is imminent for Investor's Harmony property;
- (vii) First Leaside lacks the liquidity or refinancing options to rehabilitate a number of the properties and execute on its business plan; and,
- (viii) First Leaside generally has been able to make mortgage payments to its creditors, but in the future it will be difficult to do so given the need to expend monies on property development and upgrading activities

[18] In his description of the status of the employees of the Applicants, Mr. MacLeod did not identify any issue concerning a pension funding deficiency.¹ The internally-prepared 2010 FLWM financial statements did not record any such liability. Grant Thornton did not identify any such issue in its Pre-filing Report.

[19] First Leaside is not proposing to place all of its operations under court-supervised insolvency proceedings. It does not plan to seek Chapter 11 protection for its Texas properties since it believes they may be able to continue operations over the anticipated wind-up period using cash flows they generate and pay their liabilities as they become due. Nor does First Leaside seek to include in this CCAA proceeding the First Leaside Venture LP (“Ventures”) which owns and operates several properties in Ontario and British Columbia. On February 15, 2012 Ventures and Bridge Gap Konsult Inc. signed a non-binding term sheet to provide some bridge financing for Ventures. First Leaside decided not to include certain Ventures-related limited partnerships in the CCAA application at this stage,² while reserving the right to later bring a motion to extend the Initial Order and stay to these Excluded LPs. The Initial Order which I signed reflected that reservation.

[20] As noted above, over the better part of the past year the proposed Monitor, Grant Thornton, has become familiar with the affairs of the First Leaside Group as a result of the review it conducted for its August, 2011 report. Last November First Leaside retained Grant Thornton as an independent monitor of its business.

[21] In its Pre-filing Report Grant Thornton noted that the last available financial statements for FLWM were internally prepared ones for the year ended December 31, 2010. They showed a net loss of about \$2.863 million. The Pre-filing Report contained a 10-week cash flow projection (ending April 27, 2012) prepared by the First Leaside Group. The Cash Flow Projection does not contemplate servicing interest and principal payments during the projection period. On that basis the Cash Flow Projection showed the Group’s combined closing bank balance declining from \$6.97 million to \$4.144 million by the end of the projection period. Grant Thornton reviewed the Cash Flow Projection and stated that it reflected the probable and hypothetical assumptions on which it was prepared and that the assumptions were suitably supported and consistent with the plans of the First Leaside Group and provided a reasonable basis for the Cash Flow Projection.

[22] Grant Thornton reported that certain creditors, specifically construction lien claimants, had commenced enforcement proceedings and it concluded:

Given creditors’ actions to date and due to the complicated nature of the FL Group’s business, the complex corporate structure and the number of competing stakeholders, it is unlikely that the FL Group will be able to conduct an orderly wind-up or continue to

¹ MacLeod Affidavit, paras. 104 to 106.

² The Excluded LPs were identified in paragraph 134 of Mr. MacLeod’s affidavit.

rehabilitate properties without the stability provided by a formal Court supervised restructuring process.

...

As the various stakeholder interests are in many cases intertwined, including intercompany claims, the granting of the relief requested would provide a single forum for the numerous stakeholders of the FL Group to be heard and to deal with such parties' claims in an orderly manner, under the supervision of the Court, a CRO and a Court-appointed Monitor. In particular, a simple or forced divestiture of the properties of the FL Group would not only erode potential investor value, but would not provide the structure necessary to reconcile investor interests on an equitable and ratable basis.

A stay of proceedings for both the Applicants and the LPs is necessary if it is deemed appropriate by this Honourable Court to allow the FL Group to maintain its business and to allow the FL Group the opportunity to develop, refine and implement their restructuring/wind-up plan(s) in a stabilized environment.

B. Findings

[23] I am satisfied that the Applicants are “companies” within the meaning of the *CCAA* and that the total claims against the Applicants, as an affiliated group of companies, is greater than \$5 million.

[24] Are the Applicant companies “debtor companies” in the sense that they are insolvent? For the purposes of the *CCAA* a company may be insolvent if it falls within the definition of an insolvent person in section 2 of the *Bankruptcy and Insolvency Act* or if its financial circumstances fall within the meaning of insolvent as described in *Re Stelco Inc.* which include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".³

[25] When looked at as a group the Applicants fall within the extended meaning of “insolvent”: as a result of the cease trade their ability to raise capital has been severely restricted; cash reserves fell significantly from November until the time of filing, and the Cash Flow Projection indicates that cash reserves will continue to decline even with the cessation of payments on mortgages and other debt; Mr. MacLeod estimated that cash reserves would run out in April; distributions to unit holders were suspended last November; and, some formal mortgage defaults have occurred.

³ (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.).

[26] However, a secured creditor mortgagee, Midland Loan Services Inc., submitted that to qualify for CCAA protection each individual applicant must be a “debtor company” and that in the case of one applicant, Queenston Manor General Partner Inc., that company was not insolvent. In his affidavit Mr. MacLeod deposed that the Queenston Manor LP is owned by the First Leaside Expansion Limited Partnership (“FLEX”). Queenston owns and operates a 77-unit retirement complex in St. Catherines, has been profitable since 2008 and is expected to remain profitable through 2013. Queenston has been listed for sale, and management currently is considering an offer to purchase the property. Midland Loan submitted that in light of that financial situation, no finding could be made that the applicant, Queenston Manor General Partner Inc., was a “debtor company”.

[27] Following that submission I asked Applicants’ counsel where in the record one could find evidence about the insolvency of each individual Applicant. That prompted a break in the hearing, at the end of which the Applicants filed a supplementary affidavit from Mr. MacLeod. Indicating that one of the biggest problems facing the Applicants was the lack of complete and up-to-date records, in consultation with the Applicants’ CFO Mr. MacLeod submitted a chart providing, to the extent possible, further information about the financial status of each Applicant. That chart broke down the financial status of each of the 52 Applicants as follows:

Insolvent	28
Dormant	15
Little or no realizable assets	5
More information to be made available to the court	3
Other: management revenue stopped in 2010; \$70,000 cash; \$270,000 in related-company receivables	1

Queenston Manor General Partner Inc. was one of the applicants for which “more information would be made available to the court”.

[28] As I have found, when looked at as a group, the Applicants fall within the extended meaning of “insolvent”. When one descends a few levels and looks at the financial situation of some of the aggregator LPs, such as FLEX, Mr. MacLeod deposed that FLEX is one of the largest net debtors – i.e. it is unable to repay inter-company balances from operating cash flows and lacks sufficient net asset value to settle the intercompany balances through the immediate liquidation of assets. The evidence therefore supports a finding that the corporate general partner of FLEX is insolvent. Queenston Manor is one of several assets owned by FLEX, albeit an asset which uses the form of a limited partnership.

[29] If an insolvent company owns a healthy asset in the form of a limited partnership does the health of that asset preclude it from being joined as an applicant in a CCAA proceeding? In the

circumstances of this case it does not. The jurisprudence under the CCAA provides that the protection of the Act may be extended not only to a “debtor company”, but also to entities who, in a very practical sense, are “necessary parties” to ensure that that stay order works. Morawetz J. put the matter the following way in *Prizm Income Fund (Re)*:

The CCAA definition of an eligible company does not expressly include partnerships. However, CCAA courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehndorff, supra*, and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (S.C.J.).

The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.⁴

[30] Although section 3(1) of the CCAA requires a court on an initial application to inquire into the solvency of any applicant, the jurisprudence also requires a court to take into account the relationship between any particular company and the larger group of which it is a member, as well as the need to place that company within the protection of the Initial Order so that the order will work effectively. On the evidence filed I had no hesitation in concluding that given the insolvency of the overall First Leaside Group and the high degree of inter-connectedness amongst the members of that group, the protection of the CCAA needed to extend both to the Applicants and the limited partnerships listed in Schedule “A” to the Initial Order. The presence of all those entities within the ambit of the Initial Order is necessary to effect an orderly winding-up of the insolvent group as a whole. Consequently, whether Queenston Manor General Partner Inc. falls under the Initial Order by virtue of being a “debtor company”, or by virtue of being a necessary party as part of an intertwined whole, is, in the circumstances of this case, a distinction without a practical difference.

[31] In sum, I am satisfied that those Applicants identified as “insolvent” on the chart attached to Mr. MacLeod’s supplementary affidavit are “debtor companies” within the meaning of the CCAA and that the other Applicants, as well as the limited partnerships listed on Schedule “A” of the Initial Order, are entities to which it is necessary and appropriate to extend CCAA protection.

C. “Liquidation” CCAA

[32] While in most circumstances resort is made to the CCAA to “permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets” and to create “conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all”, the

⁴ 2011 ONSC 2061, paras. 26-27.

reality is that “reorganizations of differing complexity require different legal mechanisms.”⁵ That reality has led courts to recognize that the CCAA may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership,⁶ or to wind-up or liquidate it. In *Lehndorff General Partner Ltd. (Re)*⁷ Farley J. observed:

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 *Assoc. Investors, supra*, at p. 318; *Re Amirault Co. (1951)*, 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

[33] In the decision of *Associated Investors of Canada Ltd. (Re)* referred to by Farley J., the Alberta Court of Queen’s Bench stated:

The realities of the modern marketplace dictate that courts of law respond to commercial problems in innovative ways without sacrificing legal principle. In my opinion, the Companies' Creditors Arrangement Act is not restricted in its application to companies which are to be kept in business. Moreover, the Court is not without the ability to address within its jurisdiction the concerns expressed in the Ontario cases. The Act may be invoked as a means of liquidating a company and winding-up its affairs but only if certain conditions precedent are met:

1. It must be demonstrated that benefits would likely flow to Creditors that would not otherwise be available if liquidation were effected pursuant to the Bankruptcy Act or the Winding-Up Act.
2. The Court must concurrently provide directions pursuant to compatible legislation that ensures judicial control over the liquidation process and an effective means whereby the affairs of the company may be investigated and the results of that investigation made available to the Court.
3. A Plan of Arrangement should not receive judicial sanction until the Court has in its possession, all of the evidence necessary to allow the Court to properly

⁵ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paras. 15, 77 and 78.

⁶ *Nortel Networks Corp. (Re)*, 2009 ONCA 833, para. 46; see Kevin P. McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), pp. 284 et seq.

⁷ [1993] O.J. No. 14 (Gen. Div.). In *Brake Pro, Ltd. (Re)*, [2008] O.J. No. 2180 (S.C.J.), Wilton-Siegel J. stated, at paragraph 10: “While reservations are expressed from time to time regarding the appropriateness of a “liquidating” CCAA proceeding, such proceedings are permissible under the CCAA.”

exercise its discretion according to standards of fairness and reasonableness, absent any findings of illegality.⁸

The editors of *The 2012 Annotated Bankruptcy and Insolvency Act* take some issue with the extent of those conditions:

With respect, these conditions may be too rigorous. If the court finds that the plan is fair and reasonable and in the best interests of creditors, and there are cogent reasons for using the statute rather than the *BIA* or *WURA*, there seems no reason why an orderly liquidation could not be carried out under the *CCAA*.⁹

[34] Mr. MacLeod, the CRO, deposed that no viable plan exists to continue First Leaside as a going concern and that the most appropriate course of action is to effect an orderly wind-down of First Leaside's operations over a period of time and in a manner which will create the opportunity to realize improved net asset value. In his professional judgment the *CCAA* offered the most appropriate mechanism by which to conduct such an orderly liquidation:

[T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues – especially the numerous investor and creditor claims and the inter-company claims – can be dealt with in one forum under the supervision of the court.

In its Pre-filing Report the Monitor also supported using the *CCAA* to implement the “restructuring/wind-up plan(s) in a stabilized environment”.

[35] Both the CRO and the proposed Monitor possess extensive knowledge about the workings of the Applicants. Both support a process conducted under the *CCAA* as the most practical and effective way in which to deal with the affairs of this insolvent group of companies. No party contested the availability of the *CCAA* to conduct an orderly winding-up of the affairs of the Applicants (although, as noted, some parties questioned whether certain entities should be included within the scope of the Initial Order). Given that state of affairs, I saw no reason not to accept the professional judgment of the CRO and the proposed Monitor that a liquidation under the *CCAA* was the most appropriate route to take.

[36] Moreover, I saw no prejudice to claimant creditors by permitting the winding-up of the First Leaside Group to proceed under the *CCAA* instead of under the *BIA* in view of the convergence which exists between the *CCAA* and *BIA* on the issue of priorities. As the Supreme Court of Canada pointed out in *Century Services*:

⁸ *First Investors Corp. (Re)* (1987), 46 D.L.R. (4th) 669 (Alta. Q.B.), para. 36.

⁹ Houlden, Morawetz & Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act*, N§1, p. 1099.

Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful.¹⁰

As the British Columbia Court of Appeal observed in *Caterpillar Financial Services Ltd. v. 360networks corp.* interested parties also use that priorities backdrop to negotiate successful CCAA reorganizations:

While it might be suggested that CCAA proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan.¹¹

[37] I therefore concluded that the CCAA was available to the Applicants in the circumstances, and I so ordered.

V. Representative Counsel, CRO and Monitor

[38] The Applicants sought the appointment of Fraser Milner Casgrain (“FMC”) as Representative Counsel to represent the interests of the some 1,200 clients of FLSI in this proceeding, subject to the right of any client to opt-out of such representation. The proposed Monitor expressed the view that it would be in the best interests of the FL Group and its investors to appoint Representative Counsel. No party objected to such an appointment. I reviewed the qualifications and experience of proposed Representative Counsel and its proposed fees, and I was satisfied that it would be appropriate to appoint FMC as Representative Counsel on the terms set out in the Initial Order.

[39] The Applicants sought the appointment of G.S. MacLeod & Associates Inc. as CRO of First Lease. No party objected to that appointment. The Applicants included a copy of the CRO’s December 21, 2011 Retention Agreement in their materials. The proposed Monitor stated that the appointment of a CRO was important to ensure an adequate level of senior corporate governance leadership. I agree, especially in light of the withdrawal of Mr. Phillips last November from the management of the Group. The proposed Monitor reported that the terms and conditions of the Retention Agreement were consistent with similar arrangements approved by other courts in CCAA proceedings and the remuneration payable was reasonable in the circumstances. As a result, I confirmed the appointment of G.S. MacLeod & Associates Inc. as CRO of First Lease.

¹⁰ *Century Services, supra.*, para. 23.

¹¹ (2007), 279 D.L.R. (4th) 701 (B.C.C.A.), para. 42.

[40] Finally, I appointed Grant Thornton as Monitor. No party objected, and Grant Thornton has extensive knowledge of the affairs of the First Leaside Group.

VI. Administration and D&O Charges and their priorities

A. Charges sought

[41] The Applicants sought approval, pursuant to section 11.52 of the CCAA, of an Administration Charge in the amount of \$1 million to secure amounts owed to the Estate Professionals – First Leaside’s legal advisors, the CRO, the Monitor, and the Monitor’s counsel.

[42] They also sought an order indemnifying the Applicants’ directors and officers against any post-filing liabilities, together with approval, pursuant to section 11.51 of the CCAA, of a Director and Officer’s Charge in the amount of \$250,000 as security for such an indemnity. Historically the First Leaside Group did not maintain D&O insurance, and the Independent Committee was not able to secure such insurance at reasonable rates and terms when it tried to do so in 2011.

[43] The Monitor stated that the amount of the Administration Charge was established based on the Estate Professionals’ previous history and experience with restructurings of similar magnitude and complexity. The Monitor regarded the amount of the D&O Charge as reasonable under the circumstances. The Monitor commented that the combined amount of both charges (\$1.25 million) was reasonable in comparison with the amount owing to mortgagees (\$176 million).

[44] In its Pre-filing Report the Monitor did note that shortly before commencing this application the Applicants paid \$250,000 to counsel for the Independent Committee of the Board. The Monitor stated that the payment might “be subject to review by the Monitor, if/when it is appointed, in accordance with s. 36.1(1) of the CCAA”. No party requested an adjudication of this issue, so I refer to the matter simply to record the Monitor’s expression of concern.

[45] Based on the evidence filed, I concluded that it was necessary to grant the charges sought in order to secure the services of the Estate Professionals and to ensure the continuation of the directors in their offices and that the amounts of the charges were reasonable in the circumstances.

B. Priority of charges

[46] The Applicants sought super-priority for the Administration and D&O Charges, with the Administration Charge enjoying first priority and the D&O Charge second, with some modification with respect to the property of FLSI which the Applicants had negotiated with IIROC.

[47] In its Pre-filing Report the proposed Monitor stated that the mortgages appeared to be well collateralized, and the mortgagees would not be materially prejudiced by the granting of the proposed priority charges. The proposed Monitor reported that it planned to work with the

Applicants to develop a methodology which would allocate the priority charges fairly amongst the Applicants and the included LPs, and the allocation methodology developed would be submitted to the Court for review and approval.

[48] In *Indalex Limited (Re)*¹² the Court of Appeal reversed the super-priority initially given to a DIP Charge by the motions judge in an initial order and, instead, following the sale of the debtor company's assets, granted priority to deemed trusts for pension deficiencies. In reaching that decision Court of Appeal observed that affected persons – the pensioners – had not been provided at the beginning of the CCAA proceeding with an appropriate opportunity to participate in the issue of the priority of the DIP Charge.¹³ Specifically, the Court of Appeal held:

In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under CCAA protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including “regulatory deemed trust requirements”.

While the super-priority charge provides that it ranks in priority over trusts, “statutory or otherwise”, I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.¹⁴

[49] In his recent decision in *Timminco Limited (Re)*¹⁵ (“Timminco I”) Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in CCAA proceedings:

In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of

¹² 2011 ONCA 265.

¹³ *Ibid.*, para. 155.

¹⁴ *Ibid.*, paras. 178 and 179.

¹⁵ 2012 ONSC 506.

the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.¹⁶

[50] In its Pre-filing Report the proposed Monitor expressed the view that if the priority charges were not granted, the First Leaside Group likely would not be able to proceed under the CCAA.

[51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a CCAA proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the CCAA process, certainty must accompany the granting of such super-priority charges. When those important objectives of the CCAA process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.

[52] Accordingly I raised that issue at the commencement of the hearing last Thursday and requested submissions on the issues of priority and paramountcy from any interested party. Several parties made submissions on those points: (i) the Applicants, proposed Monitor and proposed Representative Counsel submitted that the Court should address any priority or paramountcy issues raised; (ii) IIROC advised that it did not see any paramountcy issue in respect of its interests; (iii) counsel for Midland Loan submitted that a paramountcy issue existed with respect to its client, a secured mortgagee, because it enjoyed certain property rights under provincial mortgage law; she also argued that the less than full day's notice of the hearing given by the Applicants was inadequate to permit the mortgagee to consider its position, and her client should be given seven days to do so; and, (iv) counsel for a construction lien claimant, Structform International, who spoke on behalf of a number of such lien claimants, made a similar submission, contending that the construction lien claimants required 10 days to determine whether they should make submissions on the relationship between their lien claims and any super-priority charge granted under the CCAA.

[53] I did not grant the adjournment requested by the mortgagee and construction lien claimants for the following reasons. First, the facts in *Indalex* were quite different from those in the present case, involving as they did considerations of what fiduciary duty a debtor company owed to pensioners in respect of underfunded pension liabilities. I think caution must be exercised before extending the holding of *Indalex* concerning CCAA-authorized priority charges to other situations, such as the one before me, which do not involve claims involving pension

¹⁶ *Ibid.*, para. 66.

deficiencies, but claims by more “ordinary” secured creditors, such as mortgagees and construction lien claimants.

[54] Second, I have some difficulty seeing how constitutional issues of paramountcy arise in a CCAA proceeding as between claims to the debtor’s property by secured creditors, such as mortgagees and construction lien claimants, and persons granted a super-priority charge by court order under sections 11.51 and 11.52 of the CCAA. At the risk of gross over-simplification, Canadian constitutional law places the issue of priorities of secured creditors in different legislative balliwicks depending on the health of the debtor company. When a company is healthy, secured creditor priorities usually are determined under provincial laws, such as personal property security legislation and related statutes, which result from provincial legislatures exercising their powers with respect to “property and civil rights in the province”.¹⁷ However, when a company gets sick - becomes insolvent - our *Constitution* vests in Parliament the power to craft the legislative regimes which will govern in those circumstances. Exercising its power in respect of “bankruptcy and insolvency”,¹⁸ Parliament has established legal frameworks under the *BIA* and *CCAA* to administer sick companies. Priority determinations under the *CCAA* draw on those set out in the *BIA*, as well as the provisions of the *CCAA* dealing with specific claims such as Crown trusts and other claims.

[55] As it has evolved over the years the constitutional doctrine of paramountcy polices the overlapping effects of valid federal and provincial legislation: “The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers.”¹⁹ Since 1960 the Supreme Court of Canada has travelled a “path of judicial restraint in questions of paramountcy”.²⁰ That Court has not been prepared to presume that, by legislating in respect of a matter, Parliament intended to rule out any possible provincial action in respect of that subject,²¹ unless (and it is a big “unless”), Parliament used very clear statutory language to that effect.²²

[56] I have found that the Applicants have entered the world of the sick, or the insolvent, and are eligible for the protection of the federal CCAA. The federal legislation *expressly* brings mortgagees and construction lien claimants within its regime – the definition of “secured creditor” contained in section 2 of the CCAA specifically includes “a holder of a mortgage” and “a holder of a ...lien...on or against...all or any of the property of a debtor company as security for indebtedness of the debtor company”. The federal legislation also *expressly* authorizes a court to grant priority to administration and D&O charges over the claims of such secured

¹⁷ *Constitution Act, 1867*, s. 92 ¶13.

¹⁸ *Ibid.*, s. 91 ¶21.

¹⁹ *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, para. 69.

²⁰ *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, para. 21

²¹ *Canadian Western Bank*, *supra.*, para. 74.

²² *Rothmans*, *supra.*, para. 21.

creditors of the debtor.²³ In light of those express provisions in sections 2, 11.51 and 11.52 of the CCAA, and my finding that the Applicants are eligible for the protection offered by the CCAA, I had great difficulty understanding what argument could be advanced by the mortgagees and construction lien claimants about the concurrent operation of provincial and federal law which would relieve them from the priority charge provisions of the CCAA. I therefore did not see any practical need for an adjournment.

[57] Finally, sections 11.51(1) and 11.52(1) of the CCAA both require that notice be given to secured creditors who are likely to be affected by an administration or D&O charge before a court grants such charges. In the present case I was satisfied that such notice had been given. Was the notice adequate in the circumstances? I concluded that it was. To repeat, making due allowance for the unlimited creativity of lawyers, I have difficulty seeing what concurrent operation argument could be advanced by mortgagee and construction lien claims against court-ordered super-priority charges under sections 11.51 and 11.52 of the CCAA. Second, as reported by the proposed Monitor, the quantum of the priority charges (\$1.25 million) is reasonable in comparison with the amount owing to mortgagees (\$176 million) and the mortgages appeared to be well collateralized based on available information. Third, the Applicant and Monitor will develop an allocation methodology for the priority charges for later consideration by this Court. The proposed Monitor reported:

It is the Proposed Monitor's view that the allocation of the proposed Priority Charges should be carried out on an equitable and proportionate basis which recognizes the separate interests of the stakeholders of each of the entities.

The secured creditors will be able to make submissions on any proposed allocation of the priority charges. Finally, while I understand why the secured creditors are focusing on their specific interests, it must be recalled that the work secured by the priority charges will be performed for the benefit of all creditors of the Applicants, including the mortgagees and construction lien claimants. All creditors will benefit from an orderly winding-up of the affairs of the Applicants.

[58] In the event that I am incorrect that no paramountcy issue arises in this case in respect of the priority charges, I echo the statements made by Morawetz J. in *Timminco I* which I reproduced in paragraph 49 above. In *Indalex* the Court of Appeal accepted that "the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation".²⁴ I find that it is both necessary and appropriate to grant super priority to both the Administration and D&O Charges in order to ensure that the objectives of the CCAA are not frustrated.

²³ CCAA ss. 11.51(2) and 11.52(2).

²⁴ *Indalex, supra.*, para. 176.

[59] For those reasons I did not grant the adjournment requested by Midland Loan and the construction lien claimants, concluding that they had been given adequate notice in the circumstances, and I granted the requested Administration and D&O Charges.

VII. Other matters

[60] At the hearing counsel for one of the construction lien claimants sought confirmation that by granting the Initial Order a construction lien claimant who had issued, but not served, a statement of claim prior to the granting of the order would not be prevented from serving the statement of claim on the Applicants. Counsel for the Applicants confirmed that such statements of claim could be served on it.

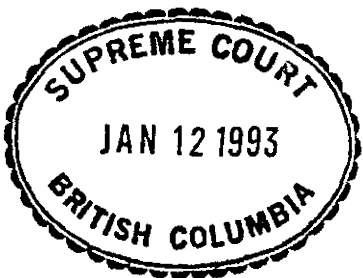
[61] At the hearing the Applicants submitted a modified form of the model Initial Order. Certain amendments were proposed during the hearing; the parties had an opportunity to make submissions on the proposed amendments.

VIII. Summary

[62] For the foregoing reasons I was satisfied that it was appropriate to grant the CCAA Initial Order in the form requested. I signed the Initial Order at 4:08 p.m. EST on Thursday, February 23, 2012.

D. M. Brown J.

Date: February 26, 2012



No. A924791
Vancouver Registry

93021 018

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

- AND -

IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1979, c. 59

IN THE MATTER OF WOODWARD'S)	REASONS FOR JUDGMENT
)	
LIMITED, WOODWARD STORES)	OF THE HONOURABLE
)	
LIMITED AND ABERCROMBIE &)	MR. JUSTICE TYSOE
)	
FITCH CO. (CANADA) LTD.)	(IN CHAMBERS)

Counsel for Woodward's Limited, Woodward
Stores Limited and Abercrombie & Fitch
Co. (Canada) Ltd.:

R.A. Millar,
M.A. Fitch
and J. Irving

Counsel for W.J. Woodward and others:

D.B. Kirkham, Q.C.
and G. Tucker

Counsel for H.J. Zayadi:

E.J. Adair

Date and place of hearing:

January 8, 1993
Vancouver, B.C.

The aspect of these proceedings presently under consideration is whether the Court should grant a stay in respect of payments owing to retired or terminated senior executives of Woodward's Limited ("Woodward's") which are secured by letters of credit issued by Woodward's banker in favour of two trust companies

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2 acting as trustees pursuant to agreements or plans benefitting
3 Woodward's senior executives.
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5 On December 11, 1992 I granted an interim stay Order
6 pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA")
7 in favour of Woodward's, Woodward Stores Limited and Abercrombie &
8 Fitch Co. (Canada) Ltd. The Order was granted on an *ex parte* basis
9 and it was expressed to expire at 6 p.m. on January 8, 1993, the
10 day on which the hearing of the Petition in this matter was
11 intended to take place. On December 17 and 24, 1992 I made further
12 interim Orders which, among other things, contained a stay in
13 relation to the letters of credit held by the two trust companies.
14

15 The hearing of the Petition began on January 8, 1993 but
16 there were also between 10 and 15 related applications scheduled to
17 be heard on January 8 and the following days. On January 8, when
18 it was clear that the hearing of the Petition and related
19 applications would take several days, I extended the interim Orders
20 until further Order with the intent that they would continue until
21 I made my determinations on the various issues to be decided.
22 There appears to be little doubt that there will be an extension of
23 the stay Order generally and it is the terms of the continuing stay
24 Order that are in dispute. These Reasons for Judgment relate to
25 one of the issues that is in dispute. I will approach this matter
26 on the basis that the CCAA stay is going to be extended and the
27 issue to be determined is whether the stay can or should apply in
28 relation to the former senior executives and the trust companies
29 acting as the trustees of the letters of credit.
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4 Woodward's decided at some point in the past that it
5 would make provision for retiring allowances to benefit its senior
6 executives when they retired or when they were terminated without
7 cause. Until 1991 Woodward's entered into individual agreements
8 with certain senior executives in relation to the retiring
9 allowances. In 1991 Woodward's established its Retiring Allowance
10 Plan which applied to designated senior executives.

