

Case Name:
Air Canada (Re)

**IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as Amended
AND IN THE MATTER OF Section 191 of the Canada Business
Corporations Act, R.S.C. 1985, c. C-44, as Amended
AND IN THE MATTER OF a Plan of Compromise or
Arrangement of Air Canada and those Subsidiaries
Listed on Schedule "A"
APPLICATION UNDER the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as Amended**

[2003] O.J. No. 6254

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

2003 CarswellOnt 9109

Docket: 03-CL-4932

Ontario Superior Court of Justice - Commercial List

J.M. Farley J.

Heard: July 15, 18, 2003.

Oral judgment: July 18, 2003. Released: July 21, 2003.

(31 paras.)

Counsel:

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Ian Dick, Jacqueline Dais-Visca for Attorney General of Canada.

Pascale Giguère for Commissioner of Official Languages.

Dougald Brown for Privacy Commissioner of Canada.

John R. Varley for Non-Union Retiree Representatives.

B.P. Bellmore for Executive, Senior Management, Management and Administrative Technical Support Employees Representative.

Heath L. Whiteley for Goodyear Tire & Rubber Company.

Robert Thornton, Greg Azeff for GE Capital Aviation Services Inc. (GECAS).

Jeremy Dacks for GE Capital.

Michael Kainer for Canadian Autoworkers.

James C. Tory for Air Canada Directors.

Stephen Wahl, Murray Gold for CUPE.

Richard B. Jones for Air Canada Pilots Association.

Elizabeth Shilton for IAMAW.

Peter Griffin, Monique Jilesen for Monitor, Ernst & Young Inc.

Kevin McElcheran, Linc Rogers for CIBC.

Joseph Bellissimo for Orix Corporation, Montrose & Company, Mitsubishi Corporation, Banca Intesca, Lambard Capital, Finova Capital Corp., Pegasus Aviation, et al.

1 J.M. FARLEY J. (orally):-- These reasons deal with what has been termed the "Regulators' Motions". As argued, these motions by the Attorney General of Canada ("AG") and the Privacy Commissioner ("PC") were to the effect that this Court, the Superior Court of Justice, in dealing with the Air Canada applicants (collectively, "AC") in relation to the Companies' Creditors Arrangement Act ("CCAA") proceedings had no jurisdiction pursuant to the CCAA to impose a stay as to any of the federal departments or commissions ("Regulators") which regulate or otherwise deal with AC. They also argued that this court did not have any inherent jurisdiction to impose such a stay if this court lacked specific jurisdiction under the CCAA. Furthermore they asserted that the CCAA was in conflict with other federal legislation such as the Canada Labour Code (e.g. s. 123(1) and s. 168(1)), which contains language to the effect that the legislation is to be applied and acted upon notwithstanding the provisions of any other legislation. Please see my endorsement of July 18, 2003 (following my oral determination in court at the end of the hearing that day) that I had reached the conclusion that this court did have jurisdiction to issue a stay vis-à-vis the Regulators and that there was no conflict with the legislation. I indicated that I would give reasons later. These are the promised reasons. In addition I will deal with the other elements of the motions as to onus and whether or not a stay is justified in the circumstances initially and on an ongoing basis (the Regulators asserting that stays concerning regulatory functions ought to be granted sparingly and only where it is demonstrated that to allow the regulatory functions to continue would be of catastrophic or devastating consequences to a CCAA applicant in its restructuring activities or at least that it would materially interfere with such applicant focusing on such activities).

2 As previously indicated the Commissioner of Official Languages ("COL") withdrew her motion on July 18, 2003; it appears that she has worked out a modus vivendi with AC as to her ongoing activities.

3 The various AC unions and AC have also reached a modus vivendi as indicated in the attached draft order which I have found appropriate in the circumstances. This contemplates that matters from June 1, 2003 forward will be dealt with on an ongoing basis.

4 I also note that these motions are without prejudice to the discussions which the Superintendent of Financial Institutions ("OSFI") is having with AC and with the AC unions and others. I understand that these discussions are being engaged in to see if there can be a modus vivendi with respect to pension related matters.