11 Mr. Kirkham's clients entered into the individual
12 agreements prior to 1991. Letters of credit have been lodged with
13 The Canada Trust Company ("Canada Trust") pursuant to these
14 agreements as security for the payment of the retiring allowances.
15 Ms. Adair's client was covered by the Retiring Allowance Plan which
16 continues in effect and also applies to senior executives who are
17 still employed by Woodward's. A letter of credit has been lodged
18 with Montreal Trust Company of Canada ("Montreal Trust") pursuant
19 to the Retiring Allowance Plan as security for the payment of the
20 retiring allowances.

21
22 All of the letters of credit have been issued to the two
23 trust companies by Woodward's banker, Canadian Imperial Bank of
24 Commerce (the "Bank") which holds security against the assets of
25 Woodward's for these contingent obligations. Counsel for
26 Woodward's advised the Court that approximately \$10.2 million has
27 been paid by Woodward's to the Bank to "cash collateralize" the
28 letters of credit. Counsel was unable to advise me when this
29 payment was made but I believe that it was made recently and that
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3 it was not made at the time of the issuance of the letters of
4 credit.
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6 Woodward's entered into trust agreements with both of
7 Canada Trust and Montreal Trust in relation to the letters of
8 credit. It is useful to refer to the relevant portions of the
9 trust agreements dealing with the calling of the letters of credit.
10 Paragraphs 3, 4 and 5 of the trust agreement with Canada Trust (the
11 "Canada Trust Agreement") read, in part, as follows:

12 3. The Trustee shall be entitled at any time and from
13 time to time to draw on the Letter of Credit comprised in
14 the Fund, either in whole or in part, to obtain money for
the purpose of making any payment required to be made by
it hereunder.....

15 4. If from time to time the Company shall for any
16 reason whatsoever fail to pay or cause to be paid to the
17 Executive or to a Beneficiary, as the case may be, any
18 amount owing to the Executive or a Beneficiary under the
19 Retiring Allowance Agreement for a period of ten days
20 after its due date, the Executive may deliver to the
21 Trustee an executed or certified true copy of the
22 Retiring Allowance Agreement and concurrently certify in
23 writing to the Trustee that the amount has not been paid
24 thereunder and that he or she is entitled to receive the
25 payment. The Trustee shall within five days after
receipt of the certificate report in writing to the
Company the claim so submitted. If within seven days
after delivery of the Trustee's report to the Company the
Trustee has not been notified by the Company that the
Company has made the payment and has not received the
certificate of the Company hereinafter mentioned, the
Trustee shall pay the claimed amount out of the Fund to
the Executive or the Beneficiary, as the case may be, in
full discharge of the Company's liability for the
payment....

26 5. If the Company becomes insolvent and the
27 Executive certifies to the Trustee that such an event has
28 occurred, the Trustee shall draw the full amount of the
Letter of Credit comprised in the Fund

29 Paragraphs 8 and 9 of the trust agreement with Montreal
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Trust (the "Montreal Trust Agreement") read, in part, as follows:

8. If the Company becomes bankrupt or insolvent and any officer of the Company or any Senior Executive certifies in writing to the Trustee that such an event has occurred and giving particulars thereof, the Trustee shall within five days after receipt of the certificate deliver a copy to the Company. Subject to any order of a court of competent jurisdiction, the Trustee shall, after the expiration of 14 days from the date of delivery of the certificate to the Company, draw the full amount of all Letters of Credit comprised in the Trust Fund

9. If the Company shall from time to time for any reason whatsoever fail to pay or cause to be paid to a Senior Executive or a Beneficiary, as the case may be, any amount owing to the Senior Executive or Beneficiary under the Retiring Allowance Plan for a period of ten days after its due date, the Senior Executive or Beneficiary may certify in writing to the Trustee that the amount has not been paid thereunder and that the Senior Executive or Beneficiary named in the certificate, as the case may be, is entitled to receive the payment. The Trustee shall within five days after receipt of the certificate report in writing to the Company the claim so submitted. If, within seven days after delivery of the Trustee's report to the Company, the Trustee has not been notified in writing by the Company that the Company has made the payment and has not received the certificate of the Company hereafter mentioned, the Trustee shall draw under the Letter of Credit

It not disputed by Woodward's that monthly retirement allowances owing to the former senior executives are overdue or that it has become insolvent.

It is the position of Woodward's that the calling of the letters of credit can and should be stayed pursuant to s. 11 of the CCAA or, alternatively, that the Court has the inherent jurisdiction to grant such a stay. Counsel for the former senior executives submit that the Court has no jurisdiction to grant a

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4 stay preventing the trust companies from calling on the letters of
5 credit.

6 Section 11 of the CCAA reads as follows:

7 11. Notwithstanding anything in the *Bankruptcy Act* or
8 the *Winding-up Act*, whenever an application has been made
9 under this Act in respect of any company, the court, on
10 the application of any person interested in the matter,
11 may, on notice to any other person or without notice as
12 it may see fit,

13 (a) make an order staying, until such time as
14 the court may prescribe or until any further
15 order, all proceedings taken or that might be
16 taken in respect of the company under the
17 *Bankruptcy Act* and the *Winding-up Act* or
18 either of them;

19 (b) restrain further proceedings in any
20 action, suit or proceeding against the company
21 on such terms as the court sees fit; and

22 (c) make an order that no suit, action, or
23 other proceeding shall be proceeded with or
24 commenced against the company except with the
25 leave of the court and subject to such terms
26 as the court imposes.

27 Section 11 of the CCAA has received a very broad
28 interpretation. The main purpose of s. 11 is to preserve the
29 status quo among the creditors of the company so that no creditor
30 will have an advantage over other creditors while the company
attempts to reorganize its affairs. The CCAA is intended to
facilitate reorganizations involving compromises between an
insolvent company and its creditors and s. 11 is an integral aspect
of the reorganization process.

31 An example of the broad interpretation given to s. 11 is
32 *Quintette Coal Limited v. Nippon Steel Corporation* (1990), 51
33 B.C.L.R. (2d) 105 (B.C.C.A. - leave to appeal to S.C.C. dismissed).

The B.C. Court of Appeal held that s. 11 was sufficiently broad to prevent a creditor from exercising a right of set-off against the insolvent company. The Court confirmed that the word "proceeding" in s. 11 encompassed extrajudicial conduct and it held that the exercise of a right of set-off was a "proceeding" within the meaning of s. 11. Gibbs J.A. commented on s. 11 in the following general terms at p. 113:

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. The power is discretionary and therefore to be exercised judicially.

Coincidentally, the authority that is generally considered to be the landmark decision in respect of the broad interpretation to be given to s. 11 is a case involving a letter of credit issued by a bank at the request of the insolvent company in favour of a creditor, *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 11 D.L.R. (4th) 576, [1984] 5 W.W.R. 215 (Alta. Q.B.). Wachowich J. posed the issues before him in the following manner at pp. 579-580 of D.L.R. and p. 219 of W.W.R.:

1. Is payment of the letter of credit a "proceeding" within the meaning of cl. 2 or 3 of the 21st March order?

2. If so, is it a proceeding "against the Petitioner" [Nu-West] so as to be restrained by cls. 2 or 3 of that order?

3. If it is found to be a "proceeding" should the

court in any case give leave to Meridian in the circumstances to obtain payment of the letter of credit?

Cls. 2 and 3 of the Order referred to by Wachowich J. followed the wording of s. 11 of the CCAA.

Wachowich J. first decided that the payment of a letter of credit fell within the meaning of the word "proceeding" in s. 11 of the CCAA and it is this portion of his judgment that deals with the broad interpretation to be given to s. 11. However, Wachowich J. went on to conclude that the payment of the letter of credit could not be termed "a proceeding against the company" with the result that the stay Order did not prevent the calling of the letter of credit.

Counsel for Woodward's submitted that the present situation falls within an exception enunciated by Wachowich J. He first points to the following passage at p. 584 of D.L.R. and p. 224 of W.W.R.:

It must be noted, however, that by the terms of the March 21, 1984 order it is only "further proceedings in any action, suit or proceeding against the petitioner" that are restrained. Unless the payment of the letter of credit is a "proceeding against the petitioner" (Nu-West) it was not restrained by this order. I agree with counsel for Meredian that the payment of the letter of credit cannot be termed a proceeding against Nu-West *unless the money to be paid is Nu-West's property.* (my italics)

Counsel next points to points to a passage on p. 588 of D.L.R. and p. 227 of W.W.R. where Wachowich J. is reviewing the American authority of *Page v. First National Bank of Maryland* (1982), 18 B.R. 713:

At p. 4 of the (unreported) decision the court stated:

In issuing the letter of credit the bank entered into an independent contractual obligation to pay W.C.C. out of its own assets. Although cashing the letter will immediately give rise to a claim by the bank against the debtors pursuant to the latter's indemnification obligation, that claim will not divest the debtors of any property since any attempt to enforce that claim would be subject to an automatic stay pursuant to 11 U.S.C., para. 362(4).

In my view, the Toronto-Dominion Bank is in the same position. It is obliged to honour its contract with Meridian even though the cashing of the letter of credit will increase Nu-West's debt to the bank and even though the bank has no method of enforcing its claim against Nu-West because of the March 21st order.

Counsel for Woodward's submits that the present situation falls within the exception recognized in the *Meridian* case in the sense that the money to be paid under the letter of credit is the property of Woodward's and that payment on the letters of credit will divest Woodward's of its property because the letters of credit are "cash collateralized" by \$10.2 million of Woodward's money. I do not accept this submission.

The fact that Woodward's may have secured its obligations to the Bank in respect of the letters of credit does not mean that the letters of credit will be paid with Woodward's money. The letter of credit is an independent obligation of its issuer which is obliged to honour a call on the letter of credit with its own money. After being required to make a payment under a letter of credit, the issuer of the letter of credit is then entitled to look

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4 to its customer pursuant to the indemnification agreement that
5 usually exists in relation to a letter of credit. If the issuer of
6 the letter of credit holds a cash deposit from its customer as
7 security for the obligations under the indemnification agreement,
8 it may indemnify itself from the cash deposit. This involves the
9 issuer of the letter of credit utilizing the money of its customer
10 to indemnify itself but it is not the money on deposit that is to
11 be used to make payment under the letter of credit.

12 After Wachowich J. made his statement that payment of the
13 letter of credit cannot be termed to be a proceeding against Nu-
14 West "unless the money to be paid is Nu-West's property", he
15 proceeded to review the general nature of a letter of credit and he
16 then reached his conclusion that payment of the letter of credit
17 could not be termed a proceeding against Nu-West. It is my view
18 that Wachowich J. was not creating an exception when he made the
19 statement. Rather, he was stating the issue to be determined in
20 deciding whether it could be termed a proceeding against Nu-West.
21 After he review the general nature of a letter of credit and
22 immediately before stating his conclusion, Wachowich J. said the
23 following at p. 587 of D.L.R. and p. 226 of W.W.R.:

24 The customer of the bank has, in my view, never had
25 "ownership" of any funds represented by the letter of
26 credit. He can lay claim only to the debt that has been
27 thereby created.

28 In addition, it should be noted that in the *Parker v. First*
29 *National Bank of Maryland* decision relied upon by Wachowich J., the
30 bank held a certificate of deposit as security for the

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4 indemnification obligations of its customer and the U.S. District
5 Court held that a claim on the letter of credit would not divest
6 the debtor of any of its property.

7 Accordingly, I do not think that the letters of credit
8 presently under consideration fall within any exception in
9 **Meridian**. However, that does not end the s. 11 analysis in my
10 view.

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12 Section 11 cannot be utilized to prevent the holder of a
13 letter of credit from requiring the third party who issued the
14 letter of credit to honour it because no steps are taken against
15 the insolvent company when a call is made on the letter of credit.
16 But there will be circumstances where the holder of the letter of
17 credit will not be entitled to call on it unless he or she first
18 does take some step that is a prerequisite to a drawing under the
19 letter of credit. If such a step constitutes a proceeding against
20 the insolvent company, it may be stayed by the Court under s. 11.
21 For example, the step taken against the insolvent company could be
22 the making of demand on the company. Stay Orders under the **CCAA**
23 frequently prevent creditors from making demand on the insolvent
24 company.

25 The issue thus becomes whether any proceeding must be
26 taken against Woodward's before the letters of credit may be called
27 upon. The prerequisites under paragraph 4 of the Canada Trust
28 Agreement are the following:
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- (a) the Company has failed to make a payment;
- (b) the Executive has delivered to the Trustee a copy of the Retiring Allowance Agreement and a certificate to the effect that he or she has not been paid;
- (c) the Trustee has reported in writing to the Company that a claim has been submitted;
- (d) the Company has not notified the Trustee that the payment has been made.

The prerequisites under paragraph 5 of the Canada Trust Agreement are that the Company has become insolvent and that the Executive has certified the occurrence of that event to the Trustee.

The prerequisites under paragraph 8 of the Montreal Trust Agreement are as follows:

- (a) the Company has become insolvent;
- (b) the Executive has certified the occurrence of the event to the Trustee;
- (c) the Trustee has delivered a copy of the Executive's certificate to the Company;
- (d) a court of competent jurisdiction has not made an order preventing the Trustee from drawing on the letters of credit.

The prerequisites under paragraph 9 of the Montreal Trust Agreement are the same as the prerequisites under paragraph 4 of the Canada Trust Agreement.

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4 It is clear that paragraph 5 of the Canada Trust
5 Agreement does not require that any proceeding be taken against the
6 Company before the Trustee can draw on the letter of credit.
7 Paragraph 4 of the Canada Trust Agreement becomes academic because
8 Woodward's is insolvent and Canada Trust can call on the letter of
9 credit pursuant to paragraph 5.

10 Both of paragraphs 8 and 9 of the Montreal Trust
11 Agreement require a step to be taken vis-a-vis the Company before
12 the Trustee can call on the letter of credit. Paragraph 8 requires
13 that the Trustee deliver to the Company a copy of the certificate
14 of the Senior Executive. Paragraph 9 requires that the Trustee
15 must report to the Company that a claim has been made. It is my
16 view that the delivery of a copy of the certificate to the Company
17 and the making of a report to the Company are both proceedings
18 against Woodward's that can be stayed pursuant to s. 11 of the
19 **CCAA**.

20
21 If a step must be taken vis-a-vis the insolvent company
22 before a creditor (or a trustee on behalf of a creditor) may
23 enforce its rights, the form of the step should make no difference
24 for the purposes of s. 11 of the **CCAA**. It should not matter
25 whether the step is a demand for payment on the company, the
26 delivery to the company of a notice of acceleration or the delivery
27 to the company of some other type of document such as a copy of a
28 certificate or a report. In the *Meridian* case, supra, Wachowich J.
29 quoted the following portion of the definition of the word
30

"proceeding" in Black's Law Dictionary, 5th ed. (1979) (at p. 582 of D.L.R. and p. 221 of W.W.R.):

Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. *Rooney v. Vermont Inv't. Corp.* (1973), 10 Cal. (3d) 351, 110 Cal. Rptr. 353, 515 P. (2d) 297 (Cal. S.C.).

The delivery of a copy of a certificate or a report to Woodward's is no less a proceeding than the payment of a letter of credit (*Meridian*) or the exercise of a right of set-off (*Quintette*). It is a proceeding against Woodward's because the copy of the certificate or the report must be delivered to Woodward's.

The result is that a stay under s. 11 of the CCAA can effectively prevent Montreal Trust from calling on the letters of credit held by it but Canada Trust cannot be restrained by such a stay from calling on the letters of credit held by it. It is therefore necessary to consider Woodward's alternative argument that the Court has the inherent jurisdiction to grant a stay that prevents a creditor (or a trustee on behalf of a creditor) from taking proceedings against third parties.

To my knowledge, the only example of the Court exercising its inherent jurisdiction in relation to the CCAA is *Re Westar Mining Ltd.* (Unreported, June 10, 1992 and June 16, 1992, B.C. Supreme Court Action No. A921164). In that case Macdonald J. exercised the inherent jurisdiction of the Court in order to create a charge against the assets of Westar for the benefit of suppliers which were continuing to provide goods and services to Westar after

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4 the commencement of the CCAA proceedings. Macdonald J. created the
5 charge on June 10, 1992 without giving extensive reasons. His
6 Order was made without prejudice to the claims of the Crown which
7 did oppose the creation of the charge a few days later on the basis
8 that it altered the priorities in the event that Westar went into
9 bankruptcy. In his Reasons for Judgment dated June 16, 1992
10 Macdonald J. first explained how and why he created the charge (at
11 p. 3):

12 The charge has already been created. In doing so, I
13 purported to exercise the inherent jurisdiction of this
14 court. The Company would have no chance of completing a
15 successful reorganization without the ability to continue
16 operations through the period of the stay. It must be
17 able to arrange for further limited credit from its
18 suppliers if it is to continue operations. Thus,
19 security which is sufficient, in the eyes of its
20 suppliers, to justify the extension of some further
21 credit is a condition precedent to any acceptable plan of
22 reorganization.

23 Macdonald J. rejected the argument of the Crown and he elaborated
24 on the use of the Court's inherent jurisdiction at pp. 9 and 10:

25 The issue is whether or not those suppliers who are
26 prepared (or have been compelled, between May 14 and June
27 10) to extend credit which will hopefully keep the
28 Company operating during the period of the stay, should
29 be secured. I have concluded that "justice dictates"
30 they should, and that the circumstances call for the
exercise of this court's inherent jurisdiction to achieve
that end. (See, Winnipeg Supply & Fuel v. Genevieve
Mortgage Corp. [1972] 1 W.W.R. 651 (Man. C.A. at p. 657).

 The circumstances in which this court will exercise
its inherent jurisdiction are not the subject of an
exhaustive list. The power is defined by Halsbury's (4th
ed., volume 23, para. 14) as:

...the reserve or fund of powers, a residual
source of powers, which the Court may draw
upon as necessary whenever it is just or

equitable to do so...

Proceedings under the CCAA are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

Mr. Kirkham submitted that *Westar* is distinguishable on the basis that the assets against which the Court created a charge were within the jurisdiction of the Court because they belonged to *Westar* and that in this case his clients and Canada Trust are not before the Court. I do not think that this is a valid distinction because the charge against *Westar's* assets affected the Crown which was not before the Court any more than Mr. Kirkham's clients and Canada Trust.

It may be argued that the Court should only exercise its inherent jurisdiction to "flesh out the bare bones" of the CCAA and that the Court should not utilize its inherent jurisdiction to grant stays because s. 11 of the CCAA already deals with the subject matter of stays and it contains Parliament's full intentions in that regard. This potential argument has not been given effect in analogous circumstances in the United States when proceedings under Chapter 11 of the U.S. Bankruptcy Code are pending. Under Chapter 11 there is an automatic stay of proceedings and, like s. 11 of the CCAA, it is a stay of proceedings against the debtor company only. The U.S. Courts have used an equivalent of inherent jurisdiction (i.e., a general provision in the U.S. Bankruptcy Code to make necessary or

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4 appropriate orders) to grant stays in relation to proceedings
5 against third parties. The most common example is a proceeding
6 against the principals of the insolvent company whose efforts are
7 required to attempt to reorganize the company. One of the leading
8 U.S. authorities is *Re Johns-Manville Corp.* (1984), 40 B.R. 219
9 which was referred to by Macdonald J. in the decision of *Re*
10 *Philip's Manufacturing Ltd.* (1991), 60 B.C.L.R. 311 where he
11 declined to continue a stay of all proceedings against the
12 directors and officers of the insolvent company. In that case
13 Macdonald J. expressed a reservation about whether the inherent
14 jurisdiction of the Court could be utilized but this predated his
15 decision in *Westar*, supra.

16 Hence, it is my view that the inherent jurisdiction of
17 the Court can be invoked for the purpose of imposing stays of
18 proceedings against third parties. However, it is a power that
19 should be used cautiously. In *Westar* Macdonald J. relied upon the
20 Court's inherent jurisdiction to create a charge against Westar's
21 assets because he was of the view that Westar would have no chance
22 of completing a successful reorganization if he did not create the
23 charge. I do not think that it is a prerequisite to the Court
24 exercising its inherent jurisdiction that the insolvent company
25 will not be able to complete a reorganization unless the inherent
26 jurisdiction is exercised. But I do think that the exercise of the
27 inherent jurisdiction must be shown to be important to the
28 reorganization process.
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4 In deciding whether to exercise its inherent jurisdiction
5 the Court should weigh the interests of the insolvent company
6 against the interests of the parties who will be affected by the
7 exercise of the inherent jurisdiction. If, in relative terms, the
8 prejudice to the affected party is greater than the benefit that
9 will be achieved by the insolvent company, the Court should decline
10 to exercise its inherent jurisdiction. The threshold of prejudice
11 will be much lower than the threshold required to persuade the
12 Court that it should not exercise its discretion under s. 11 of the
13 CCAA to grant or continue a stay that is prejudicial to a creditor
14 of the insolvent company (or other party affected by the stay).

15 In this case I am persuaded that it is important to the
16 reorganization process that the former senior executives not be
17 allowed to be paid the entire amounts of their retirement
18 allowances at this time. On the day of the hearing of this matter
19 Woodward's took the first step in implementing the reorganization
20 of its business affairs (which involves a downsizing of its
21 operations) by terminating approximately 1,200 of its 6,000
22 employees. These terminated employees will be entitled to
23 severance pay which will be a significant obligation of Woodward's.
24 They will be creditors of Woodward's who will be involved in the
25 reorganization of its financial affairs and who will be entitled to
26 vote on the reorganization plan. These former employees will
27 undoubtedly be unhappy when they realize that their severance pay
28 entitlement is an unsecured obligation of Woodward's that will be
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4 compromised as part of the reorganization while the former senior
5 executives have security for the entire amounts of their retirement
6 allowances (which are in reality severance payments in the cases of
7 the senior executives who were terminated). If the former senior
8 executives are paid the full amounts of their retirement allowances
9 at this time, the recently terminated employees may not be
10 understanding and it may cause them to vote against Woodward's
11 reorganization plan even if it is in their economic interests to
12 vote in favour of the plan. Negotiations under the CCAA require a
13 delicate balance and payment of the full amounts of the retirement
14 allowances at this time could well irreparably upset the balance.

15 The former senior executives will not be materially
16 prejudiced if the full amounts of the letters of credit are not
17 paid at this time. The amounts owed to them are fully secured by
18 the letters of credit and there will not be any deterioration in
19 the security if the right to draw on the full amounts of the
20 letters of credit is postponed pending the outcome of Woodward's
21 reorganization effort. There was some evidence that there may be
22 adverse income tax consequences if the full amounts of the letters
23 of credit are drawn upon.

24 Another consideration is the dominant intention of the
25 two trust agreements in allowing the full amounts of the letters of
26 credit to be drawn upon. In quoting the relevant provisions of the
27 two trust agreements, I only make reference to the triggering event
28 of Woodward's becoming insolvent. The other triggering events are
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as follows:

- (a) if Woodward's ceases operations;
- (b) if Woodward's makes a general assignment for the benefit of creditors or files an assignment in bankruptcy or otherwise becomes bankrupt;
- (c) if Woodward's is wound up or dissolved;
- (d) if any receiver, trustee, liquidator of or for Woodward's or any substantial portion of its property is appointed and is not discharged within a period of 60 days.

The primary purpose of these triggering events in my view was to allow the former senior executives to cause the full amounts of the letters of credit to be paid if Woodward's has effectively come to an end. The draftspersons of the trust agreements happened to chose insolvency as one of the triggering events because insolvency of a company frequently signifies its end. However, in this case, it will not be known whether Woodward's insolvency will result in its demise until it has made an attempt to reorganize pursuant to the CCAA. I am not saying that the Court should ignore the wording of the agreements but it is open to the Court to take into consideration the overall intent of the parties when deciding whether it is just and equitable to invoke its inherent jurisdiction.

The decision in *Meridian*, supra, is distinguishable from this case. In *Meridian* the Court was interpreting an Order that it had previously made and it was not considering whether a further

Order could be made pursuant to its inherent jurisdiction.

Although I have concluded that the relative benefit of staying the calling of the letters of credit in their entirety outweighs the prejudice to the former senior executives and that I should exercise the Court's inherent jurisdiction to grant a stay to prevent the letters of credit from being fully drawn, it does not necessarily follow that the stay should prevent partial draws upon the letters of credit. In exercising its inherent jurisdiction in these circumstances the Court should endeavour to exercise the jurisdiction in a manner that balances the interests of the parties as much as possible.

The main prejudice to the former senior executives if they are not permitted to cause any call to be made on the letters of credit is the fact that the monthly payments of the retiring allowances will not be made. The monthly payments provide a source of income to the former senior executives and they will be prejudiced if the payments cease. Both of Mr. Kirkham and Ms. Adair indicated that if I did grant a stay of proceedings with respect to the letters of credit, one or more of their clients may make an application to have the stay discontinued on the basis that it creates a hardship to them.

On the other hand, the continuation of the monthly payments of the retiring allowances is much less likely to create a difficulty in the negotiations with the recently terminated

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3 employees than the payment of the retiring allowances in full.
4 Although the former senior executives will be paid the monthly
5 amounts of the retiring allowances without compromise pending the
6 reorganization attempt, they will have to accept payment over a
7 period of time. In addition, the recently terminated employees
8 will hopefully appreciate that Woodward's would not be voluntarily
9 making the monthly payments to the former senior executives and
10 that it is the Court which is allowing the payments to be made.
11

12 It is my view that the interests of the parties can be
13 largely balanced if the Court exercises its inherent jurisdiction
14 to grant a stay that prevents payment on the letters of credit
15 except to the extent of satisfying the obligation of Woodward's to
16 make the monthly payments of the retiring allowances. In
17 exercising the Court's discretion in this fashion I appreciate that
18 a stay under s. 11 of the **CCAA** could effectively prevent the
19 calling on the letters of credit for the purpose of paying the
20 monthly amounts. In view of the fact that the Court is exercising
21 its inherent jurisdiction to prevent the letters of credit being
22 drawn in their entire amounts, I am exercising my discretion to
23 decline to grant a stay under s. 11 which would prevent the calling
24 on the letters of credit for the purpose of paying the monthly
25 amounts.
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27 It is necessary for the Court to exercise its inherent
28 jurisdiction because a stay under s. 11 could not be utilized to
29 prevent Canada Trust from drawing the full amounts of the letters
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4 of credit that are held by it. However, a stay under s. 11 could
5 effectively prevent Montreal Trust from making any call on the
6 letter of credit in its favour. I must now decide whether I should
7 exercise my discretion under s. 11 to prevent Montreal Trust from
8 making the partial draws on its letter of credit that I am
9 permitting Canada Trust to make on each of its letters of credit.

10 As I have indicated above, the main purpose of s. 11 is
11 to preserve the status quo among the creditors of the insolvent
12 company. Huddart J. commented on the status quo in *Re Alberta-*
13 *Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) at p.
14 105:

15 The status quo is not always easy to find. It is
16 difficult to freeze any ongoing business at a moment in
17 time long enough to make an accurate picture of its
18 financial condition. Such a picture is at best an
19 artist's view, more so if the real value of the business,
20 including goodwill, is to be taken into account. Nor is
21 the status quo easy to define. The preservation of the
22 status quo cannot mean merely the preservation of the
23 relative pre-stay debt status of each creditor. Other
24 interests are served by the CCAA. Those of investors,
25 employees, and landlords among them, and in the case of
26 the Fraser Surrey terminal, the public too, not only of
27 British Columbia, but also of the prairie provinces. The
28 status quo is to be preserved in the sense that
29 manoeuvres by creditors that would impair the financial
30 position of the company while it attempts to reorganize
are to be prevented, not in the sense that all creditors
are to be treated equally or to be maintained at the same
relative level. It is the company and all the interests
its demise would affect that must be considered.

26 In that case Huddart J. dismissed the application of the
27 owner of the insolvent company's operating facilities for payment
28 of ongoing amounts owing under the operating agreement between the
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3 two parties. In essence, the payments were the equivalent of
4 rental payments under a lease. Huddart J. dismissed the
5 application because there were insufficient funds to make the
6 payments and the owner of the facilities had not shown hardship.
7 The circumstances in that case were quite unusual because the
8 insolvent company was continuing to pay interest to one of its
9 lenders. In more normal cases under the CCAA one would expect
10 during the reorganization period that rental payments for the
11 ongoing use of facilities would be made and that interest on debt
12 would not be paid. In any event, the case is an example of a
13 situation where the status quo was maintained by way of different
14 treatment of creditors.
15

16 In the present case I have decided to exercise my
17 discretion under s. 11 of the CCAA so that Montreal Trust is
18 treated in the same fashion as Canada Trust. It is my view that
19 the status quo is best maintained in this case by giving equal
20 treatment to creditors within the same class irrespective of the
21 different wording in the two trust agreements. I add that
22 Woodward's does have surplus cash at the present time and that
23 other creditors will not be materially prejudiced by allowing
24 partial payments to be made under the letter of credit held by
25 Montreal Trust.
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27 In the result, I continue the stay to prevent Canada
28 Trust from calling on the letters of credit held by it except to
29 the extent that it may be necessary to obtain payment of the
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4 monthly retiring allowances that are overdue. I grant a stay
5 restraining Montreal Trust from delivering to Woodward's a copy of
6 any certificate provided to it under paragraph 8 of the Montreal
7 Trust Agreement.

8 The Order dated December 11, 1992 stipulates that
9 Woodward's is to retain its funds in its operating accounts with
10 the Bank and that Woodward's may only use the funds for certain
11 specified purposes. I anticipate that the continuing stay Order
12 will have a similar provision. If it does contain a similar
13 provision, the permitted purposes for use of funds may include the
14 payment of the monthly retiring allowances to the former senior
15 executives. I appreciate that Woodward's may prefer to require
16 that the letters of credit be called upon so that there is no
17 appearance to the recently terminated employees that Woodward's is
18 voluntarily making payments to the former senior executives. On
19 the other hand, Woodward's may not want to create an administrative
20 nuisance for the Bank by having numerous calls being made on the
21 letters of credit. Woodward's may exercise its discretion as to
22 whether the monthly payments to the former senior executives are
23 made voluntarily or involuntarily, recognizing of course that they
24 will be made involuntarily if they are not made voluntarily.

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28 January 11, 1993
29 Vancouver, B.C.
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D. Tysae, J.

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:)
)
IN THE MATTER OF THE *COMPANIES'*) S. Richard Orzy, Derek J. Bell and Sean H.
CREDITORS ARRANGEMENT ACT,) Zweig, for the Applicants
R.S.C. 1985, c. C-36, AS AMENDED)
)
AND IN THE MATTER OF A PLAN OF) Robert J. Chadwick and Logan Willis, for
COMPROMISE OR ARRANGEMENT OF) Duff & Phelps Canada Restructuring Inc.,
TAMERLANE VENTURES INC. and) the proposed Monitor
PINE POINT HOLDING CORP.)
) Joseph Bellissimo, for Renvest Mercantile
) Bankcorp Inc.
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) **HEARD:** August 23, 2013

NEWBOULD J.

[1] The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

Tamerlane business

[2] At the time of the application, Tamerlane Ventures Inc. ("Tamerlane") was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. ("Tamerlane Pine Point"), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

[3] The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

[4] The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

[5] The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

[6] The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

[7] As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of \$24,814,433. The assets included consolidated current assets of \$2,007,406, and consolidated non-current assets with a net book value of \$22,807,027. Non-current assets included primarily the investment in the Pine Point property of \$20,729,551 and the Los Pinos property of \$1,314,936.

[8] Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of \$12 to \$15 million using a 0.3% copper cut-off grade, or \$17 to \$21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of \$30 to \$56 million based on market comparables, with a value as high as \$229 million considering precedent transactions.

Secured and unsecured debt

[9] Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. ("Global Resource Fund" or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD \$10,000,000 . The secured indebtedness under the credit agreement is

guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

[10] The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

[11] The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD \$850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

Events leading to filing

[12] Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

[13] It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for \$1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

[14] As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

[15] Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a \$1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was \$11,631,948.90.

[16] On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

[17] On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was \$12,100,254.26.

[18] Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

Discussion

[19] There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the

proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

[20] The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

[21] Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc.* (2010), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.)*, 2012 ONSC 3767, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 and *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500. I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

[22] Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SISP and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

[23] The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of \$300,000, a financial advisor charge of

\$300,000, a directors' charge of \$45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

DIP facility and charge

[24] The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these CCAA proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

[25] The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net \$1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

[26] Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

Sunset clause

[27] During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

[28] The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

[29] Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

[30] Section 11 of the CCAA authorizes a court to make any order "that it considers appropriate in the circumstances." In considering what may be appropriate, Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379:

70. ...Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

71. It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

[32] The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Re Crystallex International Corp.* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

[33] It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to

any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

[34] What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Newbould J.

Released: August 28, 2013

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

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
TAMERLANE VENTURES INC. and PINE POINT
HOLDING CORP.

REASONS FOR JUDGMENT

Newbould J.

Released: August 28, 2013

CITATION: Jaguar Mining Inc. (Re), 2014 ONSC 494
COURT FILE NO.: CV-13-10383-00CL
DATE: 20140116

**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 JAGUAR MINING INC., Applicant**

BEFORE: MORAWETZ R.S.J.

COUNSEL: Tony Reyes and Evan Cobb, for the Applicant, Jaguar Mining Inc.

**Robert J. Chadwick and Caroline Descours, for the Ad Hoc Committee of
Noteholders**

Joseph Bellissimo, for Global Resource Fund, Secured Lender

Jeremy Dacks, for FTI Consulting Canada Inc., Proposed Monitor

Robin B. Schwill, for the Special Committee of the Board of Directors

**HEARD &
ENDORSED: DECEMBER 23, 2013**

REASONS: JANUARY 16, 2014

ENDORSEMENT

[1] On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. (“Jaguar”) and made the following three endorsements:

1. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be

confirmed on comeback motion. Sealing Order of confidential exhibits granted.

2. Meeting Order granted in form submitted.
3. Claims Procedure Order granted in form submitted.

[2] These are my reasons.

[3] Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

[4] Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

[5] Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over \$268 million of debt and new liquidity upon exit of approximately \$50 million.

[6] Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

[7] The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

[8] The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

[9] Jaguar is a corporation existing under the *Business Corporations Act*, R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

[10] Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

[11] Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineração Ltda. ("MCT"), Mineração Serras do Oeste Ltda. ("MSOL") and Mineração Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

[12] The Subsidiaries' assets include properties in the development stage and in the production stage.

[13] Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

[14] Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

[15] In aggregate, Jaguar has issued a principal amount of \$268.5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

[16] Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

[17] Jaguar is also the borrower under a fully drawn \$30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

[18] Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

[19] Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

[20] The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

[21] Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

[22] Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately \$169.3 million.

[23] Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over \$317 million and a net loss of over \$82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately \$40 million.

[24] I accept that Jaguar faces a liquidity crisis and is insolvent.

[25] Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

[26] Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

[27] Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that, because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

[28] Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of \$5 million (a \$500,000 first-ranking charge (the "Primary Administration Charge") and a \$4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

[29] Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

[30] Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of \$150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

[31] Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

[32] Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

[33] In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

[34] Each of the Claims Procedure Order and Meeting Order include a comeback provision.

[35] Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of \$5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

[36] I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

[37] I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

[38] I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

[39] In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

[40] The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partners Limited (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Calpine Canada Energy Limited (Re)*, 2006 ABQB 153, 19 C.B.R. (5th) 187; *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500, 3 C.B.R. (6th) 150.

[41] The authority to grant the court-ordered Administration Charge and Director's Charge is contained in ss. 11.51 and 11.52 of the CCAA.

[42] In granting the Administration Charge, I am satisfied that:

- (i) notice has been given to the secured creditors likely to be affected by the charge;
- (ii) the amount is appropriate; and
- (iii) the charges should extend to all of the proposed beneficiaries.

[43] In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

- (a) the size and complexity of the business being restructured; and
- (b) whether there is an unwarranted duplication of roles.

See *Canwest Publishing Inc. (Re)*, 2010 ONSC 222, 63 C.B.R. (5th) 115.

[44] In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

[45] With respect to the Director's Charge, the court must be satisfied that:

- (i) notice has been given to the secured creditors likely to be affected by the charge;
- (ii) the amount is appropriate;
- (iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
- (iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

[46] A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

[47] Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I find it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

[48] In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

[49] Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

[50] In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

MORAWETZ R.S.J.

Date: January 16, 2014

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

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

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.

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

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, if 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

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.

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

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
- (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.

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

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

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

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

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

CITATION: Timminco Limited (Re), 2012 ONSC 506
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants**

**D.W. Ellickson, for Communications, Energy and Paperworkers' Union of
Canada**

C. Sinclair, for United Steelworkers' Union

K. Peters, for AMG Advance Metallurgical Group NV

M. Bailey, for Superintendent of Financial Services (Ontario)

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD: **January 12, 2012**

RELEASED: **January 16, 2012**

REASONS: **February 2, 2012**

ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

[2] These are those reasons.

Background

[3] On January 3, 2012, Timminco Limited (“Timminco”) and Bécancour Silicon Inc. (“BSI”) (collectively, the “Timminco Entities”) applied for and obtained relief under the *Companies’ Creditors Arrangement Act* (the “CCAA”).

[4] In my endorsement of January 3, 2012, (*Timminco Limited (Re)*, 2012 ONSC 106), I stated at [11]: “I am satisfied that the record establishes that the Timminco Entities are insolvent and are ‘debtor companies’ to which the CCAA applies”.

[5] On the initial motion, the Applicants also requested an “Administration Charge” and a “Directors’ and Officers’ Charge” (“D&O Charge”), both of which were granted.

[6] The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec (“IQ”) but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the “PBA”) or the *Quebec Supplemental Pensions Plans Act* (the “QSPPA”) (collectively, the “Encumbrances”) in favour of any persons that have not been served with this application.

[7] IQ had been served and did not object to the Administration Charge and the D&O Charge.

[8] At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

[9] The Timminco Entities now bring this motion for an order:

- (a) suspending the Timminco Entities’ obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);
- (b) granting super priority to the Administration Charge and the D&O Charge;
- (c) approving key employee retention plans (the “KERPs”) offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities’ obligations under the KERPs (the “KERP Charge”); and
- (d) sealing the confidential supplement (the “Confidential Supplement”) to the First Report of FTI Consulting Canada Inc. (the “Monitor”).

[10] If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of \$1 million;
- second, the KERP Charge (in the maximum amount of \$269,000); and
- third, the D&O Charge (in the maximum amount of \$400,000).

[11] The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers' Union of Canada ("CEP"). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers' Union ("USW").

[12] The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L'Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

[13] Counsel to the Applicants identified the issues on the motion as follows:

- (a) Should this court grant increased priority to the Administration Charge and the D&O Charge?
- (b) Should this court grant an order suspending the Timminco Entities' obligations to make the pension contributions with respect to the pension plans?
- (c) Should this court approve the KERPs and grant the KERPs Charge?
- (d) Should this court seal the Confidential Supplement?

[14] It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

[15] The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

14. The Timminco Entities sponsor the following three pension plans (collectively, the "**Pension Plans**"):

- (a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the “**Haley Pension Plan**”);
- (b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the “**Bécancour Non-Union Pension Plan**”); and
- (c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the “**Bécancour Union Pension Plan**”).

Haley Pension Plan

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco’s magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the “**PBA**”), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario (“**FSCO**”) detailing the plan’s funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of \$5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of \$3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling \$4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be \$1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan’s actuaries, despite Timminco having made contributions of approximately \$4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is \$3,102,900.

Bécancour Non-Union Pension Plan

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit (“**DB**”) and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was \$3,239,600.

21. In 2011, normal cost contributions payable to this plan totaled approximately \$9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately \$41,710 per month. All contributions in respect of the plan were paid when due in accordance with the Québec *Supplemental Pension Plans Act* (the “QSPPA”) and regulations.

Bécancour Union Pension Plan

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was \$7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately \$7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately \$95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Boctor of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

Pension Plan Deficiencies and the Timminco Entities' CCAA Proceedings

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were \$1,598,500 for 2010, \$1,397,000 for 2011 and \$1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to \$1,728,700 for each of 2011 and 2012.

Suspension of Certain Pension Contributions

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the “**Normal Cost Contributions**”). Timminco currently owes approximately \$1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately \$140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the “**Pension Contributions**”), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

The Position of CEP and USW

[16] Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

[17] In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation “would frustrate the company’s ability to restructure and avoid bankruptcy”. (See *Indalex (Re)*, 2011 ONCA 265 at para. 181.)

[18] Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no

reason to believe that their interests will be protected through the issuance of the orders being sought.

[19] Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must “wear two hats” and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex (Re)*, *supra*, at para. 129.)

[20] Counsel to CEP goes on to submit that, where the “two hats” gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex (Re)*, *supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex (Re)*, *supra*, at paras. 140 and 207.)

[21] In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities’ fiduciary duties to the pension plans, the super priority charge ought not to be granted.

[22] Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (See *Indalex (Re)*, *supra*, at paras. 179 and 189.)

[23] In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

[24] CEP also takes the position that the Timminco Entities’ obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

[25] In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex (Re)*, *supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

[26] In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of \$95,300 per month to the Bécancour Union Pension Plan, and of \$47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary

obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities' request to suspend the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

[27] Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

[28] With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

[29] Counsel to CEP's final submission is that, in the event the KERPs are approved, they should not be sealed, but rather should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

The Position of the Timminco Entities

[30] At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

[31] I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers.

[32] As at December 31, 2011, the Timminco Entities' cash balance was approximately \$2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately \$5.5 million and total operating disbursements of approximately \$7.7 million for net cash outflow of approximately \$2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated \$157,000.

[33] The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities

existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two third-party lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility.¹

[34] The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

[35] There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

[36] The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

[37] Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

[38] The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities' restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

[39] Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

11.52(1) Court may order security or charge to cover certain costs — 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;

¹ In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

(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.

11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[40] Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities' liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

[41] Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

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.

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

(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.

(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.

Analysis

(i) Administration Charge and D&O Charge

[42] It seems apparent that the position of the unions' is in direct conflict with the Applicants' positions.

[43] The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

[44] Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

[45] Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

[46] It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timminco Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

[47] The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

[48] Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.*, (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corporation (Re)*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corporation (Re)*, (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

[49] It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5, at para. 36:

In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

[50] Further, as I indicated in *Nortel Networks Corporation (Re)*, (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

[51] The Court of Appeal in *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...

...

What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

[52] The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

[53] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

[54] Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities' CCAA proceedings.

[55] The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).

[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

[58] The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

[59] Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex (Re)*, *supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA

suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[63] In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial and Nortel Networks Corporation (Re)*).

[64] In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

[65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

[66] In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

[67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

[68] For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

[69] I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities' obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

[70] I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) **The KERPs**

[71] Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

[72] In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities' CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is \$269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corporation (Re)*, (2009) O.J. No. 1044 (S.C.J.), *Grant Forest Products Inc. (Re)*, (2009) 57 C.B.R. (5th) 128 (Ont. S.C.J.) [Commercial List], and *Canwest Global Communications Corp. (Re)*, (2009) 59 C.B.R. (5th) 72 (Ont. S.C.J.).

[73] In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

[74] The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

[75] I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be

necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

[76] The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent 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
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the 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.

[77] CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

[78] In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

[79] In the result, the motion is granted. An order shall issue:

- (a) suspending the Timminco Entities' obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);
- (b) granting super priority to the Administrative Charge and the D&O Charge;
- (c) approving the KERPs and the grant of the KERP Charge;

(d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

MORAWETZ J.

Date: February 2, 2012

scheme, that the scheme should fail. I perceive the position of the court in such situations to be ensuring that the proposed arrangement is properly considered by all constituents affected, before final approval or rejection is sought.³⁷

Mr. Justice Blair made this observation:

In exercising their traditional adjudicative role judges must remember that they are judges. Their mandate is not to make political decisions, but to make judicial decisions. On the other hand, judges do not live in a vacuum. They are not impervious to the social and economic implications of matters that come before them. In dealing with causes which have a public dimension to them, such as business reorganizations, underlying consequences pertaining to the social and economic impact of the reorganization on the community form the setting in which the court exercises its supervisory jurisdiction over the process . . . while the social and economic consequences for the community of the closure or restructuring of a business are not of direct concern to the judge in making her or his judicial decisions, they may well affect the court's response to the processing of the reorganization and its approach to the resolution options.³⁸

2. Jurisdiction of Filing

The court has jurisdiction to hear an application to commence a proceeding under the CCAA if the debtor company has its head office or chief place of business in its province or territory, or if the debtor has no place of business in Canada, the court can hear an application in any province in Canada within which any assets of the company are situated.³⁹ The test for jurisdiction involves alternatives in a number of instances. If the head office is in one province or territory and its chief operations are located in another, an application can be made in either jurisdiction.

There have been numerous cases in which applications have been brought in jurisdictions other than where the debtor's head office or principal place of operations is located, most notably Ontario. Such proceedings can create a problem of access to participation in proceedings for less senior creditors, including employees, when the proceedings are located far from the company's head office or principal place of operations. However, in one case where the head office was located in Manitoba and most of its assets were located in that province, the court in Saskatchewan declined to hear a CCAA application, finding that it should have

³⁷ Mr. Justice Forsyth, Alberta Court of Queen's Bench, "Judicial Discretion under the CCAA" in *Corporate Restructurings and Insolvencies* (Carswell: Scarborough, 1995) at 85-88.

³⁸ Mr. Justice Blair, in "The Judges Speak", in J. Ziegel, ed. *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford University Press, 1994) at 768-9.

³⁹ Section 9, CCAA.

been brought in Manitoba.⁴⁰ The *Pope & Talbot* proceeding started in Ontario and was moved to British Columbia after intervention by the Crown in British Columbia as represented by the Ministry of the Attorney General.

There have been approximately 413 CCAA proceedings in the calendar years 2001 to 2011.⁴¹ Chart 1 provides a summary of CCAA filings by jurisdiction. Graph 1 below illustrates that division by jurisdiction. It confirms that Ontario has had the largest number of filings, 40% of the total, with Québec having 22% of all filings. Alberta and British Columbia have also had a significant number of cases, representing 14% and 16% respectively. Two of Canada's territories, the Yukon and Nunavut, have had no filing.⁴² The Northwest Territories has had two proceedings since the statute was enacted, but not in this timeframe.

CHART 1
Summary — Filing by Jurisdiction 2001-2011

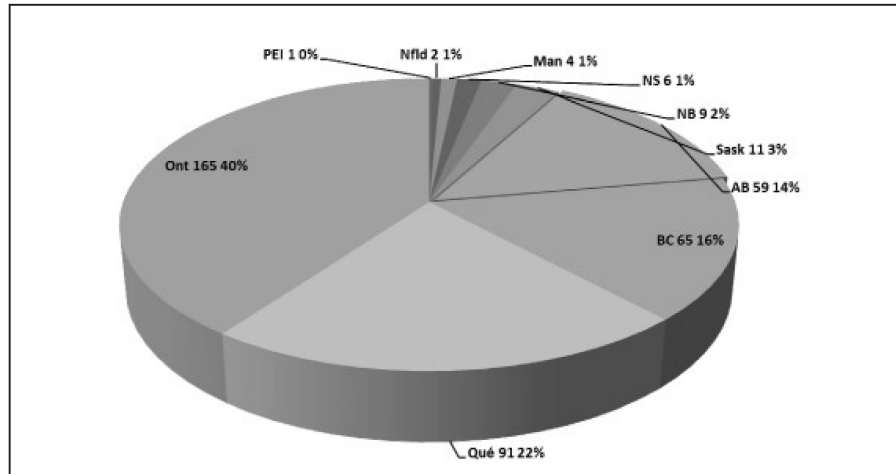
PROVINCE	NUMBER	%
Alberta	59	14%
British Columbia	65	16%
Manitoba	4	1%
New Brunswick	9	2%
Newfoundland	2	0%
Nova Scotia	6	1%
Ontario	165	40%
PEI	1	0%
Québec	91	22%
Saskatchewan	11	3%
Total	413	100%

⁴⁰ *Re Oblats de Marie Immaculee du Manitoba* (2002), 34 C.B.R. (4th) 76 (Sask. Q.B.).

⁴¹ This figure comes from an empirical study conducted by author Janis Sarra under a grant by SSHRC (Sarra, "CCAA Database").

⁴² Earlier data showed that the Northwest Territories has had two cases: Sahtu Contractors (1992); Curry Construction Ltd (1991).

GRAPH 1
CCAA Filings by Province



The Ontario numbers are not surprising, given the number of businesses registered in Ontario. The Québec numbers are low, given its relative economic importance. For a number of years, Québec headquartered companies more commonly filed proposals under the *BIA*, rather than *CCAA* proceedings. In a few cases, Québec headquartered companies filed *CCAA* proceedings in Ontario because of a higher degree of certainty offered by the procedures of the Ontario Superior Court Commercial List and the experience of judges in handling complex restructurings. The major operating lenders of many debtors were also located in Toronto and the creditors wanted proceedings in Ontario where they were assured of a timely process. Other major lenders were located in New York and they were more comfortable with the common law than the civil law jurisdiction. With the introduction of a commercial list in the Québec Superior Court in 2003, Québec has seen a rise in the number of *CCAA* filings.⁴³ However, practitioners report that the *BIA* proposal provisions still continue to be more popular in Québec, because the expense of *CCAA* proceedings makes the *BIA* proposal option more appealing.⁴⁴

⁴³ A commercial list has been introduced in the Montréal district, but is not yet available in other districts, although the possibility is under consideration. Previously the Québec Superior Court had a policy to not have a judge seized with carriage of proceedings, which lengthened the decision-making process, but that practice no longer exists and judges are seized with supervising proceedings. While a commercial list is not yet available, the court in other regions has been willing to seize itself of proceedings in complex or sensitive cases.

⁴⁴ For a discussion, see Janis Sarra, *Examining the Insolvency Toolkit*, Report of Public Hearings, Canadian Insolvency Foundation (Toronto: CIF, 2012).

Chart 2 and the illustrative graph that follows track the timelines of CCAA cases filed over the past decade.⁴⁵ As is evident below, the peak in terms of numbers of filings was 2008-2009 during the height of the global financial crisis. The average number of applications under the CCAA for the years 2002 to 2011 was 40.3 proceedings per year.

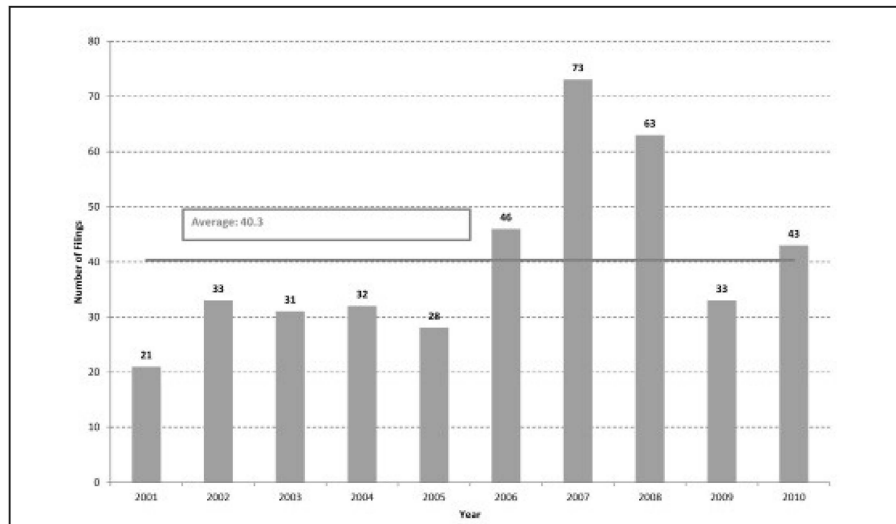
CHART 2
Summary of CCAA Filings by Date of Initial Order⁴⁶

YEAR	FILINGS	%
2001	7	2%
2002	21	5%
2003	33	8%
2004	31	8%
2005	32	8%
2006	28	7%
2007	46	11%
2008	73	18%
2009	63	15%
2010	33	8%
2011	43	10%
Total	410	100%

⁴⁵ Janis Sarra, CCAA database.

⁴⁶ Please note, this number represents only those filings from 1 September 2001 to 31 December 2011. Three files have an unknown date for their sanction order, resulting in the difference between Charts 1 and 2.

GRAPH 2
CCAA Filing by Year



3. Length of Proceedings

There is a wide variety of length of proceedings under the CCAA. Moreover, ascertaining the precise length of a proceeding requires some judgment as to the period to measure. For purposes of this book, the length is measured from date of the initial order commencing the proceeding under the CCAA until a date that the proceeding appears to have been completed or the workout has not been resulted in a plan (“terminating event”). For those filings successfully resulting in a plan of compromise and/or arrangement, the terminating event has been measured as the date of the court sanction of the plan. In reality, such proceedings are longer, as the parties then implement the plan, although the data of plan completion is very difficult to ascertain.

Where the proceeding resulted in no plan of arrangement, but rather, a sale of all or substantially all of the assets within the CCAA process, the terminating event was taken as the date of court sanction of the purchase agreement. Finally, where the filing resulted in a receivership, the terminating event was taken as the date of the receivership order. In most cases, debtor companies will remain under creditor protection for periods of time following the plan sanction, court approval of the sale agreement or receivership appointment, in order to satisfy preconditions to implement either the plan of arrangement or purchase agreement. Thus, the figures represented below in some ways understate the length of CCAA proceedings, particular as each proceeding has unique features that influence ultimate completion of the court-supervised proceeding. However, as

COMMERCIAL RESTRUCTURING AND INSOLVENCY IN CANADA

by: Linc A. Rogers and Pamela L.J. Huff

Introduction

Commercial restructuring and insolvency law in Canada is not memorialized in any single statute. Canadian restructuring and insolvency law refers to the complex matrix of statutory and common law rules that govern the rights and responsibilities of creditors and debtors in situations where the debtors are in some form of financial distress. These insolvent debtors may become subject to a host of different formal or informal proceedings, with bankruptcy proceedings being only one such form.