5 Throughout these proceedings to date, including the end of the July 18th hearing, I have urged those concerned to engage in meaningful dialogue to see if matters of concern can be dealt with in an efficient and effective manner, all with a view to seeing if there is a reasonable opportunity for AC to be restructured on an ongoing viable basis in a very competitive industry, an industry which faces many challenges (some of longstanding and others of recent impact such as SARS, the Iraqi War, the threat of terrorism and economic doldrums). Specifically on July 18th I requested AC and the Regulators to engage in bona fide objective discussions as to how to deal with regulatory activities on a streamlined effective and efficient basis that would minimize the use of A resources but at the same time ensure that each case was reasonably dealt with to ensure justice. Unfortunately as was candidly acknowledged at the hearing, in essence over the past three months, there has been a "dialogue of the deaf" by both sides as AC has insisted that it need not respond to any Regulator at all (although in fact, it appears that elements of AC have continued dealing with some of the Regulators on a "business as (almost) usual" basis), while at the same time the Regulators have insisted that there was no jurisdiction for paragraph 3 of the (Amended and Restated) Initial Order which provides:

STAY OF PROCEEDINGS

THIS COURT ORDERS that, until and including June 30, 2003, or such later date as the Court may order (the "Stay Period"), (a) no suit, action, enforcement process, extra-judicial proceeding or other proceeding (including a proceeding in any court, statutory or otherwise) (a "Proceeding") against or in respect of an Applicant or any present or future property, right, assets or undertaking of an Applicant wherever located, and whether held by an Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise, and without limiting the generality of the foregoing, including the leasehold interests of the Applicants in my aircraft and engines leased by an Applicant, whether in the possession of an Applicant, or subleased to another entity (and for greater certainty excluding any other title or other interest in such aircraft and engines held by other parties), any and all real property, personal property and intellectual property of an Applicant, and any and all securities, instruments, debentures, notes or bonds issued to, or held by or on behalf of an Applicant (the "Applicants' Property"), shall be commenced and any and all Proceedings against or in respect of an Applicant or the Applicants' Property already commenced be and are hereby stayed and suspended, and (b) all persons are enjoined and restrained from realizing

upon or enforcing by court proceedings, private seizure or otherwise, any security of any nature or description held by that person on the Applicants' Property or from otherwise seizing or retaining possession of the Applicants' Property, or from seizing, detaining or retaining aircraft operated by the Applicants.

6 While the stay is now operative to September 30, 2003, it has been indicated that under the foreseeable circumstances, the objective of AC is to emerge from CCAA protection by the end of the 2003 year with a restructured operation pursuant to a Reorganization Plan. Given the nature of the industry, it is of course "desirable for AC to see if it can do that emergence at the earliest reasonable date. Given the myriad of issues to be dealt with, it appears to me that year end is not unreasonable -- but if it is possible to do it earlier, so much the better. Given the circumstances here, that is a reasonably brief period.

7 I am of the view that every one truly appreciates that the time spent preparing for litigation and in court is not as desirably or productively spent as using that same time to work out matters on a reasonable functional basis, if that is possible with goodwill flowing both ways. The efforts of those who have engaged in such activities are recognized and applauded.

8 As was made quite clear by the Regulators' counsel during the hearing, these Motions are not in any respect to be considered as requests by the Regulators to lift the stay.

9 AC has proposed that as a compromise the Regulators be allowed to engage in their activities as such engage what AC termed the four pillars of safety, security, health and airworthiness but that there be no enforcement of any decision by the Regulators as to these areas.

CCAA Stay

10 Section 11(3) and (b) and (c) of the CCAA provides:

- s. 11(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

...

- (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.

11 The Regulators submitted that the term "proceedings" ought to be restricted to judicial proceedings involving creditors in the sense of economic, financial, business or commercial concerns being affected; however, they did acknowledge that quasi-judicial matters might also be dealt with and affected by a CCAA stay in the sense that a matter might be the subject of an (non-court) arbitration. The Regulators rely on the views expressed at p. 173 of Sullivan and Dreidger, *Construction of Statutes* 4th Ed. (Markham: Butterworths

Canada Limited, 2002) at pp. 173-4 as to the associated words rule. With respect, the term proceedings is to my view a term which imparts with it a great deal more than "action" or "suit" in their judicial or quasi-judicial element.

12 The CCAA is remedial legislation in its purest sense. See *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) at p. 306 (Doherty, J.A. dissenting but not on this point). The term "proceeding" has been determined before as not referring solely to legal proceedings -- or proceedings involving economic, financial, business or commercial rights. See *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.* (2000), 48 O.R. (3d) 746 (Ont. S.C.J. [Commercial List]) where Lane, J. was dealing with a regulatory hearing proposed by the Toronto Stock Exchange. See also *Versatech Group Inc., Re*, [2000] O.J. No. 3785 (Ont. S.C.J. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div. [Commercial List]). Although technically in obiter, Wachowich, J. had no hesitation in going beyond the narrow view of "proceedings" urged on me by the Regulators when he said at pp. 583-4 of *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 11 D.L.R. (4th) 576 (Alta. Q.B.):

Meridian argues further on the basis of the ejusdem generis rule that the interpretation of "other proceeding" in s. 11 of the Companies' Creditors Arrangement Act is limited to proceedings which would fall within the genus indicated by the words "suit" and "action". This, too, indicates that the term as used in the Act ought to be restricted to proceedings which necessarily involve a court or court official.