Bankruptcy and insolvency are oftentimes thought to be – by laypersons, media and legal professionals not practicing in the area – one in the same thing. An enterprise that ceases operations or cannot meet its obligations is commonly said to have “gone bankrupt”. A company that becomes subject to a court supervised process as a result of some form of financial distress is often referred to as having become subject to “bankruptcy proceedings.” Despite their colloquial use as synonymous terms, however, the distinction between bankruptcy and insolvency is a critical one.

Bankruptcy is a legal status. Insolvency is a financial condition. An insolvent company is unable to meet its obligations generally as they become due or its liabilities exceed the value of its assets. When a commercial entity becomes bankrupt, on the other hand, it loses the legal capacity to deal with its assets and a trustee in bankruptcy is appointed over those assets with a mandate to, among other things, liquidate the assets and distribute the proceeds of sale to creditors.

In addition to bankruptcy, an insolvent business may be rehabilitated by a restructuring of the corporation and its debts under one or more statutes governing commercial insolvencies. Such “debtor-in-possession” (“DIP”) proceedings may also result in the sale of some or all of the assets of the insolvent business.

Alternatively, the assets of a business may be liquidated or sold on a going-concern basis in creditor-initiated proceedings. Such proceedings may include the appointment of a receiver of the business (appointed privately or by a court), by the exercise of other private remedies of a secured creditor under its security or through some combination of the above.

Set out below is a summary of Canadian restructuring and insolvency law. A number of significant amendments to Canada’s insolvency legislation took effect on September 18, 2009. The impact those amendments had on Canadian insolvency law is discussed in this summary.

1. Canada’s Insolvency Statutes

Canada has four key insolvency statutes:

The Insolvency Institute of Canada (IIC) gratefully acknowledges the contribution of Linc Rogers and Pamela Huff of Blake, Cassels & Graydon LLP for their work in writing this article.

1. *Companies' Creditors Arrangement Act* (“CCAA”). The CCAA is the principal statute for the reorganization of a large insolvent corporation that has more than C\$5-million of claims against it or which is part of an affiliated group of companies that has more than C\$5 million of claims in the aggregate. The CCAA is a federal statute with application in every province and territory of Canada and is generally analogous in effect to Chapter 11 of the U.S. *Bankruptcy Code* (“U.S. Code”), although there are a number of important technical differences. As discussed below, the sale of a debtor’s business and assets in a CCAA proceeding is permitted even in the absence of a formal plan of reorganization.
2. The *Bankruptcy and Insolvency Act* (“BIA”). The BIA is also a federal statute that includes provisions to facilitate both the liquidation and reorganization of insolvent debtors. The liquidation provisions, which provide for the appointment of a trustee in bankruptcy over the assets of the insolvent debtor, are generally analogous to Chapter 7 of the U.S. Code, although there are a number of important technical differences. The reorganization provisions under the BIA, known as the “proposal” process, are more commonly used for smaller, less complicated reorganizations than those that take place under the CCAA because the BIA proposal provisions have more stringent timelines and provide less flexibility than the CCAA. The BIA also provides for the appointment of an interim receiver to protect and preserve assets in certain circumstances and, as a result of the 2009 amendments, a receiver with national power and authority. A receiver appointed over all or substantially all of the assets of an insolvent company must be a licensed trustee in bankruptcy – typically the licensed insolvency professionals in an accounting or financial advisory firm.
3. The *Personal Property Security Act* (“PPSA”). The PPSA governs the priorities, rights and obligations of secured creditors, including a secured creditor’s right, following a default by the debtor, to enforce its security and dispose of assets subject to its security (including on a going-concern basis). Each province of Canada, except Quebec (which has its own unique *Civil Code*, modelled on the French Napoleonic Code) has enacted a version of the PPSA. The PPSA is analogous to, and modelled on, the *Uniform Commercial Code* enacted in each U.S. state.
4. Provincial *Rules of Court*. In all provinces except Quebec, it is also possible to sell an insolvent business, by way of liquidation or going-concern sale, through a court-appointed receiver. Each province, other than Quebec, has “Rules of Court” similar to Ontario’s *Courts of Justice Act*, which allow the court to appoint a receiver and/or receiver and manager when it is “just or convenient” to do so. The receiver, by way of court order, can be granted the right to take possession of, and sell, the assets subject to the receivership. Receivership is an available remedy in Quebec under the federal BIA.

Proceedings under the CCAA and BIA are subject to the oversight of the federal government office known as the Office of the Superintendent of Bankruptcy. The federal government also appoints Official Receivers to carry out statutory duties in each bankruptcy jurisdiction across Canada. The Official Receivers report to the Superintendent of Bankruptcy.

2. Reorganizations Under the CCAA

2.1 Who qualifies for relief under the CCAA?

To apply for relief under the CCAA, the debtor must:

- (a) be a Canadian incorporated company or foreign incorporated company with assets in Canada or conducting business in Canada (certain regulated bodies such as banks and insurance companies are not eligible to file under the CCAA or BIA but instead may seek relief from creditors under the *Winding-Up and Restructuring Act*). As a result of the 2009 amendments, income trusts (business trusts established for commercial investments) also qualify for relief. Partnerships cannot apply under the CCAA, but, as discussed below, relief has been extended to partnerships in certain circumstances;
- (b) be insolvent or have committed an “act of bankruptcy” as within the meaning set out in the BIA. The CCAA does not contain a definition of insolvency; however, courts have held that reference may be had to the definition of insolvency under the BIA. Accordingly, a company will qualify for relief under the CCAA if it is insolvent on a cash flow basis (i.e. unable to meet its obligations generally as they become due) or on a balance sheet test (i.e. has liabilities that exceed the value of assets). Further, the Ontario Superior Court of Justice has held that in determining whether a debtor is insolvent for the purposes of the CCAA, courts may use a “contextual and purposive approach”. A debtor may be considered insolvent if the debtor faces a “looming liquidity crisis” or is in the “proximity” of insolvency even if it is currently meeting its obligations as they become due. It is sufficient if the debtor reasonably anticipates that it will become unable to meet its obligations as they come due before the debtor could reasonably be expected to complete a restructuring of its debt; and
- (c) have in excess of C\$5-million in debt or an aggregate in excess of C\$5-million in debt for a filing corporate family.

Partnerships and solvent entities do not qualify as "applicants" under the CCAA, and cannot file plans of arrangement or compromise under the CCAA. Nonetheless, Canadian courts have routinely extended the stay of proceedings and other relief granted to the qualifying insolvent applicants, to partnerships (where the partners themselves have filed) and even solvent entities affiliated with the applicants, where there is a finding that it is appropriate to do so in the circumstances. For example, relief has been extended to partnerships where the business of the partnership is inextricably entwined with the business of the applicants and granting certain relief to the partnership is required for an effective reorganization of the qualifying applicants.

2.2 How does a company commence proceedings under the CCAA?

Unlike Chapter 11, no new bankruptcy estate is created upon a CCAA filing and the CCAA does not allow a debtor company to make an electronic filing to obtain a skeletal stay of proceedings and then subsequently obtain “first day” relief. Instead, a debtor company seeks the granting of a single omnibus initial order that provides the debtor with a comprehensive stay of proceedings and other relief. Proceedings under the CCAA are commenced by an initial application to the superior court of the relevant province and not a federal bankruptcy court as in the U.S. In some jurisdictions like Ontario, there are specialized commercial branches of the provincial superior courts before which these applications may be brought. In some provinces, there are recognized model orders, which establish the accepted framework for an initial order, subject to the modifications appropriate to the case as may be granted by the court. In most instances, the application is made by the debtor company itself (creditors may initiate the process, but this is uncommon).

2.3 Where must the application be brought?

Applications for relief under the CCAA may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the debtor company in Canada is situated, or, if the debtor company has no business in Canada, in any province in which any assets of the company are located.

2.4 What must be included in the initial application?

All CCAA applications must include:

- weekly cash-flow projections for the weeks to which the stay of proceedings will apply;
- a report containing certain representations of the debtor regarding the preparation of cash-flow projections; and
- copies of all financial statements of the debtor, audited or unaudited, prepared during the year before the application.

2.5 What relief can the court provide?

The initial order granted by the court usually provides for the following key elements:

- (a) Stay of Proceedings. Initial orders grant a comprehensive stay of proceedings that will apply to both secured and unsecured creditors, and a stay against termination of contracts with the debtor. The purpose of the stay is to prevent precipitous creditor action and prohibit any single creditor or group of creditors from achieving an unfair advantage over other creditors. The stay is designed to maintain the status quo and allow the debtor company sufficient breathing room to seek a solution to its financial difficulties. Stays may also be extended to directors of the debtor in order to encourage those individuals to remain in office and advance the restructuring process.

The stay is subject to certain prescribed limits. For example, (i) the stay cannot restrict the exercise of remedies under eligible financial contracts such as futures contracts, derivatives and hedging contracts. The stay cannot prevent public regulatory bodies from taking action against the debtor, although monetary fines can be stayed; (ii) there are restrictions on the length of stays for "aircraft objects" (airframes, aircraft engines and helicopters); (iii) no order granting a stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods and services, or the use of leased (pursuant to a true lease as opposed to financing lease) or licensed property, or require the further advance of money or credit; and (iv) as noted above, partnerships do not qualify to apply under the CCAA, although, there is case law that provides that the stay may be extended over partnerships, where the partners themselves have filed for CCAA protection and the protection is required to facilitate the restructuring.

Unlike Chapter 11, the stay is not automatic; however, the court will typically exercise its discretion to issue an initial stay for up to a maximum of 30 days. An application to the court is required for any extensions. Before an extension can be granted, the court must conclude that circumstances exist that make the extension appropriate and that the debtor is acting with due diligence and in good faith. Other than the initial 30-day stay, there is no statutory limit on the duration or length of extensions.

- (b) The Monitor. As part of the initial order, the court appoints a monitor. The monitor's basic duties are set out in the CCAA, but can be expanded by court order. Generally, the monitor plays a supervisory and advisory role in the proceeding. In its supervisory role, the monitor oversees the steps taken by the company while in CCAA proceedings, on behalf of all creditors, as an officer of the court. Further, the monitor will file periodic reports with the court and creditors, including reports setting out the views of the monitor as required by the CCAA in connection with any proposed disposition of assets or in connection with any proposed DIP financing (discussed below in Section 2.5(c)).

Generally, the debtor's management will remain in control of the company throughout the proceedings, however, the monitor will assist management in dealing with the restructuring and other issues that arise. The initial order may approve the retention of a Chief Restructuring Officer ("CRO"). In certain cases – such as where the board of directors have resigned or creditors have otherwise lost confidence in management - the CRO may have a more extensive mandate or the monitor's powers can be expanded. By court order, the monitor can be authorized to sell assets, subject to court approval, and direct certain corporate functions. Monitors assuming this role are colloquially referred to as "super monitors".

There are no statutorily mandated creditor committees in Canada although they have sometimes been formed on an *ad hoc* basis. There is no

equivalent in Canada to the U.S. Trustee, which provides government oversight in Chapter 11 cases. However, the monitor fulfils certain of the functions that the U.S. Trustee and creditor committees would fulfil in Chapter 11 cases. The 2009 amendments introduced certain general oversight powers for the Superintendent of Bankruptcy, including general oversight powers.

- (c) DIP Financing and DIP Charge. DIP financing refers to the interim financing required by the debtor company to fund its working capital needs, while under CCAA protection. In many cases, the court will authorize DIP financing to the debtor and grant super priority charges over the assets of the debtor in favour of the DIP lender, if the court is of the view that additional financing during the restructuring is critical to the continued operations of the business. This may be done in the initial order at the time of the first application, or subsequently, often by way of amendment and restatement of the initial order.

The 2009 amendments to the CCAA codify the court's ability to grant DIP financing and corresponding priority charges. The amendments require courts to take into account, among other things:

- the expected duration of proceedings,
- how the debtor's business and financial affairs are to be managed during the proceedings,
- whether the debtor's management has the confidence of major creditors,
- whether the DIP loan would enhance prospects of a viable plan,
- the nature and value of the debtor's property,
- whether any creditor would be materially prejudiced as a result of the security; and,
- the monitor's report on the cash flow forecast.

The DIP charge ordered under the amendments cannot secure pre-filing obligations owed by the debtor. Notice must be given to all secured creditors that are likely to be affected by the priority DIP charge.

At the DIP approval hearing the debtor company will submit a DIP term sheet or credit agreement for approval, together with cash flows for the period of the DIP funding and the monitor's report on those cash flows. The monitor will also typically report on its view as to the appropriateness of the DIP.

Canada has not adopted the U.S. concept of “adequate protection”, which is intended to protect existing lien holders who have become subject to super-priority charges, although Canadian courts may provide protective relief in orders to address prejudice to other creditors. Canadian courts also do not need to authorize “replacement liens” because a pre-filing secured creditor’s security, if granted over after-acquired property (as typically would be the case), continues to apply and automatically extends to post-filing assets acquired by the debtor. As noted above, a CCAA filing does not create a new estate.

- (d) Other Priority Charges. Initial orders also routinely include the authorization of priority charges, such as an administrative charge to secure payment of the fees and disbursements of the monitor and the monitor’s and debtor’s legal counsel, and a directors’ and officers’ charge to secure the debtor’s indemnity to the directors and officers’ against post-filing claims. The charge in favour of directors and officers is not available if these individuals already have adequate insurance to cover such liabilities. Along with the DIP charge, these priority charges will typically rank ahead of claims of pre-filing secured creditors, provided notice is given to any such secured creditors likely to be affected by the priority charges.
- (e) Treatment of Contracts. Prior to the amendments, the debtors were typically granted the authority to repudiate (the functional equivalent of contract rejection under the Chapter 11) certain contracts and leases in the initial order. In considering whether to permit the repudiation, courts considered a balancing of interests between the affected parties. The 2009 amendments to the CCAA codify the practice for disclaimer or rescission (the equivalent of disclaimer under Civil Law in Quebec) of agreements. The debtor is not required to elect to accept or reject certain “executory contracts” (other than aircraft leases) or real property leases, as is the case with Chapter 11. Further, a standard initial order provides, among other things, that no counterparty to a contract may terminate the contract, alter, fail to renew or cease to perform its obligations under the contract.

Generally, the debtor will fulfil its post-filing payment obligations under all agreements unless the debtor disclaims the agreement in accordance with the process now set out in the CCAA. If the debtor fails to perform other covenants, which failure to perform would be a basis for the counterparty to terminate the agreement absent the stay, the counterparty may seek to lift the stay in order to exercise its termination rights. Any steps by counterparties to assert damage claims in respect of agreements that are disclaimed by the debtor are stayed by the initial order. Counterparties to disclaimed agreements can assert a claim for damages on an unsecured basis and will be entitled to share in any distribution on a *pro rata* basis along with other unsecured creditors.

The 2009 amendments require the monitor or the court to approve such disclaimer after taking into account whether the disclaimer of the contract

will cause the debtor's counterparty significant financial hardship. All disclaimers approved by the monitor are subject to review by the court if the counterparty objects. The 2009 amendments provide protections for licensees of intellectual property, analogous to s. 365(n) of the U.S. Code. The 2009 amendments also provide a process for the assignment of contracts, with court approval, despite contractual restrictions on assignment. As part of any such forced assignment, pre-filing monetary defaults must be cured.

- (f) Post-filing Supply of Goods. The initial order typically stays a party to any contract or agreement for the supply of goods or services from terminating the agreement. The initial order and the terms of the CCAA protect these suppliers by providing that no party is required to continue to supply goods or services on credit, or to otherwise advance money or credit – that is, although a supplier cannot terminate its agreement as a result of the CCAA stay of proceedings, the supplier is not obligated to honour its obligations to supply post-filing unless it is paid for those post-filing obligations.

Unlike Chapter 11, which provides for an “administrative priority claim” for post-petition suppliers, if the supplier to a CCAA debtor elects to provide goods or services on credit and does not have the benefit of a critical supplier's charge (discussed below), there is no priority given under the CCAA for post-filing suppliers. Accordingly, it is important for post-filing suppliers to ensure that they receive COD payments or are otherwise fully protected by a court-ordered charge or some other form of security such as a deposit for payments or a letter of credit issued by a third party.

- (g) Plans of Arrangement or Compromise. Initial orders in CCAA proceedings typically also authorize the debtor to file a plan of arrangement or compromise with its creditors. CCAA plans are discussed below in Section 2.5.

2.6 Can critical vendors be paid their pre-filing claims?

Historically, initial orders have sometimes included an authorization allowing the debtor to pay certain vendors some or all of their pre-filing claims (notwithstanding the general prohibition on payment of pre-filing claims) where such vendors were considered vital to the ongoing operation of the business, and where those vendors were in a position to discontinue supply or service if their pre-filing claims were not satisfied.

The 2009 amendments to the CCAA introduced a new approach to the treatment of critical suppliers. Where a vendor provides goods or services that are considered critical to the ongoing operation of the debtor, the court may declare the vendor a “critical supplier” and order the vendor to continue to provide goods or services on terms set by the court that are consistent with the existing supply relationship, or that are otherwise considered appropriate by the court. As part of the order, the court is required to grant a charge over all or any part of the debtor's property to secure the value of the goods or

services supplied under the terms of the order, which charge can be given priority over any secured creditor of the debtor. Any creditors likely to be prejudiced by the court-ordered charge must be given notice of the application to declare a vendor a critical supplier.

A decision in Ontario held that the 2009 amendments have not displaced the court's authority to authorize pre-filing payments to critical suppliers when continued supply could not be guaranteed without such authorized payments.

2.7 What is a plan of arrangement?

Essentially, the plan of arrangement or compromise is a proposal to the debtor's creditors that is designed to provide creditors with greater value than they would receive in a bankruptcy and allow the debtor to compromise its obligations and continue to carry on business, although the nature and/or scope of the business might be altered dramatically. Plans can, among other things, provide for a conversion of debt into equity of the restructured debtor (which may require a concurrent plan of arrangement under the applicable business corporations statute) or a newly created corporate entity designed to be a successor to the debtor's business; the creation of a pool of funds to be distributed to the creditors of the debtor; a proposed payment scheme whereby some or all the outstanding debt will be paid over an extended period; or some combination of the three.

Plans may offer different distributions to different classes of creditors (discussed below in Section 2.7.4). However, the plan must treat members within a class equally.

2.7.1 Who may file a plan?

Plans may be filed by the debtor, any creditor, a trustee in bankruptcy or liquidator of the debtor. As a matter of practice, plans are almost always filed by a debtor, or filed by a creditor, with the consent of the debtor. The CCAA does not provide for an "exclusivity" period for the filing of a plan by the debtor only, as is the case under the U.S. Code.

2.7.2 Whose claims may be compromised?

The claims of both secured and unsecured creditors may be compromised in a plan. The CCAA requires Crown (the federal or applicable provincial government) approval of any plan that does not provide for the payment, within six months, of all amounts owed to the Crown in respect of employee source deductions. The 2009 amendments also provide that plans must provide for the payment of certain pension and wage claims, discussed in more detail below in Section 4.3.

The CCAA also provides that plans can compromise claims against directors, subject to certain limitations. For example, claims that relate to contractual rights of one or more creditors and claims based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by directors are not subject to compromise.

Courts have also held that CCAA plans can provide for releases in favour of parties, other than the CCAA debtor itself and its directors and officers, where, among other things, such third party releases are necessary and essential to the restructuring of the debtor, the claims to be released are rationally related to the purpose of the plan, the plan could not

succeed without the releases and the parties that are the beneficiaries of the releases are contributing in a tangible and realistic way to the plan. However, there has been judicial caution expressed that third party releases are the exception, not the rule, and should not be granted as a matter of course. Also, in a number of cases, plans have been sanctioned containing releases from a broad category of claims, with limited exceptions from claims arising from fraud and wilful misconduct. Releases often purport to bind the applicable creditor as well as its officers, directors, shareholders, affiliates and other parties that may not have received notice of the proceedings. Courts have also expressed some reservation as to the scope of the releases.

2.7.3 How do creditors prove their claims?

There is no mandatory time-frame in the CCAA in which affected creditors must prove their claim. If it is anticipated that a distribution will be made to unsecured creditors in a plan or following a sale of assets, the debtor will typically seek the issuance of a claims procedure order which establishes a process to determine creditor claims and a “claims bar date”, after which further claims may not be submitted. The claims procedure order also establishes a process to determine disputed claims, including the appointment of a claims officer, to address any disputes in a mediation style, summary process. The monitor typically administers the claims process.

2.7.4 How does the plan get approved by creditors?

Creditors are separated into different classes based on the principle of commonality of interest. Although unsecured creditors will typically be placed in a single class, certain unsecured creditors, such as landlords, may be classified in a separate class based on a different set of legal rights and entitlements to other unsecured creditors. The plan must be passed by a special resolution, supported by a double majority in each class of creditors: 50% plus one of the total number of creditors voting in the class and 66-2/3% of the total value of claims voting in each class. Note that, unlike under Chapter 11, there is no concept of “cram-down” in Canada. Cram-down allows for the passing of a plan of arrangement in certain circumstances, even though the plan has been rejected by a subordinate class of creditors. In Canada, each class of creditors to which the plan is proposed must approve the plan by the requisite majorities.

2.7.5 What if the plan is not approved by creditors?

If the plan is not approved by the creditors, the debtor does not automatically become bankrupt (i.e., have a trustee in bankruptcy appointed over its assets). It is possible for the debtor to submit a new or amended plan. In the event the plan is not accepted, however, it is likely that the debtor’s significant secured creditors or unsecured creditors will seek to lift the stay to exercise the remedies against the debtor that are otherwise available to them.

2.7.6 How does the plan get approved by the court?

Once the plan is approved by the creditors, it must then be submitted to the court for approval. This proceeding is known as the sanction or the fairness hearing, and is the equivalent of the confirmation hearing under Chapter 11. The court is not required to

sanction a plan even if it has been approved by the creditors. However, creditor approval will be a significant factor in determining whether the plan is “fair and reasonable”, and thus deserving of the court’s approval.

2.7.7 Who is bound by the plan and how is it implemented?

Once the court sanctions the plan, it is binding on all creditors whose claims are compromised by the plan. Although all necessary court approvals might have been obtained, the plan may not become effective until a number of subsequent conditions are met, such as the negotiation of definitive documentation, the completion of exit financing, the obtaining of regulatory approvals or the expiry of appeal periods. Once all conditions are satisfied, the plan can be implemented. The day on which the plan is implemented is commonly referred to as the “implementation date” and is evidenced by a certificate filed with the court by the monitor, confirming that all conditions to the implementation of the plan have been satisfied. At this point, the debtor officially emerges from the restructuring.

2.8 Can the debtor void certain pre-filing transactions?

Prior to the 2009 amendments, the CCAA contained no provisions for the avoidance of pre-filing transactions.

The 2009 amendments to the CCAA added a right to review transactions, including preferences and “transfers at under value” (as discussed below in Section 4.1.6), by importing into the CCAA avoidance concepts from the BIA that were previously only available in bankruptcies (i.e., in Chapter 7-type proceedings). In summary, the amendments enabled the monitor in CCAA proceedings to challenge preferential payments or dispositions of property by the debtor for conspicuously less consideration than fair market value, unless a plan of arrangement provides otherwise.

3. Reorganizations under the BIA

3.1 What is the difference between CCAA reorganizations and BIA reorganizations?

Insolvent debtors may also seek to restructure their affairs under the BIA’s proposal provisions. There are a number of similarities between the two processes. The key elements of a proposal can be substantially the same as the key elements of a CCAA plan as both proposals and plans provide for the compromise and arrangement of claims against the debtor. The same basic restrictions and limitations that apply to CCAA plans, also apply to BIA proposals. Moreover, the 2009 amendments confirmed that DIP financing, DIP charges, the assignment of contracts, the disclaimer of contracts, the granting of other priority charges (including critical supplier charges) and the ability to sell assets, free and clear of liens and encumbrances, were all available in BIA proposal proceedings.

The essential difference between a restructuring under the CCAA and one conducted under the BIA is that a BIA proposal process has more procedural steps set out with strict timeframes, rules and guidelines. A CCAA proceeding is, relative to BIA proposal proceedings, more discretionary and judicially driven. The CCAA remains the statute of

choice for restructurings of any complexity for debtors that exceed the minimum C\$5-million debt threshold. Debtor companies and other key stakeholders that may support the restructuring process typically prefer the flexibility afforded by the CCAA over the more rigid regime of the BIA. A BIA proposal must be made to unsecured creditors whereas the CCAA can be used to compromise secured creditor claims, while leaving unsecured claims unaffected.

3.2 Who may make a proposal?

An insolvent person, a bankrupt, a receiver (in relation to an insolvent person), a liquidator of an insolvent person's property or a trustee of the estate of a bankrupt may make a proposal. An insolvent person is a person who is not a bankrupt and insolvent on a cash flow or balance sheet basis. Persons include corporations, partnerships and other legal entities.

3.3 How are proposal proceedings commenced?

The proposal proceedings may be commenced by filing a proposal or a notice of intention to make a proposal ("NOI") with the local office of the Official Receiver. Most debtors commence the proposal process with an NOI, which provides for an automatic stay for an initial 30 days (subject to extensions for additional periods of up to 45 days each, for an aggregate total of up to 6 months, on findings that the debtor is acting in good faith and with due diligence). Once the proposal is filed, the stay continues until the meeting of creditors to vote on the proposal.

The stay applies to both unsecured and secured creditors (unless the secured creditor has delivered a notice under Section 244 of the BIA of its notice of intention to enforce security and the notice period provided for thereunder has expired).

The purpose of the NOI is to allow the debtor a period of stability to negotiate a proposal with its creditors, with the assistance of a proposal trustee which is appointed at the time the NOI is filed. The NOI must also contain a list of creditors with claims of \$250 or more. Once the NOI is filed, the trustee must send a copy of the NOI to every known creditor within 5 days. Within 10 days the debtor must prepare a projected cash-flow statement.

3.4 What is the scope of the stay under an NOI?

The stay of proceedings under an NOI stays creditor action against the debtor and provides that no person may terminate an agreement because of the insolvency of the debtor or the filing of the NOI. Landlords cannot terminate leases because of rental arrears. Creditors can apply to lift the stay on demonstration of material prejudice or can oppose an extension of the stay if they can demonstrate, among other things, the debtor is not acting in good faith or with due diligence. The stay is also subject to substantially the same limitations as those discussed above in connection with a stay under the CCAA.

3.5 What if the stay extension is not granted?

If a stay extension is not granted, the debtor is deemed to have made an automatic assignment in bankruptcy.

3.6 What is the role of the proposal trustee?

The proposal trustee, selected by the debtor, has a number of statutory duties. These duties include giving notice of the filing of the NOI or the proposal to all known creditors, filing a projected cash-flow statement accompanied by a report from the trustee on its reasonableness and calling a meeting of creditors. At the creditor meeting the trustee is required to report on the financial situation of the debtor and the cause of its financial difficulties. The trustee must also make the final application to the bankruptcy court for approval of the proposal if it is accepted by creditors.

In addition to its statutory obligations, the trustee plays a supervisory and advisor role and will assist the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders.

3.7 How do creditors prove their claims?

Pursuant to the terms of the BIA, all creditors must complete a statutory proof of claim form in order to prove their claim. Although there is no predetermined bar date, a creditor is not entitled to vote at a meeting of creditors to approve the proposal, or participate in distributions provided for under the proposal, if they have not submitted a proof of claim by the meeting time or prior to distributions.

3.8 How does the proposal get approved by creditors?

Proposals are voted on at a meeting or meetings of the creditors called for that purpose. The meeting to consider the proposal must be called by the proposal trustee within 21 days of the filing of the proposal and at least 10 days' notice must be given to each of the creditors.

Like a CCAA plan, in order to be binding on creditors, a proposal must be approved by a double majority of creditors (50% plus one representing 66 2/3% of voting claims), in each class of creditors voting on a proposal; however, if the proposal is made to a class of secured creditors and rejected by that class, the proposal may still become effective provided that it is passed by the class or classes of unsecured creditors voting on the proposal. The proposal will not be binding on the dissenting class of secured creditors. These secured creditors would be entitled to enforce their security, if otherwise entitled to do so.

3.9 What if the proposal is not approved by unsecured creditors?

If the proposal is rejected by a class of unsecured creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy on the earliest of (i) the date the debtor filed the NOI, (ii) the date of the earliest outstanding application for a bankruptcy order, and (iii) the date the debtor filed its proposal.

3.10 How does the proposal get approved by the court?

In addition to creditor approval, the proposal must be approved by the court. Within 5 days of the acceptance of the proposal by the debtor's creditors, the proposal trustee must apply for a court hearing to have the proposal approved. The proposal trustee must give

15 days notice to the debtor, the Official Receiver and each creditor who has proven its claim against the debtor. The trustee must file a report regarding the terms of the proposal and the conduct of the debtor at least 2 days before the date of the hearing.

3.11 What if the proposal is not approved by the court?

If the proposal is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy on the earliest of (i) the date the NOI was filed; (ii) the date the earliest application for a bankruptcy order was issued; and, (iii) the date the debtor filed its proposal.

3.12 Who is bound by the proposal and how is it implemented?

If the proposal is approved, it is binding on all unsecured creditors and on the secured creditors included in the proposal whose classes voted for the proposal in the requisite majorities. A proposal may be implemented in substantially the same manner in which a CCAA plan is implemented.

3.13 What if a debtor defaults under the proposal?

If a debtor defaults under the terms of its proposal, and such default is not waived by inspectors (creditor representatives that may be appointed by creditors in certain cases) or the creditors themselves (if there are no inspectors), the proposal trustee must inform the creditors and the Official Receiver. In these circumstances, a motion may be brought to the court to annul the proposal. If such order is granted, the debtor is automatically bankrupt.

4. Liquidations

The two most common ways to liquidate an insolvent company in Canada are either through a bankruptcy proceeding under the BIA, or by way of an appointment of a receiver. In recent years, the CCAA has also been used as a process for the self-liquidation of a debtor, without a plan being filed and, in most cases, with the support and co-operation of the debtor's main secured creditor(s).

4.1 Bankruptcy

4.1.1 How is a bankruptcy proceeding commenced?

The legal process of bankruptcy (generally analogous in effect to Chapter 7 of the U.S. Code) can be commenced in one of three ways:

1. Involuntarily, by the filing of a bankruptcy application by one or more of the debtor's creditors. To bring a bankruptcy application, a creditor must have in excess of \$1000 of unsecured debt and allege the debtor has committed an "act of bankruptcy" within 6 months of the date of the filing of the application. The acts of bankruptcy are enumerated in the BIA, with the most commonly alleged act being that the debtor has ceased to meet its obligations generally as they become due - it is not sufficient that the creditor allege that the debtor has failed to pay the obligations owing to such debtor, only. The debtor has the right to object to the

application, in which case a determination will be made by the court as to whether the bankruptcy order should be issued.

2. Voluntarily, by the debtor making an assignment in bankruptcy for the general benefit of its creditors. To make a voluntary assignment, the debtor must be an “insolvent person” (i.e. insolvent on a cash flow or balance sheet basis). Companies, partnerships and income trusts are “persons” that may make an assignment if insolvent. To make an assignment a person must reside, carry on business or have property in Canada and have at least \$1000 of debt. The assignment is filed with the Official Receiver in the “locality of the debtor,” as defined in the BIA.
3. On the failure of a BIA proposal by the debtor to its creditors, as a result of the rejection of the proposal by creditors or the court, or default under the proposal. This is discussed above in Sections 3.9, 3.11, 3.12 and 3.13.

4.1.2 What is the effect of the commencement of the bankruptcy proceeding?

When a corporate debtor becomes bankrupt, the debtor ceases to have legal capacity to dispose of its assets or otherwise deal with its property, which vests in a trustee in bankruptcy (other than property held in trust). Such appointment is expressly subject to the rights of secured creditors. Trustees in bankruptcy are licensed insolvency professionals who, in almost all cases, are chartered accountants (unlike the U.S. where trustees are typically lawyers). They are not government officials but they are licensed and regulated by the Office of the Superintendent of Bankruptcy. In a voluntary proceeding, the debtor itself selects the trustee, however, the selection is subject to confirmation by unsecured creditors at the first meeting of creditors. In an involuntary proceeding, the applying creditor selects the trustee, also subject to confirmation at the first creditors meeting. Unsecured creditors are to be provided with notice of the first meeting of creditors promptly after the trustee’s appointment.

4.1.3 What are the trustee’s duties?

A trustee is an officer of the court and, accordingly, must represent the interests of creditors impartially. It is the trustee’s duty to collect the debtor’s property, realize upon it and distribute the proceeds of realization according to a priority scheme set out in the BIA (discussed below in Section 4.3). The trustee is required to give notice of the bankruptcy to all known creditors of the bankrupt. The trustee must also convene a first meeting of the creditors of the bankrupt within 30 days of appointment, unless extended or waived by the court.

At the first meeting of creditors, creditors with proven claims must confirm the trustee’s appointment. Proven creditors may also elect “inspectors” from their ranks who will then act in a supervisory role and instruct the trustee. There are certain actions that a trustee cannot engage in without inspector approval, such as carrying on the business of the bankrupt or the sale or other disposition of any property of the bankrupt. A trustee must obtain court approval if it wishes to undertake these actions prior to or in the absence of the appointment of inspectors. At the first meeting, the creditors can vote to dispense with inspectors. If there are no inspections appointed at the first meeting of creditors, the

trustee can exercise all of its power on its own accord, except dispose of assets to a party related to the bankrupt. This action can only be taken with court approval.

4.1.4 How does a creditor prove its claim?

Upon the commencement of bankruptcy proceedings, unsecured creditors are stayed from exercising any remedy against the bankrupt or the bankrupt's property and may not commence or continue any action or proceeding for the recovery of a claim (unless the creditor is granted special permission by the court). Secured creditors are not subject to this stay of proceedings (discussed below in Section 4.1.5).

A creditor can assert its claim against the debtor by completing a statutorily prescribed proof of claim and submitting it to the trustee in bankruptcy. A proof of claim form is attached to the notice of bankruptcy sent by the trustee to all known creditors. The creditor must submit the completed form before the first meeting of creditors if it wishes to vote on the motion to affirm the appointment of the trustee or vote for and/or act as an inspector in the bankruptcy. Otherwise, the creditor need only submit its proof of claim before the distribution of proceeds by the trustee (known creditors will be provided notice before distribution) unless otherwise ordered by the court.

A trustee can disallow the quantum of the amount set out in a proof of claim or the entire claim itself. Disputed claims may be resolved through a judicial process if the parties are not able to reach an agreement.

4.1.5 How does bankruptcy affect the rights of secured creditors?

The rights of a trustee in bankruptcy are expressly subject to the rights of secured creditors. Generally, a bankruptcy does not effect the rights of secured creditors except to the extent necessary to allow the trustee to realize on any value in the collateral subject to the security, above and beyond what is owed to the secured creditor. The BIA provides the trustee with a number of tools in this regard. The trustee can require the secured creditor to prove its security; cause the secured creditor to value its security; inspect the collateral subject to the security (generally for the purpose of valuing it); and, redeem the collateral subject to the security by paying the secured creditor the amount of the assessed value of the security. On redemption, the collateral subject to the security becomes an asset of the bankruptcy estate. In addition, the court may make an order staying a secured creditor from realizing on its security, but the maximum period of such stay is six months. Such stay orders are not commonly granted; they may, however, be made in situations where the trustee requires some time to value the collateral and determine if it should exercise its right of redemption.

To the extent that the amount of a secured creditor's debt exceeds the value of the collateral subject to its security, a secured creditor may participate in the bankruptcy process and file a proof of claim in respect of the unsecured deficiency portion of its claim.

4.1.6 Can the trustee void certain pre-bankruptcy transactions?

Provided the assets available to the trustee are sufficient to support the costs, the trustee is responsible for scrutinizing the actions of the bankrupt before the bankruptcy and for

reporting to creditors on transactions that may be impugned as preferences, fraudulent conveyances, transfers at undervalue or on other grounds and, where appropriate, commencing proceedings to challenge such transactions. If a challenge is successful, depending on the remedy, the transaction is either voided and property transferred by the debtor before the bankruptcy must be returned to the bankrupt estate or, in the case of a “transfer at undervalue” (described below), the difference in value between the actual consideration given by the debtor (if any) and the fair market value as determined by the court must be paid to the bankrupt estate. To the extent assets are not available to the trustee to pursue such remedies, creditors can apply to the court for an order to pursue the trustee’s remedies, for the benefit of those creditors that fund the proceedings.

The 2009 amendments to the BIA introduced the concept of “transfer at undervalue”, which is defined as a transfer of property made by the bankrupt for little or no consideration within one year of the initial bankruptcy event, when the bankrupt is insolvent and where the bankrupt intends to defeat or defraud creditors. The “initial bankruptcy event” is the earliest of the filing of the following: an assignment, a proposal, a notice of intention to file a proposal, a CCAA filing or the first application for a bankruptcy order against a person. Moreover, where the bankrupt disposes of property for little or no consideration to a party that is not at arm’s length, the relevant period of review is five years.

Another change introduced by the 2009 amendments is that in respect of transactions with non-arm’s-length parties, it is no longer a defence for debtors to prove that they did not intend to make a preferential payment. The fact of a non-arm’s-length creditor having received a preference is sufficient to void the transaction, irrespective of whether or not the debtor actually intended to give such preference.

Generally, Canadian trustees are much less aggressive in attacking pre-bankruptcy transactions than their U.S. counterparts and the technical requirements to void such transactions in Canada are more onerous than they are in the U.S.

4.1.7 What repossession rights do unpaid suppliers have?

Suppliers have a limited right to recover inventory supplied to a bankrupt debtor. Prior to the 2009 amendments, unpaid suppliers could repossess goods delivered 30 days before the issuance of the demand for the return of such goods following a bankruptcy or receivership of the customer. The amendments provide a modest change, allowing unpaid suppliers the right to repossess goods shipped 30 days before the date of bankruptcy or receivership, rather than having the time-frame tied to the date the demand was issued. In addition, the written demand must be sent within 15 days of the purchaser becoming bankrupt or subject to a receivership. The goods must be identifiable, in the same state as on delivery, still in the possession of the trustee or receiver, and not subject to an arm’s-length sale. In practice, suppliers often find it difficult to satisfy these tracing requirements.

4.2 Receiverships

4.2.1 What is a receiver?

A receiver or receiver and manager, may be given the authority to deal with the debtor company's assets, including authority to operate and manage the business in place of the existing management, and to shut down the business if the receiver concludes the continued operations will likely erode the recoveries for creditors or there is insufficient funding to continue operations. The receiver does not become the owner of the debtor company's assets; however, the receiver may have the right (but not the obligation) in the instrument appointing it to take possession and custody of the assets and to sell them.

4.2.2 How is a receiver appointed?

A receiver may be appointed (i) privately by a secured creditor pursuant to the terms of a security agreement or (ii) by court order.

- (a) Privately Appointed Receiver. A secured creditor may have the right to appoint a receiver under its security agreement. The receiver's duties are primarily to the secured creditor that appointed it. It also has a general duty to act honestly, in good faith and in a commercially reasonable manner, including the duty to attempt to maximize recoveries, and to obtain the best price for the debtor's assets in the circumstances.

The secured creditor is mandated by s. 244 of the BIA to provide a statutory 10 day notice of its intention to enforce its security and appoint a receiver, if such receiver is appointed over all or substantially all of the inventory, accounts receivables or other property of an insolvent debtor, to the extent acquired for, or used in the business carried on by the insolvent debtor. As a matter of practice, secured lenders typically issue a "Section 244 notice" whenever enforcing security, out of an abundance of caution. Also, a receiver appointed over all or substantially all of the assets in the categories set out in Section 244 of the BIA must be a licensed trustee in bankruptcy who, as noted above, is typically an accountant. As discussed below an interim receiver may be appointed prior to the expiry of the 10 day notice period.

- (b) Court-Appointed Receiver. In the case of a court-appointed receiver, the receiver is appointed by a court order, typically on application by a secured creditor under the *Rules of Court* of the province where the debtor's business is based. Generally, the courts in the common law provinces (i.e., all provinces other than Quebec) have the authority to appoint a receiver when the court is satisfied that it is "just or convenient" to do so. As a result of the 2009 amendments, courts also have the authority to appoint receivers under the BIA, with authority across Canada (the BIA being a federal statute) as opposed to in a particular province, as is the case with receivers appointed under provincial *Rules of Court*. Court appointments usually occur in more complex cases, especially where there are disputes among creditors or between the creditor and the debtor or in cases where it appears likely from the outset that the assistance of the court will be required on an ongoing basis. For example, the court appointment of a receiver is typically accompanied by a comprehensive stay of proceedings restraining creditor action against the debtor and providing a more stable platform for the realization to occur (discussed below in Section 4.2.4).

A receiver appointed by the court derives its powers from the court order and any specific legislation governing its powers. The receiver is an officer of the court and has duties to all creditors of the debtor. It takes directions and instructions from the court, not the creditor that first sought its appointment. In most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately appointed receiver under a security agreement, although certain actions, such as major asset sales, usually require specific court approval. The court-appointed receiver is also permitted to borrow on a super priority basis, akin to DIP financing in a CCAA case..

- (c) Interim Receiver. Prior to the 2009 amendments to the BIA, it was quite common in cases where a debtor had assets in several provinces for an “interim receiver” to be appointed by the court pursuant to the provisions of the federal BIA. The advantage of the federal interim receiver was that its jurisdiction extended nationally by virtue of the federal scope of the BIA, while the jurisdiction of a receiver appointed under the *Rules of Court* is limited to the province in which it is appointed. While the title suggested a temporary role, interim receivers were often given a mandate similar to an ordinary court-appointed receiver, and were often appointed as both interim receiver under the BIA and as receiver under the applicable *Rules of Court*, in order to exercise authority across Canada.

The 2009 amendments restrict “interim receivers” to having a more temporary and restricted mandate than previous practice. The appointment of the interim receiver expires on the earlier of: (a) the taking of possession by a receiver or a trustee in bankruptcy of the debtor’s property, and (b) the expiry of 30 days following the day on which the interim receiver was appointed or any period specified by the court, or in the case that an interim receivership coincides with a proposal, upon court approval of the proposal. This restriction on the duration of an interim receivership and the advent of the national receiver has triggered a decline in the use of interim receiverships.

The court may direct an interim receiver to take possession of all or part of the debtor’s property mentioned in the appointment, exercise such control over the property and the debtor’s business as the court considers advisable and summarily dispose of property. Interim receivers, however, are not authorized to borrow funds.

4.2.3 What reporting requirements does a receiver have?

Both privately and court appointed receivers have certain obligations mandated by their appointment. The “receiver” must provide notice of its appointment to all known creditors and, at various stages of administration of the receivership, prepare and distribute interim and final reports concerning the receivership. These reports are filed with the Office of the Superintendent of Bankruptcy and may be made available to all creditors. Court-appointed receivers must also report to the court itself, at such times and intervals as may be required, in carrying out its mandate.

4.2.4 How do creditors assert their claims in a receivership?

Where a receiver is court-appointed, the court will typically issue a stay of proceedings restricting creditors from exercising any rights or remedies without first obtaining permission from the court. This stay will be much broader than the statutory stay of proceedings that occurs when a company simply becomes bankrupt and is generally analogous to the comprehensive stay of proceedings found in CCAA proceedings.

Typically, once a receiver has realized on the assets of the debtor, it will seek to distribute proceeds to creditors in accordance with their entitlements and priority, following court approval. If the only recovery is to secured creditors, there may be no need for a claims process. If there are any surplus funds after satisfying all secured claims, the receiver may run a court-sanctioned claims process or seek the court's approval to assign the debtor into bankruptcy and have unsecured claims dealt with through bankruptcy proceedings (described in Section 4.1 above).

4.3 Priorities in Liquidation

4.3.1 What are the super-priority claims?

Secured creditors rank in priority to unsecured creditors in a liquidation; however, there are certain statutorily prescribed super-priority claims that will rank ahead of secured creditors.

The 2009 amendments to the BIA established a priority for certain workers (the priority does not apply to officers or directors of the debtor company), to a maximum of C\$2,000 per employee, for unpaid wages (including vacation pay) earned up to six months before the appointment of a receiver or initial bankruptcy event. The priority is secured by a charge over the debtor company's current assets, which are essentially inventory and receivables. To the extent that a receiver or trustee pays the aggrieved worker, the secured claim is reduced accordingly.

The *Wage Earner Protection Program Act* establishes a program run by the federal government through which employees entitled to claim a priority for unpaid wages are compensated directly by the government, to a maximum of the greater of C\$3,000 in actual unpaid wages or an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act* (which currently equals approximately C\$3,300). The government is subrogated to the rights of the unpaid employee for amounts paid under this program, and receives a priority claim against the current assets of the debtor company in the amount of the compensation actually paid out, to a maximum amount of C\$2,000 per employee. Any balance over such C\$2,000 priority claim does not have priority over secured creditors.

The 2009 amendments to the BIA also established a priority for amounts deducted and not remitted and for unpaid regularly scheduled contributions (i.e., not special contributions or the underfunded liability itself) to a pension plan by creating a priority charge, equal to the amount owing, over all of the debtor company's assets.

The 2009 amendments to the CCAA effectively provided the same priorities for unpaid wages and unpaid pension contributions against proceeds realized in a CCAA sale, and also required that any plan of arrangement provide that such priority claims be satisfied.

Before distributions are made to unsecured creditors in an insolvency proceeding, certain statutorily mandated priority claims, such as employee deductions (i.e., income tax withholdings, unemployment insurance premiums and Canada Pension Plan premiums) must also be paid.

In addition to those listed above, there are a number of other federal and provincial statutory liens and deemed trusts that have priority over secured creditors outside of bankruptcy, but which are treated as ordinary unsecured claims following bankruptcy (e.g., liens for unremitted federal and provincial sales tax). CCAA liquidations and receivership proceedings are often converted into bankruptcy proceedings once the statutory super-priority claims and secured creditor claims are satisfied, in part to achieve a reversal of priorities.

4.3.2 What is the priority scheme after the super-priorities and secured creditors are satisfied?

The BIA sets out the priority scheme for distribution to unsecured creditors, primarily as follows:

1. The costs of administration of the bankruptcy;
2. A Superintendent of Bankruptcy's levy on all payments made by the trustee to creditors (which is currently 5% on the first C\$1 million of distributions, and a sliding scale on amounts in excess of C\$1 million);
3. Preferred claims, which include wage claims in excess of the statutory C\$2,000 charge, secured creditors' claims in the amount equal to the difference between what they received and what they would have received but for the operation of the wage and pension super-priorities, and landlords' claims up to the maximum amounts prescribed by statute; and
4. Ordinary unsecured claims on a *pro rata* basis.

5. Going-Concern Sales

5.1 Can insolvent businesses be sold as a going-concern?

Although a going-concern sale can be affected by a trustee in bankruptcy or a privately-appointed receiver, a sale of an insolvent business on a going-concern basis will typically be conducted by a court-appointed receiver or through the CCAA or BIA proposal process.

5.2 What is involved in a receivership sales process?

To sell a business on a going-concern basis, a court-appointed receiver will typically request that the court approve a detailed marketing process for the assets of the company. The requirements for and timelines of the marketing process will vary depending on the nature of the business, the value of the assets, the rate at which the assets will depreciate in value through a sales process, and the realistic pool of potential purchasers. The court-appointed receiver will select the bidder with the best and highest offer, taking into account conditions of closing, timing of closing, the purchaser's ability to close and any potential purchase price adjustments, among other factors.

Unless specifically authorized by the court, the agreement of purchase and sale with the winning bidder will not be subject to overbids as is the case in the Chapter 11 stalking-horse process. While there is no statutory requirement for a stalking horse process in Canada, nonetheless, Canadian courts routinely establish a stalking horse process by court order and stalking horse sales are commonplace in Canada.

The receiver, on notice to interested persons, will then request that the court approve the agreement of purchase and sale and vest the assets in the purchaser free and clear of all liens and encumbrances. Liens and encumbrances that exist in the purchased assets will be preserved in the proceeds of sale with the same rank and priority as they had in the purchased assets. Net sale proceeds are typically held by the receiver pending the issuance of a "distribution order" of the court authorizing the receiver to disburse the funds to creditors in accordance with their entitlements. All interested parties are required to receive notice of the motion for the distribution order and disputes between creditors as to priority and allocation of funds are usually addressed at the distribution motion, rather than at the sale approval stage.

5.3 What is involved in a CCAA sales process?

Sales by the debtor while under CCAA protection have become a preferred method of realization in many cases. The debtor remains in possession of the assets, but approval and vesting orders are still available to give the purchaser the necessary comfort that it will acquire the purchased assets free and clear of any liens and encumbrances.

The CCAA sales process is similar to the receivership sales process, except the debtor itself controls the sales process, is the vendor, and is the party requesting the court's approval of a sales process and eventually the sale itself. Generally, the process is supported by the key stakeholders, who have significant influence over the debtor's sales process. The debtor will also require the support of its monitor if the sales process and sale are to be approved by the court. Courts also frequently approve the retainer of a financial adviser or investment bank to conduct the sales process on behalf of the debtor.

The proceeds of the sale may be held by the monitor. As is the case with sales by court-appointed receivers, a vesting order will provide that creditors will have the same priority against the proceeds that they had against the assets, prior to the sale. Following court approval and closing, the court will authorize the distribution of the proceeds to creditors in accordance with their priorities. If there are surplus funds available for unsecured creditors following payment to secured creditors, it is common to bankrupt the debtor and have any surplus proceeds distributed by a trustee in bankruptcy in accordance with the priorities set out in the BIA, discussed in Section 4.3 above. The debtor company may

also elect to file a plan of arrangement or compromise that provides for the distribution of proceeds of sale to unsecured creditors. Plans such as those are commonly referred to as distribution plans.

5.4 Can you credit bid in Canada?

There is no equivalent in the CCAA to s. 363(k) of the U.S. Code, which expressly authorizes a secured creditor to credit bid its debt. However, courts have authorized credit bids in Canada. Unlike in the U.S., there is no case law in Canada addressing a collateral or administrative agent's contractual right to credit bid on behalf of a syndicate of lenders and bind dissenting lenders.

6. Cross-Border Insolvencies

Like Chapter 11, the CCAA provides for the coordination of cross-border insolvencies. Historically, Canadian courts have coordinated proceedings in Canada with related party proceedings in other jurisdictions, communicated with foreign courts in accordance with established guidelines and harmonized procedural matters pursuant to agreed upon and court approved cross-border protocols. Canadian courts have also recognized the orders of a foreign court in Canada, including a recognition of a foreign stay of proceedings or a foreign court order approving a plan of arrangement. This typically occurred where the principal business of the debtor was in a foreign jurisdiction but the debtor had some assets and/or creditors in Canada and thus needed the Canadian court's assistance in giving effect to the overall restructuring or liquidation. Canadian courts have recognized orders authorizing DIP financing, stalking horse going-concern sales and a host of other relief in foreign proceedings.

The 2009 amendments included comprehensive provisions for the recognition of foreign insolvency proceedings. These provisions, incorporated in both the CCAA and BIA, are based on the UNICITRAL Model Law on Cross-Border Insolvency, similar to Chapter 15 of the U.S. Code. The majority of coordinated cross-border proceedings for large commercial insolvencies are conducted under the cross-border provisions of the CCAA rather than the BIA. Accordingly, the CCAA provisions are summaries below.

6.1 What's the purpose of the Model Law?

The purpose of Model Law, as adopted in the CCAA and BIA, is to promote:

- cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- greater legal certainty for trade and investment;
- the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- the protection and maximization of the value of debtor company's property; and

- the rescue of financially troubled businesses to protect investment and preserve employment.

6.2 Who may commence a recognition proceeding?

A foreign representative may apply to a Canadian court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

6.3 What is a foreign representative?

A foreign representative is a person or body (including one appointed on an interim basis) who is authorized, in a foreign proceeding in respect of a debtor company, to (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding.

As a result of the second criteria, a debtor company itself can be a foreign representative, provided it has been duly authorized to act as such by the supervising court in the foreign country. Among other things, a foreign representative is required to inform the Canadian court of any substantial change in the status of the recognized foreign proceeding and any substantial change in the foreign representative's authority to act.

6.4 What is a foreign proceeding?

A foreign proceeding is a judicial or an administrative proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

6.5 What evidence needs to be before the Canadian court in a recognition proceeding?

In connection with application for recognition, there are certain basic documentary requirements: (a) a certified copy of the instrument that commenced the foreign proceeding (typically a court order); (b) a certified copy of the instrument authorizing the foreign representative to act as foreign representative (typically a court order); and, (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. In the absence of the evidence described above, the court has discretion to accept other evidence satisfactory to it.

6.6 What discretion does the Canadian court have in recognizing the foreign proceeding?

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding. There is no discretion in this regard. However, the court does have discretion as to what relief is granted in connection with the recognized proceedings (discussed below in

Section 6.9). In addition, the order granting recognition will specify whether the proceeding is a “foreign main proceeding” or a “foreign non-main proceeding”.

6.7 What is a foreign main proceeding?

A foreign proceeding will be a “main” proceeding if it is taking place in the jurisdiction that is the centre of the debtor’s main interests (the “COMI”). There is a presumption that the debtor company’s registered office is its COMI. Provided there are no insolvency proceedings in Canada with respect to the debtor company the court “shall” make an order, subject to any terms and conditions it considers appropriate, granting a stay of proceedings until otherwise ordered by the court, and restraining the debtor company from selling assets outside the ordinary course of business. Such recognition orders must be “consistent” with any order that may be made under the CCAA.

6.8 What is a foreign non-main proceeding?

A foreign non-main proceeding is defined in the negative: a foreign non-main proceeding is a foreign proceeding that is not a foreign main proceeding. If the court recognizes the foreign proceeding as a “non-main” proceeding the stay is not automatic, but the court may, at its discretion, order a stay if it is necessary for the protection of the debtor’s property or is in the interest of creditors. Chapter 15 takes a different approach to the recognition of foreign non-main proceedings, requiring that the debtor at least have an “establishment” in the foreign jurisdiction. Accordingly, under the analogous U.S. law a foreign proceeding could be neither a main proceeding or a non-main proceeding. Under Canadian law, it must be one or the other.