These arguments are persuasive. None the less, 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 must consider, for instance, the fact that it may still be possible to make distress without requiring a sheriff or his bailiff, as for example, on a chattel mortgage. It might well be necessary in terms of s. 11 in some future situations. As a result, in 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". (emphasis added)

I agree with these views. Indeed there are no such restrictive words on proceedings nor are there any words which denote that the jurisdiction to grant a stay is only to deal with

economic, financial, business or commercial matters. I would note that Parliament has had ample opportunity over the past two decades to amend section 11(3)(b) and (c) in the way urged on me by the Regulators if it felt that desirable; that could have been done in the 1992 or 1997 amendments pursuant to the five year review procedure. Amendments were made at those times in various areas; however, it appears that Parliament recognized that, with respect to the types of applicants which could apply for restructuring protection under the CCAA, it was undesirable to restrict the discretion of the court to deal with matters which involve delicate balancing of various interests with a view to ensuring that productive resources were utilized to the maximum degree for the overall benefit to Canada's social and economic values. Of course that discretion is not without restraint -- rather that discretion is to be judicially exercised according to the circumstances applicable in any particular case.

13 That is not to say that s. 11(3) has not been affected by amendment. In 1997, s. 11.1(2) was added to underscore that any stay granted under the CCAA did not affect certain activities related to the Canadian Payments Act. In 2001, s. 11.1(2) was modified to read:

11.1(2) No order may be made under this Act staying or restraining the exercise of my right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the Canadian Payments Act from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.

That same year, the CCAA was further amended by adding s. 11.11:

11:11 No order may be made under this Act staying or restraining

- (a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions 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 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.

It is clear that the activities envisaged by these restricting changes are not in any way related to judicial or quasi-judicial proceedings. Nor can they be said to be of the nature of

the economic, financial, business or commercial concerns pressed on me by the Regulators. Indeed most of these activities could reasonably be said to be at a polar edge of the spectrum of activities well beyond the regulatory activities which the Regulators are engaged in. The Regulators suggested that these amendments were merely clarifications of what was already understood; however in my view, if it were already understood, then there would have been no need for clarification of that nature.

14 I am of the view that Section 11(3) provides this court with specific jurisdiction to grant the stay complained about by the Regulators.

15 I did observe during the hearing that the natural human tendency of legal counsel to add into "routine orders" additional language or provisions so as to "improve" the workability of the order (but within the four corners of the authority governing) sometimes backfires. It may well be that in expanding on the language of s. 11(3) inadvertently the draftspersons of these draft orders open up what might be perceived as loopholes and thus create false expectations amongst some of those affected. The Commercial List Users Committee is presently engaged in seeing if there can be a consensus on a "perfect order" for matters such as Initial CCAA orders; however, I recognize that legal counsel will undoubtedly be tempted to improve on that "perfection". It is perhaps the "overworking" of language in such orders that leads to misinterpretation which I respectfully am concerned may have been the case in *Always Travel Inc. v. Air Canada*, [2003] F.C.J. No. 933, 2003 FCT 707 (Fed. T.D.) regarding the question of "court".

Inherent Jurisdiction Stay

16 Even if I were to have reached the conclusion that this court had no jurisdiction under the CCAA to stay the activities of the Regulators, then I would be of the view that this court has the inherent jurisdiction to do so. See *Loxtave Buildings of Canada Ltd., Re* (1943), 25 C.B.R. 22 (Sask. K.B.):

It is well established law that nothing shall be intended to be out of the jurisdiction of a Superior Court but what expressly appears to be so. The jurisdiction of the King's Superior Courts over matters cognizable by them can not be taken away but by express words or perhaps by necessary implication arising from the use of words absolutely inconsistent with the exercise of the jurisdiction, or to which effect can not be given except by exclusion of such jurisdiction. If a Court has jurisdiction of the principal matter it has also jurisdiction over all matters incident thereto and may try them according to the course of their law so that it be not contrary to the common law. I realize that the Bankruptcy law is statutory mainly and a Court should not go beyond the provisions of the statute applicable. But, if the subject matter is within the statute, the Court may draw on its inherent powers to give effect to the provisions of the statute applicable.