6.9 What obligations does the Canadian court have once recognition has been granted?

If an order recognizing a foreign proceeding is made, the court is to cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation include, among other things, the appointment of a person to act at the direction of the court (typically referred to as an “information officer” having similar reporting obligations as a monitor in a CCAA case); and the coordination of concurrent proceedings regarding the same debtor company.

6.10 What rules can the court apply?

Nothing in the CCAA prevents the court, on application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of the CCAA.

Also, nothing in the CCAA prevents the Canadian court from refusing to do something that would be contrary to public policy. Under Chapter 15 of the US Code, the analogous provision refers to anything that is “manifestly” contrary to public policy. This suggests that the US courts are directed to be even more accommodating than their Canadian counterparts, when called upon to determine what is contrary to public policy.



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to February 17, 2025

À jour au 17 février 2025

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to February 17, 2025. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of February 17, 2025 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité – lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 17 février 2025. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 17 février 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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R.S.C., 1985, c. C-36

L.R.C., 1985, ch. C-36

An Act to facilitate compromises and arrangements between companies and their creditors

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Short Title

Titre abrégé

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies*.

S.R., ch. C-25, art. 1.

Interpretation

Définitions et application

Definitions

2 (1) In this Act,

aircraft objects [Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit

Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*, les compagnies de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

contrôleur S'agissant d'une compagnie, la personne nommée en application de l'article 11.7 pour agir à titre de contrôleur des affaires financières et autres de celle-ci. (*monitor*)

convention collective S'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre la compagnie débitrice et l'agent négociateur. (*collective agreement*)

créancier chirographaire Tout créancier d'une compagnie qui n'est pas un créancier garanti, qu'il réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire pour les détenteurs d'obligations non garanties, lesquelles sont émises en vertu d'un acte de fiducie ou autre acte fonctionnant en faveur du fiduciaire, est réputé un créancier chirographaire pour toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations. (*unsecured creditor*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

- (a) a dividend or similar payment,
- (b) a return of capital,
- (c) a redemption or retraction obligation,
- (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

- (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

- (a) cash or cash equivalents, including negotiable instruments and demand deposits,
- (b) securities, a securities account, a securities entitlement or a right to acquire securities, or
- (c) a futures agreement or a futures account; (*garantie financière*)

income trust means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act; (*fiducie de revenu*)

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations. (*secured creditor*)

demande initiale La demande faite pour la première fois en application de la présente loi relativement à une compagnie. (*initial application*)

état de l'évolution de l'encaisse Relativement à une compagnie, l'état visé à l'alinéa 10(2)a) portant, projections à l'appui, sur l'évolution de l'encaisse de celle-ci. (*cash-flow statement*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par règlement à la date à laquelle des procédures sont intentées sous le régime de la présente loi, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujéti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

- a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;
- b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;
- c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

intérêt relatif à des capitaux propres

initial application means the first application made under this Act in respect of a company; (*demande initiale*)

monitor, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; (*contrôleur*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

prescribed means prescribed by regulation; (*Version anglaise seulement*)

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (*créancier garant*)

shareholder includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

Superintendent of Bankruptcy means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; (*surintendant des faillites*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

title transfer credit support agreement means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

unsecured creditor means any creditor of a company who is not a secured creditor, whether resident or

a) S'agissant d'une compagnie autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

obligation Sont assimilés aux obligations les débetures, stock-obligations et autres titres de créance. (*bond*)

réclamation S'entend de toute dette, de tout engagement ou de toute obligation de quelque nature que ce soit, qui constituerait une réclamation prouvable au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*. (*claim*)

réclamation relative à des capitaux propres Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (*equity claim*)

surintendant des faillites Le surintendant des faillites nommé au titre du paragraphe 5(1) de la *Loi sur la faillite et l'insolvabilité*. (*Superintendent of Bankruptcy*)

surintendant des institutions financières Le surintendant des institutions financières nommé en application du paragraphe 5(1) de la *Loi sur le Bureau du surintendant des institutions financières*. (*Superintendent of Financial Institutions*)

tribunal

domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

Meaning of related and dealing at arm's length

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89.

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

a.1) dans la province d'Ontario, la Cour supérieure de justice;

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

c.1) dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

d) au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

Définition de personnes liées

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2^e suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3, art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37; 2018, ch. 10, art. 89.

Application

3 (1) La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

Application

(2) Pour l'application de la présente loi :

a) appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

b) sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

R.S., 1985, c. C-36, s. 3; 1997, c. 12, s. 121; 2005, c. 47, s. 125.

PART I

Compromises and Arrangements

Compromise with unsecured creditors

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, 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.

R.S., c. C-25, s. 4.

Application

(3) Pour l'application de la présente loi, ont le contrôle d'une compagnie la personne ou les compagnies :

a) qui détiennent — ou en sont bénéficiaires —, autrement qu'à titre de garantie seulement, des valeurs mobilières conférant plus de cinquante pour cent du maximum possible des voix à l'élection des administrateurs de la compagnie;

b) dont lesdites valeurs mobilières confèrent un droit de vote dont l'exercice permet d'élire la majorité des administrateurs de la compagnie.

Application

(4) Pour l'application de la présente loi, une compagnie est la filiale d'une autre compagnie dans chacun des cas suivants :

a) elle est contrôlée :

(i) soit par l'autre compagnie,

(ii) soit par l'autre compagnie et une ou plusieurs compagnies elles-mêmes contrôlées par cette autre compagnie,

(iii) soit par des compagnies elles-mêmes contrôlées par l'autre compagnie;

b) elle est la filiale d'une filiale de l'autre compagnie.

L.R. (1985), ch. C-36, art. 3; 1997, ch. 12, art. 121; 2005, ch. 47, art. 125.

PARTIE I

Transactions et arrangements

Transaction avec les créanciers chirographaires

4 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers chirographaires ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 4.

Compromise with secured creditors

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.

R.S., c. C-25, s. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

- (a)** relate to contractual rights of one or more creditors; or
- (b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of 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 affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres —

meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any

présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme,

related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

ainsi que des intérêts, pénalités ou autres charges afférents, laquelle somme :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe.

Défaut d'effectuer un versement

(4) Lorsqu'une ordonnance comporte une disposition autorisée par l'article 11.09, le tribunal ne peut homologuer la transaction ou l'arrangement si, lors de l'audition de la demande d'homologation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut de la compagnie d'effectuer un versement portant sur une somme visée au paragraphe (3) et qui est devenue exigible après le dépôt de la demande d'ordonnance visée à l'article 11.02.

Restriction — employés, etc.

(5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)d) de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that were required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be

Restriction — régime de pension

(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension réglementaire régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(A.1) la somme égale au total des paiements spéciaux, établis conformément à l'article 9 du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds visé aux articles 81.5 et 81.6 de la *Loi sur la faillite et l'insolvabilité* pour la liquidation d'un passif non capitalisé ou d'un déficit de solvabilité,

(A.2) toute somme requise pour la liquidation de tout autre passif non capitalisé ou déficit de solvabilité du fonds établi à la date à laquelle des procédures sont intentées sous le régime de la présente loi,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(C) les sommes que l'employeur est tenu de verser à l'administrateur d'un régime de pension agréé collectif au sens du paragraphe 2(1) de la *Loi sur les régimes de pension agréés collectifs*,

(iii) dans le cas de tout autre régime de pension réglementaire :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that would have been required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82; 2023, c. 6, s. 5.

(A.1) la somme égale au total des paiements spéciaux, établis conformément à l'article 9 du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds visé aux articles 81.5 et 81.6 de la *Loi sur la faillite et l'insolvabilité* pour la liquidation d'un passif non capitalisé ou d'un déficit de solvabilité si le régime était régi par une loi fédérale,

(A.2) toute somme requise pour la liquidation de tout autre passif non capitalisé ou déficit de solvabilité du fonds établi à la date à laquelle des procédures sont intentées sous le régime de la présente loi,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale,

(C) les sommes que l'employeur serait tenu de verser à l'égard du régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Non-application du paragraphe (6)

(7) Par dérogation au paragraphe (6), le tribunal peut homologuer la transaction ou l'arrangement qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(8) Le tribunal ne peut homologuer la transaction ou l'arrangement qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

L.R. (1985), ch. C-36, art. 6; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 123; 2004, ch. 25, art. 194; 2005, ch. 47, art. 126, 2007, ch. 36, art. 106; 2009, ch. 33, art. 27; 2012, ch. 16, art. 82; 2023, ch. 6, art. 5.

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

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

Scope of Act

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

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

Right of unpaid supplier of perishable fruits or vegetables

8.1 (1) Subject to this section, if a person (in this section referred to as the “supplier”) has sold to a debtor company (in this section referred to as the “purchaser”) perishable fruits or vegetables for use in relation to the purchaser’s business and the purchaser has not fully paid the supplier, the perishable fruits or vegetables, as well as any of the proceeds of sale, are deemed to be held in trust by the purchaser for the supplier, if

- (a) the supplier has included in their invoice a notice, or has otherwise given notice within 30 days of the receipt by the purchaser of the perishable fruits or vegetables, in the prescribed form and manner, informing the purchaser of their intention to avail themselves of their right as beneficial owner of the perishable fruits or vegetables and the proceeds of sale in case the purchaser applies to the court to sanction a compromise or an arrangement;
- (b) the purchaser has 30 days or less to pay the entire balance owing to the supplier; and
- (c) the purchaser does not pay to the supplier the entire balance owing when it becomes due as provided in the invoice.

Le tribunal peut donner des instructions

7 Si une modification d’une transaction ou d’un arrangement est proposée après que le tribunal a ordonné qu’une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l’avis et autrement, et ces instructions peuvent être données tant après qu’avant l’ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu’il ne sera pas nécessaire d’ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l’opinion du tribunal, n’est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l’article 6.

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

Champ d’application de la loi

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

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

Droit du fournisseur impayé — fruits ou légumes périssables

8.1 (1) Sous réserve des autres dispositions du présent article, dans le cas où une compagnie débitrice — appelée « acheteur » au présent article — n’a pas payé au complet des fruits ou légumes périssables destinés à être utilisés dans le cadre de ses affaires à la personne — appelée « fournisseur » au présent article — qui les lui a vendus, les fruits ou légumes périssables, ainsi que tout produit de vente, sont réputés être détenus en fiducie par l’acheteur pour le fournisseur lorsque les conditions suivantes sont réunies :

- a) le fournisseur a donné avis à l’acheteur, en la forme et de la manière réglementaires — soit dans sa facture, soit autrement dans un délai de trente jours suivant la réception des fruits ou légumes périssables par l’acheteur — de son intention de se prévaloir de son droit à titre de véritable propriétaire des fruits ou légumes périssables et de tout produit de vente dans le cas où l’acheteur demande au tribunal d’homologuer une transaction ou un arrangement;
- b) l’acheteur disposait d’au plus trente jours pour acquitter le solde impayé;

Clarification

(2) For greater certainty, once the perishable fruits or vegetables, as well as any of the proceeds of sale, are deemed to be held in trust by the purchaser for the supplier in accordance with subsection (1), they are not included in the property of the purchaser.

Provincial law

(3) The laws of general application in relation to trusts and trustees in force in the province in which the purchaser resided or carried on business when the purchaser applied to the court to sanction a compromise or an arrangement apply to the trust, and in the event of any inconsistency or conflict between this section and the provisions of any of those laws, the provisions of those laws prevail to the extent of the inconsistency or conflict.

Definitions

(4) The following definitions apply in this section.

perishable fruits or vegetables includes perishable fruits and vegetables that have been repackaged or transformed by the purchaser to the extent that the nature of the fruits or vegetables remains unchanged. (*fruits ou légumes périssables*)

proceeds of sale means the proceeds from the sale by the purchaser of the perishable fruits or vegetables that are subject to the trust, whether or not those proceeds have been kept by the purchaser in a separate account or have been combined with other funds. (*produit de vente*)

2024, c. 31, s. 3.

PART II

Jurisdiction of Courts

Jurisdiction of court to receive applications

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

c) l'acheteur n'a pas acquitté le solde impayé lorsqu'il est devenu exigible conformément à ce qui était prévu dans la facture.

Précision

(2) Il est entendu que les fruits ou légumes périssables, ainsi que tout produit de vente, ne sont pas compris dans les biens de l'acheteur dès lors qu'ils sont réputés être détenus en fiducie par l'acheteur pour le fournisseur au titre du paragraphe (1).

Droit provincial

(3) La fiducie est assujettie aux lois d'application générale concernant les fiducies et les fiduciaires de la province où l'acheteur résidait ou exerçait des activités lorsqu'il a demandé au tribunal d'homologuer une transaction ou un arrangement, les dispositions de ces lois l'emportant sur les dispositions incompatibles du présent article.

Définitions

(4) Les définitions qui suivent s'appliquent au présent article.

fruits ou légumes périssables Sont compris parmi les fruits ou légumes périssables ceux qui sont réemballés ou transformés par l'acheteur sans qu'en soit changée leur nature. (*perishable fruits or vegetables*)

produit de vente Produit de la vente par l'acheteur des fruits ou légumes périssables assujettis à la fiducie, qu'il ait été gardé par l'acheteur dans un compte distinct ou combiné à d'autres fonds. (*proceeds of sale*)

2024, ch. 31, art. 3.

PARTIE II

Juridiction des tribunaux

Le tribunal a juridiction pour recevoir des demandes

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

Single judge may exercise powers, subject to appeal

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

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

Form of applications

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

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a)** a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b)** a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c)** copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

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

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

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

Forme des demandes

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

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

- a)** d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b)** d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c)** d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

- a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;
- b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
- c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of 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 affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has effect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2005, c. 47, s. 128.

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la personne — autre que la compagnie visée par l'ordonnance — qui a des obligations au titre de lettres de crédit ou de garanties se rapportant à la compagnie.

2005, ch. 47, art. 128.

11.05 [Abrogé, 2007, ch. 29, art. 105]

Membre de l'Association canadienne des paiements

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

2005, ch. 47, art. 128; 2007, ch. 36, art. 64.

11.07 [Abrogé, 2012, ch. 31, art. 420]

Restrictions : exercice de certaines attributions

11.08 L'ordonnance prévue à l'article 11.02 ne peut avoir d'effet sur :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

c) l'exercice par le procureur général du Canada des pouvoirs qui lui sont conférés par la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 128.

Suspension des procédures : Sa Majesté

11.09 (1) L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou

premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

- (i) the expiry of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or an arrangement,
- (iv) the default by the company on any term of a compromise or an arrangement, or
- (v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

When order ceases to be in effect

(2) The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

- (i) à l'expiration de l'ordonnance,
- (ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,
- (iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,
- (iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,
- (v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

- (i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,
- (ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Cessation d'effet

(2) Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d'avoir effet dans les cas suivants :

- a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a

Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette

sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Operation of similar legislation

(3) An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

loi ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Effet

(3) L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

Meaning of regulatory body

11.1 (1) In this section, *regulatory body* means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

Définition de organisme administratif

11.1 (1) Au présent article, *organisme administratif* s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

b) l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

11.2 (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.

Priority — secured creditors

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

Priority — other orders

(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.

Factors to be considered

(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;

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;
- b)** la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c)** la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d)** la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

- (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.

Additional factor – initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

- e) la nature et la valeur des biens de la compagnie;
- f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;
- g) le rapport du contrôleur visé à l'alinéa 23(1)b).

Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a) l'acquiescement du contrôleur au projet de cession, le cas échéant;
- b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;
- c) l'opportunité de lui céder les droits et obligations.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

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 or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(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.

Security or charge in favour of critical supplier

(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.

Priority

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

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

11.31 [Abrogé, 2005, ch. 47, art. 128]

Fournisseurs essentiels

11.4 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priorité

(4) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Révocation des administrateurs

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

11.51 (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 after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(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.

Negligence, misconduct or fault

(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.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (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

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

(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.

Priority

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Lien avec la Loi sur la faillite et l'insolvabilité

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

Nomination du contrôleur

11.7 (1) Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

1997, c. 12, s. 124; 2005, c. 47, s. 129.

No personal liability in respect of matters before appointment

11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

Personnes qui ne peuvent agir à titre de contrôleur

(2) Sauf avec l'autorisation du tribunal et aux conditions qu'il peut fixer, ne peut être nommé pour agir à titre de contrôleur le syndic :

a) qui est ou, au cours des deux années précédentes, a été :

(i) administrateur, dirigeant ou employé de la compagnie,

(ii) lié à la compagnie ou à l'un de ses administrateurs ou dirigeants,

(iii) vérificateur, comptable ou conseiller juridique de la compagnie, ou employé ou associé de l'un ou l'autre;

b) qui est :

(i) le fondé de pouvoir aux termes d'un acte constitutif d'hypothèque — au sens du *Code civil du Québec* — émanant de la compagnie ou d'une personne liée à celle-ci ou le fiduciaire aux termes d'un acte de fiducie émanant de la compagnie ou d'une personne liée à celle-ci,

(ii) lié au fondé de pouvoir ou au fiduciaire visé au sous-alinéa (i).

Remplacement du contrôleur

(3) Sur demande d'un créancier de la compagnie, le tribunal peut, s'il l'estime indiqué dans les circonstances, remplacer le contrôleur en nommant un autre syndic, au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité*, pour agir à ce titre à l'égard des affaires financières et autres de la compagnie.

1997, ch. 12, art. 124; 2005, ch. 47, art. 129.

Immunité

11.8 (1) Par dérogation au droit fédéral et provincial, le contrôleur qui, en cette qualité, continue l'exploitation de l'entreprise de la compagnie débitrice ou lui succède comme employeur est dégagé de toute responsabilité personnelle découlant de quelque obligation de la compagnie, notamment à titre d'employeur successeur, si celle-ci, à la fois :

a) l'oblige envers des employés ou anciens employés de la compagnie, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

b) existait avant sa nomination ou est calculée par référence à une période la précédant.

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Liability in respect of environmental matters

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

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

Reports, etc., still required

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

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

- (a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor
 - (i) complies with the order, or
 - (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;
- (b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days

Obligation exclue des frais

(2) L'obligation visée au paragraphe (1) ne fait pas partie des frais d'administration.

Responsabilité de l'employeur successeur

(2.1) Le paragraphe (1) ne dégage aucun employeur successeur, autre que le contrôleur, de sa responsabilité.

Responsabilité en matière d'environnement

(3) Par dérogation au droit fédéral et provincial, le contrôleur est, ès qualités, dégage de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu, avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée.

Rapports

(4) Le paragraphe (3) n'a pas pour effet de soustraire le contrôleur à l'obligation de faire rapport ou de communiquer des renseignements prévus par le droit applicable en l'espèce.

Immunité — ordonnances

(5) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (3), le contrôleur est, ès qualités, dégage de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par des procédures intentées au titre de la présente loi, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

- a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :
 - (i) il s'y conforme,
 - (ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout intérêt dans l'immeuble en cause, en dispose ou s'en dessaisit;
- b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(c) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au contrôleur de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout intérêt dans le bien immeuble en cause ou y avait renoncé, ou s'en était dessaisi.

Suspension

(6) En vue de permettre au contrôleur d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

Frais

(7) Si le contrôleur a abandonné tout intérêt dans le bien immeuble en cause ou y a renoncé, les réclamations pour les frais de réparation du fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

Priorité des réclamations

(8) Dans le cas où des procédures ont été intentées au titre de la présente loi contre une compagnie débitrice, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre elle pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un de ses biens immeubles est garantie par une sûreté sur le bien immeuble en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge ou réclamation visant le bien.

Précision

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien

damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124; 2007, c. 36, s. 67.

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Factors to be considered

(2) In deciding whether to make an order, the court is to consider, among other things,

- (a)** whether the monitor approved the proposed disclosure;
- (b)** whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and
- (c)** whether any interested person would be materially prejudiced as a result of the disclosure.

Meaning of *economic interest*

(3) In this section, *economic interest* includes

- (a)** a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;
- (b)** the consideration paid for any right or interest, including those referred to in paragraph (a); or
- (c)** any other prescribed right or interest.

2019, c. 29, s. 139.

Fixing deadlines

12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

R.S., 1985, c. C-36, s. 12; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 2004, c. 25, s. 195; 2005, c. 47, s. 130; 2007, c. 36, s. 68.

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from

immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

1997, ch. 12, art. 124; 2007, ch. 36, art. 67.

Divulgence de renseignements financiers

11.9 (1) Sur demande de tout intéressé sous le régime de la présente loi à l'égard d'une compagnie débitrice et sur préavis de la demande à tout intéressé qui sera vraisemblablement touché par l'ordonnance rendue au titre du présent article, le tribunal peut ordonner à cet intéressé de divulguer tout intérêt économique qu'il a dans la compagnie débitrice, aux conditions que le tribunal estime indiquées.

Facteurs à prendre en considération

(2) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, notamment, les facteurs suivants :

- a)** la question de savoir si le contrôleur acquiesce à la divulgation proposée;
- b)** la question de savoir si la divulgation proposée favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie débitrice;
- c)** la question de savoir si la divulgation proposée causera un préjudice sérieux à tout intéressé.

Définition de *intérêt économique*

(3) Au présent article, *intérêt économique* s'entend notamment :

- a)** d'une réclamation, d'un contrat financier admissible, d'une option ou d'une hypothèque, d'un gage, d'une charge, d'un nantissement, d'un privilège ou d'un autre droit qui grève le bien;
- b)** de la contrepartie payée pour l'obtention, notamment, de tout intérêt ou droit visés à l'alinéa a);
- c)** de tout autre intérêt ou droit prévus par règlement.

2019, ch. 29, art. 139.

Échéances

12 Le tribunal peut fixer des échéances aux fins de votation et aux fins de distribution aux termes d'une transaction ou d'un arrangement.

L.R. (1985), ch. C-36, art. 12; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 2004, ch. 25, art. 195; 2005, ch. 47, art. 130; 2007, ch. 36, art. 68.

Permission d'en appeler

13 Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la

the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134.

Court of appeal

14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

R.S., 1985, c. C-36, s. 14; 2002, c. 7, s. 135.

Appeals

15 (1) An appeal lies to the Supreme Court of Canada on leave therefor being granted by that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

Jurisdiction of Supreme Court of Canada

(2) The Supreme Court of Canada shall have jurisdiction to hear and to decide according to its ordinary procedure any appeal under subsection (1) and to award costs.

Stay of proceedings

(3) No appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless and to the extent ordered by that Court.

Security for costs

(4) The appellant in an appeal under subsection (1) shall not be required to provide any security for costs, but, unless he provides security for costs in an amount to be fixed by the Supreme Court of Canada, he shall not be awarded costs in the event of his success on the appeal.

présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.

L.R. (1985), ch. C-36, art. 13; 2002, ch. 7, art. 134.

Cour d'appel

14 (1) Cet appel doit être porté au tribunal de dernier ressort de la province où la procédure a pris naissance.

Pratique

(2) Tous ces appels sont régis autant que possible par la pratique suivie dans d'autres causes devant le tribunal saisi de l'appel; toutefois, aucun appel n'est recevable à moins que, dans le délai de vingt et un jours après qu'a été rendue l'ordonnance ou la décision faisant l'objet de l'appel, ou dans le délai additionnel que peut accorder le tribunal dont il est interjeté appel ou, au Yukon, un juge de la Cour suprême du Canada, l'appellant n'y ait pris des procédures pour parfaire son appel, et à moins que, dans ce délai, il n'ait fait un dépôt ou fourni un cautionnement suffisant selon la pratique du tribunal saisi de l'appel pour garantir qu'il poursuivra dûment l'appel et payera les frais qui peuvent être adjugés à l'intimé et se conformera aux conditions relatives au cautionnement ou autres qu'impose le juge donnant la permission d'en appeler.

L.R. (1985), ch. C-36, art. 14; 2002, ch. 7, art. 135.

Appels

15 (1) Un appel peut être interjeté à la Cour suprême du Canada sur autorisation à cet effet accordée par ce tribunal, du plus haut tribunal de dernier ressort de la province ou du territoire où la procédure a pris naissance.

Jurisdiction de la Cour suprême du Canada

(2) La Cour suprême du Canada a juridiction pour entendre et décider, selon sa procédure ordinaire, tout appel ainsi permis et pour adjuger des frais.

Suspension de procédures

(3) Un tel appel à la Cour suprême du Canada n'a pas pour effet de suspendre les procédures, à moins que ce tribunal ne l'ordonne et dans la mesure où il l'ordonne.

Cautionnement pour les frais

(4) L'appellant n'est pas tenu de fournir un cautionnement pour les frais; toutefois, à moins qu'il ne fournisse un cautionnement pour les frais au montant que fixe la Cour suprême du Canada, il ne lui est pas adjugé de frais en cas de réussite dans son appel.

Decision final

(5) The decision of the Supreme Court of Canada on any appeal under subsection (1) is final and conclusive.

R.S., c. C-25, s. 15; R.S., c. 44(1st Supp.), s. 10.

Order of court of one province

16 Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it.

R.S., c. C-25, s. 16.

Courts shall aid each other on request

17 All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

R.S., c. C-25, s. 17.

18 [Repealed, 2005, c. 47, s. 131]

18.1 [Repealed, 2005, c. 47, s. 131]

18.2 [Repealed, 2005, c. 47, s. 131]

18.3 [Repealed, 2005, c. 47, s. 131]

18.4 [Repealed, 2005, c. 47, s. 131]

18.5 [Repealed, 2005, c. 47, s. 131]

PART III

General

Duty of Good Faith

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Décision finale

(5) La décision de la Cour suprême du Canada sur un tel appel est définitive et sans appel.

S.R., ch. C-25, art. 15; S.R., ch. 44(1^{er} suppl.), art. 10.

Ordonnance d'un tribunal d'une province

16 Toute ordonnance rendue par le tribunal d'une province dans l'exercice de la juridiction conférée par la présente loi à l'égard de quelque transaction ou arrangement a pleine vigueur et effet dans les autres provinces, et elle est appliquée devant le tribunal de chacune des autres provinces de la même manière, à tous égards, que si elle avait été rendue par le tribunal la faisant ainsi exécuter.

S.R., ch. C-25, art. 16.

Les tribunaux doivent s'entraider sur demande

17 Tous les tribunaux ayant juridiction sous le régime de la présente loi et les fonctionnaires de ces tribunaux sont tenus de s'entraider et de se faire les auxiliaires les uns des autres en toutes matières prévues par la présente loi, et une ordonnance du tribunal sollicitant de l'aide au moyen d'une demande à un autre tribunal est réputée suffisante pour permettre à ce dernier tribunal d'exercer, en ce qui concerne les questions prescrites par l'ordonnance, la juridiction que le tribunal ayant formulé la demande ou le tribunal auquel est adressée la demande pourrait exercer à l'égard de questions similaires dans les limites de leurs juridictions respectives.

S.R., ch. C-25, art. 17.

18 [Abrogé, 2005, ch. 47, art. 131]

18.1 [Abrogé, 2005, ch. 47, art. 131]

18.2 [Abrogé, 2005, ch. 47, art. 131]

18.3 [Abrogé, 2005, ch. 47, art. 131]

18.4 [Abrogé, 2005, ch. 47, art. 131]

18.5 [Abrogé, 2005, ch. 47, art. 131]

PARTIE III

Dispositions générales

Obligation d'agir de bonne foi

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

1997, c. 12, s. 125; 2005, c. 47, s. 131; 2019, c. 29, s. 140.

Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

1997, ch. 12, art. 125; 2005, ch. 47, art. 131; 2019, ch. 29, art. 140.

Réclamations

Réclamations considérées dans le cadre des transactions ou arrangements

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

Exception

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

a) toute ordonnance d'un tribunal imposant une amende, une pénalité, la restitution ou une autre peine semblable;

b) toute indemnité accordée en justice dans une affaire civile :

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

R.S., 1985, c. C-36, s. 19; 1996, c. 6, s. 167; 2005, c. 47, s. 131; 2007, c. 36, s. 69.

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant d'un acte visé au sous-alinéa (i);

(c) toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors que la compagnie agissait, au Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

(d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

(e) toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas a) à d).

L.R. (1985), ch. C-36, art. 19; 1996, ch. 6, art. 167; 2005, ch. 47, art. 131; 2007, ch. 36, art. 69.

Détermination du montant de la réclamation

20 (1) Pour l'application de la présente loi, le montant de la réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

(a) le montant d'une réclamation non garantie est celui :

(i) dans le cas d'une compagnie en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, dont la preuve a été établie en conformité avec cette loi,

(ii) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue sous le régime de la *Loi sur la faillite et l'insolvabilité*, dont la preuve a été établie en conformité avec cette loi,

(iii) dans le cas de toute autre compagnie, dont la preuve peut être établie sous le régime de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier;

(b) le montant d'une réclamation garantie est celui dont la preuve pourrait être établie sous le régime de la *Loi sur la faillite et l'insolvabilité* si la réclamation n'était pas garantie, mais ce montant, s'il n'est pas admis par la compagnie, est, dans le cas où celle-ci est assujettie à une procédure pendante sous le régime de la *Loi sur les liquidations et les restructurations* ou de

under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

R.S., 1985, c. C-36, s. 20; 2005, c. 47, s. 131; 2007, c. 36, s. 70.

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

1997, c. 12, s. 126; 2005, c. 47, s. 131.

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

la *Loi sur la faillite et l'insolvabilité*, établi par preuve de la même manière qu'une réclamation non garantie sous le régime de l'une ou l'autre de ces lois, selon le cas, et, s'il s'agit de toute autre compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier.

Admission des réclamations

(2) Malgré le paragraphe (1), la compagnie peut admettre le montant d'une réclamation aux fins de votation sous réserve du droit de contester la responsabilité quant à la réclamation pour d'autres objets, et la présente loi, la *Loi sur les liquidations et les restructurations* et la *Loi sur la faillite et l'insolvabilité* n'ont pas pour effet d'empêcher un créancier garanti de voter à une assemblée de créanciers garantis ou d'une catégorie de ces derniers à l'égard du montant total d'une réclamation ainsi admis.

L.R. (1985), ch. C-36, art. 20; 2005, ch. 47, art. 131; 2007, ch. 36, art. 70.

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131.

Catégories de créanciers

Établissement des catégories de créanciers

22 (1) La compagnie débitrice peut établir des catégories de créanciers en vue des assemblées qui seront tenues au titre des articles 4 ou 5 relativement à une transaction ou un arrangement la visant; le cas échéant, elle demande au tribunal d'approuver ces catégories avant la tenue des assemblées.

Critères

(2) Pour l'application du paragraphe (1), peuvent faire partie de la même catégorie les créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

a) la nature des créances et obligations donnant lieu à leurs réclamations;

b) la nature et le rang de toute garantie qui s'y rattache;

c) les voies de droit ouvertes aux créanciers, abstraction faite de la transaction ou de l'arrangement, et la mesure dans laquelle il pourrait être satisfait à leurs réclamations s'ils s'en prévalaient;

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

Monitors

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

d) tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas a) à c).

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

22.1 Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Contrôleurs

Attributions

23 (1) Le contrôleur est tenu :

a) à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à l'égard de la demande initiale visant une compagnie débitrice :

(i) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,

(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :

(A) de rendre l'ordonnance publique selon les modalités réglementaires,

(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

b) de réviser l'état de l'évolution de l'encaisse de la compagnie, en ce qui a trait à sa justification, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(c) de faire ou de faire faire toute évaluation ou investigation qu'il estime nécessaire pour établir l'état des affaires financières et autres de la compagnie et les causes des difficultés financières ou de l'insolvabilité de celle-ci, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

(d) de déposer auprès du tribunal un rapport portant sur l'état des affaires financières et autres de la compagnie et contenant les renseignements réglementaires :

(i) dès qu'il note un changement défavorable important au chapitre des projections relatives à l'encaisse ou de la situation financière de la compagnie,

(ii) au plus tard quarante-cinq jours — ou le nombre de jours supérieur que le tribunal fixe — après la fin de chaque trimestre d'exercice,

(iii) à tout autre moment fixé par ordonnance du tribunal;

d.1) de déposer auprès du tribunal, au moins sept jours avant la date de la tenue de l'assemblée des créanciers au titre des articles 4 ou 5, un rapport portant sur l'état des affaires financières et autres de la compagnie, contenant notamment son opinion sur le caractère raisonnable de la décision d'inclure dans la transaction ou l'arrangement une disposition prévoyant la non-application à celle-ci des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, et contenant les renseignements réglementaires;

e) d'informer les créanciers de la compagnie du dépôt du rapport visé à l'un ou l'autre des alinéas b) à d.1);

f) de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement;

f.1) afin de défrayer le surintendant des faillites des dépenses engagées par lui dans l'exercice de ses attributions prévues par la présente loi, de lui verser, pour dépôt auprès du receveur général, le prélèvement réglementaire, et ce au moment prévu par les règlements;

g) d'assister aux audiences du tribunal tenues dans le cadre de toute procédure intentée sous le régime de la présente loi relativement à la compagnie et aux assemblées de créanciers de celle-ci, s'il estime que sa présence est nécessaire à l'exercice de ses attributions;

h) dès qu'il conclut qu'il serait plus avantageux pour les créanciers qu'une procédure visant la compagnie

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

Right of access

24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

2005, c. 47, s. 131.

Obligation to act honestly and in good faith

25 In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

2005, c. 47, s. 131.

Powers, Duties and Functions of Superintendent of Bankruptcy

Public records

26 (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, a public record of prescribed information relating to proceedings under this Act. On request, and on payment of the prescribed fee, the Superintendent of Bankruptcy must provide, or cause to be provided, any information contained in that public record.

soit intentée sous le régime de la *Loi sur la faillite et l'insolvabilité*, d'en aviser le tribunal;

i) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers;

j) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

k) d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire.

Non-responsabilité du contrôleur

(2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)(b) à d.1), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

2005, ch. 47, art. 131; 2007, ch. 36, art. 72.

Droit d'accès aux biens

24 Dans le cadre de la surveillance des affaires financières et autres de la compagnie et dans la mesure où cela s'impose pour lui permettre de les évaluer adéquatement, le contrôleur a accès aux biens de celle-ci, notamment les locaux, livres, données sur support électronique ou autre, registres et autres documents financiers.

2005, ch. 47, art. 131.

Diligence

25 Le contrôleur doit, dans l'exercice de ses attributions, agir avec intégrité et de bonne foi et se conformer au code de déontologie mentionné à l'article 13.5 de la *Loi sur la faillite et l'insolvabilité*.

2005, ch. 47, art. 131.

Attributions du surintendant des faillites

Registres publics

26 (1) Le surintendant des faillites conserve ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, un registre public contenant des renseignements réglementaires sur les procédures intentées sous le régime de la présente loi. Il fournit ou voit à ce qu'il soit fourni à quiconque le demande tous renseignements figurant au registre, sur paiement des droits réglementaires.

Other records

(2) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, any other records relating to the administration of this Act that he or she considers appropriate.

Agreement to provide compilation

(3) The Superintendent of Bankruptcy may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.

2005, c. 47, s. 131; 2007, c. 36, s. 73.

Applications to court and right to intervene

27 The Superintendent of Bankruptcy may apply to the court to review the appointment or conduct of a monitor and may intervene, as though he or she were a party, in any matter or proceeding in court relating to the appointment or conduct of a monitor.

2005, c. 47, s. 131.

Complaints

28 The Superintendent of Bankruptcy must receive and keep a record of all complaints regarding the conduct of monitors.

2005, c. 47, s. 131.

Investigations

29 (1) The Superintendent of Bankruptcy may make, or cause to be made, any inquiry or investigation regarding the conduct of monitors that he or she considers appropriate.

Rights

(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

(a) shall have access to and the right to examine and make copies of the books, records, data, documents or papers — including those in electronic form — in the possession or under the control of a monitor under this Act; and

(b) may, with the leave of the court granted on an *ex parte* application, examine the books, records, data, documents or papers — including those in electronic form — relating to any compromise or arrangement in respect of which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

Autres dossiers

(2) Il conserve également, ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, les autres dossiers qu'il estime indiqués concernant l'application de la présente loi.

Accord visant la fourniture d'une compilation

(3) Enfin, il peut conclure un accord visant la fourniture d'une compilation de tout ou partie des renseignements figurant au registre public.

2005, ch. 47, art. 131; 2007, ch. 36, art. 73.

Demande au tribunal et intervention

27 Le surintendant des faillites peut demander au tribunal d'examiner la nomination ou la conduite de tout contrôleur et intervenir dans toute affaire ou procédure devant le tribunal se rapportant à ces nomination ou conduite comme s'il y était partie.

2005, ch. 47, art. 131.

Plaintes

28 Le surintendant des faillites reçoit et note toutes les plaintes sur la conduite de tout contrôleur.

2005, ch. 47, art. 131.

Investigations et enquêtes

29 (1) Le surintendant des faillites effectue ou fait effectuer au sujet de la conduite de tout contrôleur les investigations ou les enquêtes qu'il estime indiquées.

Droit d'accès

(2) Pour les besoins de ces investigations ou enquêtes, le surintendant des faillites ou la personne qu'il nomme à cette fin :

a) a accès aux livres, registres, données, documents ou papiers, sur support électronique ou autre, se trouvant, en vertu de la présente loi, en la possession ou sous la responsabilité du contrôleur et a droit de les examiner et d'en tirer des copies;

b) peut, avec la permission du tribunal donnée *ex parte*, examiner les livres, registres, données, documents ou papiers, sur support électronique ou autre, qui sont en la possession ou sous la responsabilité de toute autre personne désignée dans l'ordonnance et se rapportent aux transactions ou arrangements auxquels la présente loi s'applique et peut, en vertu d'un mandat du tribunal et aux fins d'examen, pénétrer dans tout lieu et y faire des perquisitions.

Staff

(3) The Superintendent of Bankruptcy may engage the services of persons having technical or specialized knowledge, and persons to provide administrative services, to assist the Superintendent of Bankruptcy in conducting an inquiry or investigation, and may establish the terms and conditions of their engagement. The remuneration and expenses of those persons, when certified by the Superintendent of Bankruptcy, are payable out of the appropriation for the office of the Superintendent.

2005, c. 47, s. 131; 2007, c. 36, s. 74.

Powers in relation to licence

30 (1) If, after making or causing to be made an inquiry or investigation into the conduct of a monitor, it appears to the Superintendent of Bankruptcy that the monitor has not fully complied with this Act and its regulations or that it is in the public interest to do so, the Superintendent of Bankruptcy may

- (a)** cancel or suspend the monitor's licence as a trustee under the *Bankruptcy and Insolvency Act*; or
- (b)** place any condition or limitation on the licence that he or she considers appropriate.

Notice to trustee

(2) Before deciding whether to exercise any of the powers referred to in subsection (1), the Superintendent of Bankruptcy shall send the monitor written notice of the powers that the Superintendent may exercise and the reasons why they may be exercised and afford the monitor a reasonable opportunity for a hearing.

Summons

(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a summons requiring the person named in it

- (a)** to appear at the time and place mentioned in it;
- (b)** to testify to all matters within their knowledge relative to the subject matter of the inquiry or investigation into the conduct of the monitor; and
- (c)** to bring and produce any books, records, data, documents or papers — including those in electronic form — in their possession or under their control relative to the subject matter of the inquiry or investigation.

Effect throughout Canada

(4) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (3).

Personnel

(3) Le surintendant des faillites peut retenir les services des experts ou autres personnes et du personnel administratif dont il estime le concours utile à l'investigation ou l'enquête et fixer leurs fonctions et leurs conditions d'emploi. La rémunération et les indemnités dues à ces personnes sont, une fois certifiées par le surintendant, imputables sur les crédits affectés à son bureau.

2005, ch. 47, art. 131; 2007, ch. 36, art. 74.

Décision relative à la licence

30 (1) Si, au terme d'une investigation ou d'une enquête sur la conduite du contrôleur, il estime que ce dernier n'a pas observé la présente loi ou les règlements ou que l'intérêt public le justifie, le surintendant des faillites peut annuler ou suspendre la licence que le contrôleur détient, en vertu de la *Loi sur la faillite et l'insolvabilité*, à titre de syndic ou soumettre sa licence aux conditions ou restrictions qu'il estime indiquées.

Avis au syndic

(2) Avant de prendre l'une des mesures visées au paragraphe (1), le surintendant des faillites envoie au syndic un avis écrit et motivé de la ou des mesures qu'il peut prendre et lui donne la possibilité de se faire entendre.

Convocation de témoins

(3) Le surintendant des faillites peut, aux fins d'audition, convoquer des témoins par assignation leur enjoignant :

- a)** de comparaître aux date, heure et lieu indiqués;
- b)** de témoigner sur tous faits connus d'eux se rapportant à l'investigation ou à l'enquête sur la conduite du contrôleur;
- c)** de produire tous livres, registres, données, documents ou papiers, sur support électronique ou autre, qui sont pertinents et dont ils ont la possession ou la responsabilité.

Effet

(4) Les assignations visées au paragraphe (3) ont effet sur tout le territoire canadien.

Fees and allowances

(5) Any person summoned under subsection (3) is entitled to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

Procedure at hearing

(6) At the hearing, the Superintendent of Bankruptcy

- (a)** has the power to administer oaths;
- (b)** is not bound by any legal or technical rules of evidence in conducting the hearing;
- (c)** shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and
- (d)** shall cause a summary of any oral evidence to be made in writing.

Record

(7) The notice referred to in subsection (2) and, if applicable, the summary of oral evidence referred to in paragraph (6)(d), together with any documentary evidence that the Superintendent of Bankruptcy receives in evidence, form the record of the hearing, and that record and the hearing are public unless the Superintendent of Bankruptcy is satisfied that personal or other matters that may be disclosed are of such a nature that the desirability of avoiding public disclosure of those matters, in the interest of a third party or in the public interest, outweighs the desirability of the access by the public to information about those matters.

Decision

(8) The decision of the Superintendent of Bankruptcy after the hearing, together with the reasons for the decision, must be given in writing to the monitor not later than three months after the conclusion of the hearing, and is public.

Review by Federal Court

(9) A decision of the Superintendent of Bankruptcy given under subsection (8) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside under the *Federal Courts Act*.

2005, c. 47, s. 131; 2007, c. 36, s. 75.

Delegation

31 (1) The Superintendent of Bankruptcy may, in writing, authorize any person to exercise or perform, subject to any terms and conditions that he or she may specify in the authorization, any of the powers, duties or functions

Frais et indemnités

(5) Toute personne assignée reçoit les frais et indemnités accordés aux témoins assignés devant la Cour fédérale.

Procédure de l'audition

(6) Lors de l'audition, le surintendant :

- a)** peut faire prêter serment;
- b)** n'est lié par aucune règle de droit ou de procédure en matière de preuve;
- c)** règle les questions exposées dans l'avis d'audition avec célérité et sans formalisme, eu égard aux circonstances et à l'équité;
- d)** fait établir un résumé écrit de toute preuve orale.

Dossier et audition

(7) L'audition et le dossier de celle-ci sont publics à moins que le surintendant ne juge que la nature des révélations possibles sur des questions personnelles ou autres est telle que, en l'occurrence, l'intérêt d'un tiers ou l'intérêt public l'emporte sur le droit du public à l'information. Le dossier comprend l'avis prévu au paragraphe (2), le résumé de la preuve orale prévu à l'alinéa (6)d) et la preuve documentaire reçue par le surintendant des faillites.

Décision

(8) La décision du surintendant des faillites est rendue par écrit, motivée et remise au contrôleur dans les trois mois suivant la clôture de l'audition, et elle est publique.

Examen de la Cour fédérale

(9) La décision du surintendant, rendue et remise conformément au paragraphe (8), est assimilée à celle d'un office fédéral et est soumise au pouvoir d'examen et d'annulation prévu par la *Loi sur les Cours fédérales*.

2005, ch. 47, art. 131; 2007, ch. 36, art. 75.

Pouvoir de délégation

31 (1) Le surintendant des faillites peut, par écrit, selon les modalités qu'il précise, déléguer les attributions que lui confèrent les articles 29 et 30.

of the Superintendent of Bankruptcy under sections 29 and 30.

Notification to monitor

(2) If the Superintendent of Bankruptcy delegates in accordance with subsection (1), the Superintendent or the delegate must give notice of the delegation in the prescribed manner to any monitor who may be affected by the delegation.

2005, c. 47, s. 131.

Agreements

Disclaimer or rescission of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or rescind any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or rescission.

Court may prohibit disclaimer or rescission

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or rescinded.

Court-ordered disclaimer or rescission

(3) If the monitor does not approve the proposed disclaimer or rescission, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or rescinded.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

- (a)** whether the monitor approved the proposed disclaimer or rescission;
- (b)** whether the disclaimer or rescission would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c)** whether the disclaimer or rescission would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or rescission

(5) An agreement is disclaimed or rescinded

Notification

(2) En cas de délégation, le surintendant des faillites ou le délégué en avise, de la manière réglementaire, tout contrôleur qui pourrait être touché par cette mesure.

2005, ch. 47, art. 131.

Contrats et conventions collectives

Résiliation de contrats

32 (1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.

Contestation

(2) Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner que le contrat ne soit pas résilié.

Absence d'acquiescement du contrôleur

(3) Si le contrôleur n'acquiesce pas au projet de résiliation, la compagnie peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner la résiliation du contrat.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** l'acquiescement du contrôleur au projet de résiliation, le cas échéant;
- b)** la question de savoir si la résiliation favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;
- c)** le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

Résiliation

(5) Le contrat est résilié :

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

- (a)** an eligible financial contract;
- (b)** a collective agreement;
- (c)** a financing agreement if the company is the borrower; or
- (d)** a lease of real property or of an immovable if the company is the lessor.

2005, c. 47, s. 131; 2007, c. 29, s. 108, c. 36, ss. 76, 112.

a) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), si aucune demande n'est présentée en vertu du paragraphe (2);

b) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1) ou à la date postérieure fixée par le tribunal, si ce dernier rejette la demande présentée en vertu du paragraphe (2);

c) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (3) ou à la date postérieure fixée par le tribunal, si ce dernier ordonne la résiliation du contrat en vertu de ce paragraphe.

Propriété intellectuelle

(6) Si la compagnie a autorisé par contrat une personne à utiliser un droit de propriété intellectuelle, la résiliation n'empêche pas la personne de l'utiliser ni d'en faire respecter l'utilisation exclusive, à condition qu'elle respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce pour la période prévue au contrat et pour toute période additionnelle dont elle peut et décide de se prévaloir de son propre gré.

Pertes découlant de la résiliation

(7) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.

Motifs de la résiliation

(8) Dans les cinq jours qui suivent la date à laquelle une partie au contrat le lui demande, la compagnie lui expose par écrit les motifs de son projet de résiliation.

Exceptions

(9) Le présent article ne s'applique pas aux contrats suivants :

- a)** les contrats financiers admissibles;
- b)** les conventions collectives;
- c)** les accords de financement au titre desquels la compagnie est l'emprunteur;
- d)** les baux d'immeubles ou de biens réels au titre desquels la compagnie est le locateur.

2005, ch. 47, art. 131; 2007, ch. 29, art. 108, ch. 36, art. 76 et 112.

Collective agreements

33 (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Application for authorization to serve notice to bargain

(2) A debtor company that is a party to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the company to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Conditions for issuance of order

(3) The court may issue the order only if it is satisfied that

- (a)** a viable compromise or arrangement could not be made in respect of the company, taking into account the terms of the collective agreement;
- (b)** the company has made good faith efforts to renegotiate the provisions of the collective agreement; and
- (c)** a failure to issue the order is likely to result in irreparable damage to the company.

No delay on vote

(4) The vote of the creditors in respect of a compromise or an arrangement may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent has not expired.

Claims arising from termination or amendment

(5) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the company, the bargaining agent that is a party to the agreement is deemed to have a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

Conventions collectives

33 (1) Si une procédure a été intentée sous le régime de la présente loi à l'égard d'une compagnie débitrice, toute convention collective que celle-ci a conclue à titre d'employeur demeure en vigueur et ne peut être modifiée qu'en conformité avec le présent article ou les règles de droit applicables aux négociations entre les parties.

Demande pour que le tribunal autorise le début de négociations en vue de la révision

(2) Si elle est partie à une convention collective à titre d'employeur et qu'elle ne peut s'entendre librement avec l'agent négociateur sur la révision de celle-ci, la compagnie débitrice peut, après avoir donné un préavis de cinq jours à l'agent négociateur, demander au tribunal de l'autoriser, par ordonnance, à donner à l'agent négociateur un avis de négociations collectives pour que celui-ci entame les négociations collectives en vue de la révision de la convention collective conformément aux règles de droit applicables aux négociations entre les parties.

Cas où l'autorisation est accordée

(3) Le tribunal ne rend l'ordonnance que s'il est convaincu, à la fois :

- a)** qu'une transaction ou un arrangement viable à l'égard de la compagnie ne pourrait être fait compte tenu des dispositions de la convention collective;
- b)** que la compagnie a tenté de bonne foi d'en négocier de nouveau les dispositions;
- c)** qu'elle subirait vraisemblablement des dommages irréparables si l'ordonnance n'était pas rendue.

Vote sur la proposition

(4) Le vote des créanciers sur la transaction ou l'arrangement ne peut être retardé pour la seule raison que le délai imparti par les règles de droit applicables aux négociations collectives entre les parties à la convention collective n'est pas expiré.

Réclamation consécutive à la révision

(5) Si les parties parviennent à une entente sur la révision de la convention collective après qu'une procédure a été intentée sous le régime de la présente loi à l'égard d'une compagnie, l'agent négociateur en cause est réputé avoir une réclamation à titre de créancier chirographaire pour une somme équivalant à la valeur des concessions accordées à l'égard de la période non écoulée de la convention.

Order to disclose information

(6) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the company's business or financial affairs and that is relevant to the collective bargaining between the company and the bargaining agent. The court may make the order only after the company has been authorized to serve a notice to bargain under subsection (2).

Parties

(7) For the purpose of this section, the parties to a collective agreement are the debtor company and the bargaining agent that are bound by the collective agreement.

Unrevised collective agreements remain in force

(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

2005, c. 47, s. 131.

Certain rights limited

34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

Public utilities

(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

Certain acts not prevented

(4) Nothing in this section is to be construed as

Ordonnance de communication

(6) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes qui ont un intérêt, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tout renseignement qu'elles ont en leur possession ou à leur disposition sur les affaires et la situation financière de la compagnie pertinent pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (2).

Parties

(7) Pour l'application du présent article, les parties à la convention collective sont la compagnie débitrice et l'agent négociateur liés par elle.

Maintien en vigueur des conventions collectives

(8) Il est entendu que toute convention collective que la compagnie et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur et que les tribunaux ne peuvent en modifier les termes.

2005, ch. 47, art. 131.

Limitation de certains droits

34 (1) Il est interdit de résilier ou de modifier un contrat — notamment un contrat de garantie — conclu avec une compagnie débitrice ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat au seul motif qu'une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie ou que celle-ci est insolvable.

Baux

(2) Lorsque le contrat visé au paragraphe (1) est un bail, l'interdiction prévue à ce paragraphe vaut également dans le cas où la compagnie est insolvable ou n'a pas payé son loyer à l'égard d'une période antérieure à l'introduction de la procédure.

Entreprise de service public

(3) Il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès d'une compagnie débitrice au seul motif qu'une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie, que celle-ci est insolvable ou qu'elle n'a pas payé des services ou marchandises fournis avant l'introduction de la procédure.

Exceptions

(4) Le présent article n'a pas pour effet :

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

(b) requiring the further advance of money or credit; or

(c) [Repealed, 2012, c. 31, s. 421]

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

a) d'empêcher une personne d'exiger que soient effectués des paiements en espèces pour toute contrepartie de valeur — marchandises, services, biens loués ou autres — fournie après l'introduction d'une procédure sous le régime de la présente loi;

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

c) [Abrogé, 2012, ch. 31, art. 421]

Incompatibilité

(5) Le présent article l'emporte sur les dispositions incompatibles de tout contrat, celles-ci étant sans effet.

Pouvoirs du tribunal

(6) À la demande de l'une des parties à un contrat ou d'une entreprise de service public, le tribunal peut déclarer le présent article inapplicable, ou applicable uniquement dans la mesure qu'il précise, s'il est établi par le demandeur que son application lui causerait vraisemblablement de sérieuses difficultés financières.

Contrats financiers admissibles

(7) Le paragraphe (1) ne s'applique pas aux contrats financiers admissibles et n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'association.

Opérations permises

(8) Si le contrat financier admissible conclu avant qu'une procédure soit intentée sous le régime de la présente loi à l'égard de la compagnie est résilié à la date d'introduction de la procédure ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

a) la compensation des obligations entre la compagnie et les autres parties au contrat;

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 131; 2007, c. 29, s. 109, c. 36, ss. 77, 112; 2012, c. 31, s. 421.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

2005, ch. 47, art. 131; 2007, ch. 29, art. 109, ch. 36, art. 77 et 112; 2012, ch. 31, art. 421.

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, 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 monitor approved the process leading to the proposed sale or disposition;
- (c)** whether the monitor 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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a)** a director or officer of the company;
- (b)** a person who has or has had, directly or indirectly, control in fact of the company; and
- (c)** a person who is related to a person described in paragraph (a) or (b).

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la justification des circonstances ayant mené au projet de disposition;
- b)** l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
- c)** le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;
- d)** la suffisance des consultations menées auprès des créanciers;
- e)** les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;
- f)** le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

- a)** d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;
- b)** d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

- a)** le dirigeant ou l'administrateur de celle-ci;
- b)** la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;
- c)** la personne liée à toute personne visée aux alinéas a) ou b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269.

Preferences and Transfers at Undervalue

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to “date of the bankruptcy” is to be read as a reference to “day on which proceedings commence under this Act”;

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78; 2017, ch. 26, art. 14; 2018, ch. 27, art. 269.

Traitements préférentiels et opérations sous-évaluées

Application des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*

36.1 (1) Les articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité* s'appliquent, avec les adaptations nécessaires, à la transaction ou à l'arrangement sauf disposition contraire de ceux-ci.

Interprétation

(2) Pour l'application du paragraphe (1), la mention, aux articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, de la date de la faillite vaut mention de la date à laquelle une procédure a été intentée sous le régime de la présente loi, celle du syndic vaut mention du contrôleur et celle du failli, de la personne insolvable ou du débiteur vaut mention de la compagnie débitrice.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78.

(b) to “trustee” is to be read as a reference to “monitor”; and

(c) to “bankrupt”, “insolvent person” or “debtor” is to be read as a reference to “debtor company”.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

Her Majesty

Deemed trusts

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Exceptions

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a *provincial pension plan* as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

2005, c. 47, s. 131.

Sa Majesté

Fiducies présumées

37 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

Exceptions

(2) Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même

Status of Crown claims

38 (1) In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 39 called a "workers' compensation body", rank as unsecured claims.

Exceptions

(2) Subsection (1) does not apply

(a) in respect of claims that are secured by a security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

(i) pursuant to any law, or

(ii) pursuant to provisions of federal or provincial legislation if those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or a workers' compensation body; and

(b) to the extent provided in subsection 39(2), to claims that are secured by a security referred to in subsection 39(1), if the security is registered in accordance with subsection 39(1).

Operation of similar legislation

(3) Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts if the sum

effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 131.

Réclamations de la Couronne

38 (1) Dans le cadre de toute procédure intentée sous le régime de la présente loi, les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

Exceptions

(2) Sont soustraites à l'application du paragraphe (1) :

a) les réclamations garanties par un type de charge ou de sûreté dont toute personne, et non seulement Sa Majesté ou l'organisme, peut se prévaloir au titre de dispositions législatives fédérales ou provinciales n'ayant pas pour seul ou principal objet l'établissement de mécanismes garantissant les réclamations de Sa Majesté ou de l'organisme, ou au titre de toute autre règle de droit;

b) les réclamations garanties et enregistrées aux termes du paragraphe 39(1), dans la mesure prévue au paragraphe 39(2).

Effet

(3) Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

and, for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 131; 2009, c. 33, s. 29.

Statutory Crown securities

39 (1) In relation to proceedings under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the day on which proceedings commence, the security is registered under a system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

Effect of security

(2) A security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to setting them up against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

2005, c. 47, s. 131; 2007, c. 36, s. 79.

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 131; 2009, ch. 33, art. 29.

Garanties créées par législation

39 (1) Dans le cadre de toute procédure intentée à l'égard d'une compagnie débitrice sous le régime de la présente loi, les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but — ou principalement dans le but — de protéger des réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail ne sont valides que si elles ont été enregistrées avant la date d'introduction de la procédure et selon un système d'enregistrement des garanties qui est accessible non seulement à Sa Majesté du chef du Canada ou de la province ou à l'organisme, mais aussi aux autres créanciers détenant des garanties, et qui est accessible au public à des fins de consultation ou de recherche.

Rang

(2) Les garanties enregistrées conformément au paragraphe (1) :

a) prennent rang après toute autre garantie à l'égard de laquelle les mesures requises pour la rendre opposable aux autres créanciers ont toutes été prises avant l'enregistrement;

b) ne sont valides que pour les sommes dues à Sa Majesté ou à l'organisme lors de l'enregistrement et les intérêts échus depuis sur celles-ci.

2005, ch. 47, art. 131; 2007, ch. 36, art. 79.

Act binding on Her Majesty

40 This Act is binding on Her Majesty in right of Canada or a province.

2005, c. 47, s. 131.

Miscellaneous

Certain sections of *Winding-up and Restructuring Act* do not apply

41 Sections 65 and 66 of the *Winding-up and Restructuring Act* do not apply to any compromise or arrangement to which this Act applies.

2005, c. 47, s. 131.

Act to be applied conjointly with other Acts

42 The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

2005, c. 47, s. 131.

Claims in foreign currency

43 If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.

2005, c. 47, s. 131.

PART IV

Cross-border Insolvencies

Purpose

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

Obligation de Sa Majesté

40 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

2005, ch. 47, art. 131.

Dispositions diverses

Inapplicabilité de certains articles de la *Loi sur les liquidations et les restructurations*

41 Les articles 65 et 66 de la *Loi sur les liquidations et les restructurations* ne s'appliquent à aucune transaction ni à aucun arrangement auxquels la présente loi est applicable.

2005, ch. 47, art. 131.

Application concurrente d'autres lois

42 Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

2005, ch. 47, art. 131.

Créances en monnaies étrangères

43 Dans le cas où une transaction ou un arrangement est proposé à l'égard d'une compagnie débitrice, la réclamation visant une créance en devises étrangères doit être convertie en monnaie canadienne au taux en vigueur à la date de la demande initiale, sauf disposition contraire de la transaction ou de l'arrangement.

2005, ch. 47, art. 131.

PARTIE IV

Insolvabilité en contexte international

Objet

Objet

44 La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

2005, c. 47, s. 131.

Interpretation

Definitions

45 (1) The following definitions apply in this Part.

foreign court means a judicial or other authority competent to control or supervise a foreign proceeding. (*tribunal étranger*)

foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. (*principale*)

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding. (*secondaire*)

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. (*instance étrangère*)

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding. (*représentant étranger*)

(b) garantir une plus grande certitude juridique dans le commerce et les investissements;

(c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;

(d) protéger les biens des compagnies débitrices et en optimiser la valeur;

(e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

2005, ch. 47, art. 131.

Définitions

Définitions

45 (1) Les définitions qui suivent s'appliquent à la présente partie.

instance étrangère Procédure judiciaire ou administrative, y compris la procédure provisoire, régie par une loi étrangère relative à la faillite ou à l'insolvabilité qui touche les droits de l'ensemble des créanciers et dans le cadre de laquelle les affaires financières et autres de la compagnie débitrice sont placées sous la responsabilité ou la surveillance d'un tribunal étranger aux fins de réorganisation. (*foreign proceeding*)

principale Qualifie l'instance étrangère qui a lieu dans le ressort où la compagnie débitrice a ses principales affaires. (*foreign main proceeding*)

représentant étranger Personne ou organe qui, même à titre provisoire, est autorisé dans le cadre d'une instance étrangère à surveiller les affaires financières ou autres de la compagnie débitrice aux fins de réorganisation, ou à agir en tant que représentant. (*foreign representative*)

secondaire Qualifie l'instance étrangère autre que l'instance étrangère principale. (*foreign non-main proceeding*)

tribunal étranger Autorité, judiciaire ou autre, compétente pour contrôler ou surveiller des instances étrangères. (*foreign court*)

Centre of debtor company's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

2005, c. 47, s. 131.

Recognition of Foreign Proceeding

Application for recognition of a foreign proceeding

46 (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

2005, c. 47, s. 131.

Lieu des principales affaires

(2) Pour l'application de la présente partie, sauf preuve contraire, le siège social de la compagnie débitrice est présumé être le lieu où elle a ses principales affaires.

2005, ch. 47, art. 131.

Reconnaissance des instances étrangères

Demande de reconnaissance de l'instance étrangère

46 (1) Le représentant étranger peut demander au tribunal de reconnaître l'instance étrangère dans le cadre de laquelle il a qualité.

Documents accompagnant la demande de reconnaissance

(2) La demande de reconnaissance est accompagnée des documents suivants :

a) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — introductif de l'instance étrangère ou le certificat délivré par le tribunal étranger attestant l'introduction de celle-ci;

b) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — autorisant le représentant étranger à agir à ce titre ou le certificat délivré par le tribunal étranger attestant la qualité de celui-ci;

c) une déclaration faisant état de toutes les instances étrangères visant la compagnie débitrice qui sont connues du représentant étranger.

Documents acceptés comme preuve

(3) Le tribunal peut, sans preuve supplémentaire, accepter les documents visés aux alinéas (2)a) et b) comme preuve du fait qu'il s'agit d'une instance étrangère et que le demandeur est le représentant étranger dans le cadre de celle-ci.

Autre preuve

(4) En l'absence des documents visés aux alinéas (2)a) et b), il peut accepter toute autre preuve — qu'il estime indiquée — de l'introduction de l'instance étrangère et de la qualité du représentant étranger.

Traduction

(5) Il peut exiger la traduction des documents accompagnant la demande de reconnaissance.

2005, ch. 47, art. 131.

Order recognizing foreign proceeding

47 (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

2005, c. 47, s. 131.

Order relating to recognition of a foreign main proceeding

48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Ordonnance de reconnaissance

47 (1) S'il est convaincu que la demande de reconnaissance vise une instance étrangère et que le demandeur est un représentant étranger dans le cadre de celle-ci, le tribunal reconnaît, par ordonnance, l'instance étrangère en cause.

Nature de l'instance

(2) Il précise dans l'ordonnance s'il s'agit d'une instance étrangère principale ou secondaire.

2005, ch. 47, art. 131.

Effets de la reconnaissance d'une instance étrangère principale

48 (1) Sous réserve des paragraphes (2) à (4), si l'ordonnance de reconnaissance précise qu'il s'agit d'une instance étrangère principale, le tribunal, par ordonnance, selon les modalités qu'il estime indiquées :

a) suspend, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoit, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdit, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie;

d) interdit à la compagnie de disposer, notamment par vente, des biens de son entreprise situés au Canada hors du cours ordinaire des affaires ou de ses autres biens situés au Canada.

Compatibilité

(2) L'ordonnance visée au paragraphe (1) doit être compatible avec les autres ordonnances rendues sous le régime de la présente loi.

Non-application du paragraphe (1)

(3) Le paragraphe (1) ne s'applique pas si au moment où l'ordonnance de reconnaissance est rendue une procédure a déjà été intentée sous le régime de la présente loi contre la compagnie débitrice.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

- (a)** if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
- (b)** respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
- (c)** authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Terms and conditions of orders

50 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

2005, c. 47, s. 131.

Application de la présente loi et d'autres lois

(4) Le paragraphe (1) n'a pas pour effet d'empêcher la compagnie débitrice d'intenter ou de continuer une procédure sous le régime de la présente loi, de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 131.

Autre ordonnance

49 (1) Une fois l'ordonnance de reconnaissance rendue, le tribunal, sur demande présentée par le représentant étranger demandeur, peut, s'il est convaincu que la mesure est nécessaire pour protéger les biens de la compagnie débitrice ou les intérêts d'un ou plusieurs créanciers, rendre toute ordonnance qu'il estime indiquée, notamment pour :

- a)** s'il s'agit d'une instance étrangère secondaire, imposer les interdictions visées au paragraphe 48(1);
- b)** régir l'interrogatoire des témoins et la manière de recueillir des preuves ou fournir des renseignements concernant les biens, affaires financières et autres, dettes, obligations et engagements de la compagnie débitrice;
- c)** autoriser le représentant étranger à surveiller les affaires financières et autres de la compagnie débitrice qui se rapportent à ses opérations au Canada.

Restriction

(2) Si, au moment où l'ordonnance de reconnaissance est rendue, une procédure a déjà été intentée sous le régime de la présente loi contre la compagnie débitrice, l'ordonnance prévue au paragraphe (1) doit être compatible avec toute ordonnance qui peut être rendue dans le cadre de cette procédure.

Application de la présente loi et d'autres lois

(3) L'ordonnance rendue au titre de l'alinéa (1)a) n'a pas pour effet d'empêcher que soit intentée ou continuée, contre la compagnie débitrice, une procédure sous le régime de la présente loi, de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 131.

Conditions

50 Le tribunal peut assortir les ordonnances qu'il rend au titre de la présente partie des conditions qu'il estime indiquées dans les circonstances.

2005, ch. 47, art. 131.

Commencement or continuation of proceedings

51 If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

2005, c. 47, s. 131.

Obligations

Cooperation – court

52 (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation – other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

- (a)** the appointment of a person to act at the direction of the court;
- (b)** the communication of information by any means considered appropriate by the court;
- (c)** the coordination of the administration and supervision of the debtor company's assets and affairs;
- (d)** the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- (e)** the coordination of concurrent proceedings regarding the same debtor company.

2005, c. 47, s. 131; 2007, c. 36, s. 80.

Obligations of foreign representative

53 If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

- (a)** without delay, inform the court of

Début et continuation de la procédure

51 Une fois l'ordonnance de reconnaissance rendue, le représentant étranger en cause peut intenter ou continuer la procédure visée par la présente loi comme s'il était créancier de la compagnie débitrice ou la compagnie débitrice elle-même, selon le cas.

2005, ch. 47, art. 131.

Obligations

Collaboration – tribunal

52 (1) Une fois l'ordonnance de reconnaissance rendue, le tribunal collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause dans le cadre de l'instance étrangère reconnue.

Collaboration – autres autorités compétentes

(2) Si une procédure a été intentée sous le régime de la présente loi contre une compagnie débitrice et qu'une ordonnance a été rendue reconnaissant une instance étrangère visant cette compagnie, toute personne exerçant des attributions dans le cadre de cette procédure collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause.

Moyens d'assurer la collaboration

(3) Pour l'application du présent article, la collaboration peut être assurée par tout moyen approprié, notamment :

- a)** la nomination d'une personne chargée d'agir suivant les instructions du tribunal;
- b)** la communication de renseignements par tout moyen jugé approprié par celui-ci;
- c)** la coordination de l'administration et de la surveillance des biens et des affaires de la compagnie débitrice;
- d)** l'approbation ou l'application par les tribunaux des accords concernant la coordination des procédures;
- e)** la coordination de procédures concurrentes concernant la même compagnie débitrice.

2005, ch. 47, art. 131; 2007, ch. 36, art. 80.

Obligations du représentant étranger

53 Si l'ordonnance de reconnaissance est rendue, il incombe au représentant étranger demandeur :

- a)** d'informer sans délai le tribunal :

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

2005, c. 47, s. 131.

Multiple Proceedings

Concurrent proceedings

54 If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

2005, c. 47, s. 131.

Multiple foreign proceedings

55 (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

Multiple foreign proceedings

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

2005, c. 47, s. 131.

(i) de toute modification sensible du statut de l'instance étrangère reconnue,

(ii) de toute modification sensible de sa qualité,

(iii) de toute autre procédure étrangère visant la compagnie débitrice qui a été portée à sa connaissance;

b) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires.

2005, ch. 47, art. 131.

Instances multiples

Instances concomitantes

54 Si, après qu'a été rendue une ordonnance de reconnaissance à l'égard d'une instance étrangère visant une compagnie débitrice, une procédure est intentée sous le régime de la présente loi contre cette compagnie, le tribunal examine toute ordonnance rendue au titre de l'article 49 et, s'il conclut qu'elle n'est pas compatible avec toute ordonnance rendue dans le cadre des procédures intentées sous le régime de la présente loi, il la modifie ou la révoque.

2005, ch. 47, art. 131.

Plusieurs instances étrangères

55 (1) Si, après qu'a été rendue une ordonnance de reconnaissance à l'égard d'une instance étrangère secondaire visant une compagnie débitrice, une ordonnance de reconnaissance est rendue à l'égard d'une instance étrangère principale visant la même compagnie, toute ordonnance rendue au titre de l'article 49 dans le cadre de l'instance étrangère secondaire doit être compatible avec toute ordonnance qui peut être rendue au titre de cet article dans le cadre de l'instance étrangère principale.

Plusieurs instances étrangères

(2) Si, après qu'a été rendue une ordonnance de reconnaissance à l'égard d'une instance étrangère secondaire visant une compagnie débitrice, une autre ordonnance de reconnaissance est rendue à l'égard d'une instance étrangère secondaire visant la même compagnie, le tribunal examine, en vue de coordonner les instances étrangères secondaires, toute ordonnance rendue au titre de l'article 49 dans le cadre de la première procédure reconnue et la modifie ou la révoque s'il l'estime indiqué.

2005, ch. 47, art. 131.

Miscellaneous Provisions

Authorization to act as representative of proceeding under this Act

56 The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

2005, c. 47, s. 131.

Foreign representative status

57 An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

2005, c. 47, s. 131.

Foreign proceeding appeal

58 A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

2005, c. 47, s. 131.

Presumption of insolvency

59 For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

2005, c. 47, s. 131.

Credit for recovery in other jurisdictions

60 (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and

(b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires

Dispositions diverses

Autorisation d'agir à titre de représentant dans toute procédure intentée sous le régime de la présente loi

56 Le tribunal peut autoriser toute personne ou tout organe à agir à titre de représentant dans le cadre de toute procédure intentée sous le régime de la présente loi en vue d'obtenir la reconnaissance de celle-ci dans un ressort étranger.

2005, ch. 47, art. 131.

Statut du représentant étranger

57 Le représentant étranger n'est pas soumis à la juridiction du tribunal pour le motif qu'il a présenté une demande au titre de la présente partie, sauf en ce qui touche les frais de justice; le tribunal peut toutefois subordonner toute ordonnance visée à la présente partie à l'observation par le représentant étranger de toute autre ordonnance rendue par lui.

2005, ch. 47, art. 131.

Instance étrangère : appel

58 Le fait qu'une instance étrangère fait l'objet d'un appel ou d'une révision n'a pas pour effet d'empêcher le représentant étranger de présenter toute demande au tribunal au titre de la présente partie; malgré ce fait, le tribunal peut, sur demande, accorder des redressements.

2005, ch. 47, art. 131.

Présomption d'insolvabilité

59 Pour l'application de la présente partie, une copie certifiée conforme de l'ordonnance d'insolvabilité ou de réorganisation ou de toute ordonnance semblable, rendue contre une compagnie débitrice dans le cadre d'une instance étrangère, fait foi, sauf preuve contraire, de l'insolvabilité de celle-ci et de la nomination du représentant étranger au titre de l'ordonnance.

2005, ch. 47, art. 131.

Sommes reçues à l'étranger

60 (1) Lorsqu'une transaction ou un arrangement visant la compagnie débitrice est proposé, les éléments énumérés ci-après doivent être pris en considération dans la distribution des dividendes aux créanciers d'un débiteur au Canada comme s'ils faisaient partie de la distribution :

a) les sommes qu'un créancier a reçues — ou auxquelles il a droit — à l'étranger, à titre de dividende, dans le cadre d'une instance étrangère le visant;

b) la valeur de tout bien de la compagnie que le créancier a acquis à l'étranger au titre d'une créance prouvable ou par suite d'un transfert qui, si la présente loi

outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

Restriction

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

2005, c. 47, s. 131.

Court not prevented from applying certain rules

61 (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

2005, c. 47, s. 131; 2007, c. 36, s. 81.

PART V

Administration

Regulations

62 The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including regulations

(a) specifying documents for the purpose of paragraph 23(1)(f); and

(b) prescribing anything that by this Act is to be prescribed.

2005, c. 47, s. 131; 2007, c. 36, s. 82.

Review of Act

63 (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to those provisions.

lui était applicable, procurerait à un créancier une préférence sur d'autres créanciers ou constituerait une opération sous-évaluée.

Restriction

(2) Le créancier n'a toutefois pas le droit de recevoir un dividende dans le cadre de la distribution faite au Canada tant que les titulaires des créances venant au même rang que la sienne dans l'ordre de collocation prévu par la présente loi n'ont pas reçu un dividende dont le pourcentage d'acquittement est égal au pourcentage d'acquittement des éléments visés aux alinéas (1)a) et b).

2005, ch. 47, art. 131.

Application de règles étrangères

61 (1) La présente partie n'a pas pour effet d'empêcher le tribunal d'appliquer, sur demande faite par le représentant étranger ou tout autre intéressé, toute règle de droit ou d'équité relative à la reconnaissance des ordonnances étrangères en matière d'insolvabilité et à l'assistance à prêter au représentant étranger, dans la mesure où elle n'est pas incompatible avec les dispositions de la présente loi.

Exception relative à l'ordre public

(2) La présente partie n'a pas pour effet d'empêcher le tribunal de refuser de prendre une mesure contraire à l'ordre public.

2005, ch. 47, art. 131; 2007, ch. 36, art. 81.

PARTIE V

Administration

Règlements

62 Le gouverneur en conseil peut, par règlement, prendre toute mesure d'application de la présente loi, notamment :

a) préciser les documents pour l'application de l'alinéa 23(1)f);

b) prendre toute mesure d'ordre réglementaire prévue par la présente loi.

2005, ch. 47, art. 131; 2007, ch. 36, art. 82.

Rapport

63 (1) Dans les cinq ans suivant l'entrée en vigueur du présent article, le ministre présente au Sénat et à la Chambre des communes un rapport sur les dispositions de la présente loi et son application dans lequel il fait état des modifications qu'il juge souhaitables.

Reference to parliamentary committee

(2) The report stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that is designated or established for that purpose, which shall

(a) as soon as possible after the laying of the report, review the report; and

(b) report to the Senate, the House of Commons or both Houses of Parliament, as the case may be, within one year after the laying of the report of the Minister, or any further time authorized by the Senate, the House of Commons or both Houses of Parliament.

2005, c. 47, s. 131.

Examen parlementaire

(2) Le comité du Sénat, de la Chambre des communes, ou mixte, constitué ou désigné à cette fin, est saisi d'office du rapport et procède dans les meilleurs délais à l'étude de celui-ci et, dans l'année qui suit le dépôt du rapport ou le délai supérieur accordé par le Sénat, la Chambre des communes ou les deux chambres, selon le cas, leur présente son rapport.

2005, ch. 47, art. 131.

RELATED PROVISIONS

— R.S., 1985, c. 27 (2nd Supp.), s. 11

Transitional: proceedings

11 Proceedings to which any of the provisions amended by the schedule apply that were commenced before the coming into force of section 10 shall be continued in accordance with those amended provisions without any further formality.

— 1990, c. 17, s. 45(1)

Transitional: proceedings

45 (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1997, c. 12, s. 127

Application

127 Section 120, 121, 122, 123, 124, 125 or 126 applies to proceedings commenced under the *Companies' Creditors Arrangement Act* after that section comes into force.

— 1998, c. 30, s. 10

Transitional — proceedings

10 Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 2000, c. 30, s. 156(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.

— 2000, c. 30, s. 157(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.

— 2000, c. 30, s. 158(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.

DISPOSITIONS CONNEXES

— L.R. (1985), ch. 27 (2^e suppl.), art. 11

Disposition transitoire : procédure

11 Les procédures intentées en vertu des dispositions modifiées en annexe avant l'entrée en vigueur de l'article 10 se poursuivent en conformité avec les nouvelles dispositions sans autres formalités.

— 1990, ch. 17, par. 45(1)

Disposition transitoire : procédures

45 (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles s'appliquent des dispositions visées par la présente loi se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1997, ch. 12, art. 127

Application

127 Les articles 120, 121, 122, 123, 124, 125 ou 126 s'appliquent aux procédures intentées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* après l'entrée en vigueur de l'article en cause.

— 1998, ch. 30, art. 10

Procédures

10 Les procédures intentées avant l'entrée en vigueur du présent article et auxquelles s'appliquent des dispositions visées par les articles 12 à 16 se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 2000, ch. 30, par. 156(2)

(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2000, ch. 30, par. 157(2)

(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2000, ch. 30, par. 158(2)

(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2001, c. 34, s. 33(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.

— 2005, c. 47, s. 134, as amended by 2007, c. 36, s. 107

Companies' Creditors Arrangement Act

134 An amendment to the *Companies' Creditors Arrangement Act* that is enacted by any of sections 124 to 131 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.

— 2007, c. 29, s. 119

Companies' Creditors Arrangement Act

119 An amendment to the *Companies' Creditors Arrangement Act* made by section 104 or 106 of this Act applies only to a debtor company in respect of which proceedings under that Act are commenced on or after the day on which the amendment comes into force.

— 2007, c. 36, s. 111

Companies' Creditors Arrangement Act

111 The amendment to the *Companies' Creditors Arrangement Act* that is enacted by section 67 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.

— 2018, c. 27, s. 271

Companies' Creditors Arrangement Act

271 Subsection 36(8) of the *Companies' Creditors Arrangement Act*, as enacted by section 269, applies only in respect of proceedings that are commenced under that Act on or after the day on which this section comes into force.

— 2001, ch. 34, par. 33(2)

(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2005, ch. 47, art. 134, modifié par 2007, ch. 36, art. 107

Loi sur les arrangements avec les créanciers des compagnies

134 Toute modification à la *Loi sur les arrangements avec les créanciers des compagnies* édictée par l'un des articles 124 à 131 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* à la date d'entrée en vigueur de la modification ou par la suite.

— 2007, ch. 29, art. 119

Loi sur les arrangements avec les créanciers des compagnies

119 La modification apportée à la *Loi sur les arrangements avec les créanciers des compagnies* par les articles 104 ou 106 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de cette loi à la date d'entrée en vigueur de la modification ou par la suite.

— 2007, ch. 36, art. 111

Loi sur les arrangements avec les créanciers des compagnies

111 La modification à la *Loi sur les arrangements avec les créanciers des compagnies* édictée par l'article 67 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* à la date d'entrée en vigueur de la modification ou par la suite.

— 2018, ch. 27, art. 271

Loi sur les arrangements avec les créanciers des compagnies

271 Le paragraphe 36(8) de la *Loi sur les arrangements avec les créanciers des compagnies*, édicté par l'article 269, ne s'applique qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur du présent article ou par la suite.

— 2019, c. 29, s. 150

150 Section 11.001, subsections 11.02(1) and 11.2(5) and sections 11.9 and 18.6 of the *Companies' Creditors Arrangement Act*, as enacted by sections 136 to 140, apply only in respect of proceedings that are commenced under that Act on or after the day on which that section or subsection, as the case may be, comes into force.

— 2023, c. 6, s. 7(2)

Exception — companies

7 (2) Subsections 5(1) and (2) do not apply in respect of a company that, on the day before the day on which those subsections come into force, participated in a prescribed pension plan for the benefit of its employees until the fourth anniversary of the day on which this Act comes into force.

— 2024, c. 15, s. 276

Companies' Creditors Arrangement Act

276 The definition *company* in subsection 2(1) of the *Companies' Creditors Arrangement Act*, as enacted by section 274, applies only in respect of proceedings that are commenced under that Act on or after the day on which that section 274 comes into force.

— 2019, ch. 29, art. 150

150 L'article 11.001, les paragraphes 11.02(1) et 11.2(5) et les articles 11.9 et 18.6 de la *Loi sur les arrangements avec les créanciers des compagnies*, édictés par les articles 136 à 140, ne s'appliquent qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur de l'article ou du paragraphe, selon le cas, ou par la suite.

— 2023, ch. 6, par. 7(2)

Exception — compagnies

7 (2) Les paragraphes 5(1) et (2) ne s'appliquent pas à la compagnie qui, la veille de leur entrée en vigueur, participait à un régime de pension réglementaire institué pour ses employés, et ce, jusqu'au quatrième anniversaire de l'entrée en vigueur de la présente loi.

— 2024, ch. 15, art. 276

Loi sur les arrangements avec les créanciers des compagnies

276 La définition de *compagnie*, au paragraphe 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, édictée par l'article 274, ne s'applique qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur de cet article 274 ou après cette date.

AMENDMENTS NOT IN FORCE

— 2024, c. 15, s. 274

274 The definition *company* in subsection 2(1) of the *Companies' Creditors Arrangement Act* is replaced by the following:

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies, companies to which the *Trust and Loan Companies Act* applies and prescribed public post-secondary educational institutions; (*compagnie*)

MODIFICATIONS NON EN VIGUEUR

— 2024, ch. 15, art. 274

274 La définition de *compagnie*, au paragraphe 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, est remplacée par ce qui suit :

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées au sens de l'article 2 de la *Loi sur les banques*, les compagnies de télégraphe, les compagnies d'assurances, les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt* et les établissements publics d'enseignement postsecondaire prévus par règlement. (*company*)

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 CLEARPIER ACQUISITION CORP. AND 1000238820 ONTARIO INC.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

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