(emphasis added)

See also *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) and *Scaffold Connection Corp., Re* (2000), 15 C.B.R. (4th) 289 (Alta. Q.B.) at p. 295. I am thoroughly familiar with the concept that inherent jurisdiction has no

place to fill the gap if there is indeed no gap: see *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), wherein I followed the view of the Supreme Court of Canada in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), 57 D.L.R. (3d) 1 (S.C.C.) while noting:

However, it is fair to say that the S.C.C. in *Baxter*, when faced with the choice between an unpractical but "legal" solution and a procedural one, opted for the unpractical one. Thus, one is constrained from distinguishing on the basis of the recognition of the CCAA over the past 15 years having a familial relationship with *Necessity*.

17 However, it does not appear to me that there is any statute (or binding decision) which constrains or eliminates the ability of this court to grant a stay pursuant to its inherent jurisdiction provided that that discretion is judicially exercised in the circumstances prevailing. As I ruled at pp. 296-7 of *Royal Oak Mines Inc.*, in order to accomplish the goal of facilitating the restructuring of a debtor company, the court has a fund of discretionary powers arising from its inherent jurisdiction to make orders not only to do justice between the parties or other affected person but also to do what practicality demands. See *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at p. 196 citing *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) as to the recognition that appellate courts are reluctant to interfere with ongoing supervision of a CCAA matter, appreciating that the supervising judge is required of course to exercise his or her discretion judicially.

Question of Conflict with Other Legislation

18 The Regulators appeared to have approached these motions on the basis that the stay which has been granted is a permanent stay. Nothing could be further from the truth though since this stay is a temporal one only. Once AC emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved Regulator matter. As discussed above, it is contemplated that the time horizon for that will be the end of 2003. By that time, if so, then AC will have been in CCAA proceedings for some nine months. It would not seem to me that the adage of "Justice delayed is justice denied" is truly applicable in these circumstances on a general basis (I do however recognize that there may be particular instances where that nine month period may cause some "justice delivery" difficulties; I would think that any such instances could be handled by reasonable discussion). See below for my view concerning the resource difficulty. Since the temporal stay is of an anticipated nine month temporary duration, then I do not see that there is any conflict with federal legislation such as the Canada Labour Code which has "notwithstanding any other legislation" language. See also *United Used Auto & Truck Parts Ltd., Re* (2000), 77 B.C.L.R. (3d) 143 (B.C. S.C. [In Chambers]) at p. 158, para. 38; *Minister of National Revenue v. Points North Freight Forwarding Inc.* (2000), 24 C.B.R. (4th) 184 (Sask. Q.B.) at p. 189 (Para. 14). Given my conclusion on there being no conflict, it is unnecessary to conclude whether or not federal jurisdiction to make laws respecting labour statutes is limited to its use as an ancillary power as to the regulation of federal undertakings as alluded to at p. 775 of *Québec (Commission du salaire minimum) c. Bell Telephone Co.*, [1966] S.C.R. 767 (S.C.C.). AC was asserting that the federal jurisdiction with respect to insolvency matters, in contrast, was a core area of jurisdiction enu-

merated in section 91(21) of the Constitution Act, 1967. I pause to note that if AC were not to successfully emerge from these CCAA proceedings, then most, if not all, of the accumulated regulatory matters would become moot. Since these proceedings were initiated, no one has come forward to indicate that they would be advantage by a demise of AC; indeed when participants in these proceedings (including the Regulators) were asked that question, they all responded negatively. I take it as an unspoken given that the Regulators will do everything that is reasonably possible to avoid that possibility with its recognized very negative effects upon the stakeholders of AC, the great disruption that would entail for the public and the necessary loss of domestic economic activity and jobs. I am therefore confident that with the issue of principle as to whether or not this court has jurisdiction decided, AC and the Regulators will be able to work together to achieve a *modus vivendi* and not get bogged down.

19 Indeed it appears to me that if there is a bogging down, then there is the significant risk that momentum, the positive momentum which the AC proceedings have generated since their initiation will be halted. CCAA proceedings are somewhat like bicycles; if the rider loses momentum, the bicycle and the rider fall over. Neither should the parties get the Court bogged down as in a CCAA situation by bringing to it indefinitely and infinitely small item by small item as opposed to working out matters, if reasonably possible.

20 But I must not lose sight of the other issues which were argued and which of course affect the ultimate determination of these motions.

Onus

21 Firstly, allow me to deal with the question of onus. The onus is on an applicant in CCAA proceedings to demonstrate that it is appropriate to have a stay of proceedings. However, it must be recognized that insolvency situations are inherently chaotic. Perhaps the AC one is a prime example of that as events radically overtook which had been anticipated to be a consensual restructuring, forcing AC to run gasping to the Court for this CCAA proceeding. That was recognized at the initial order stage of April 1, 2003, with the indication that it was recognized that the order would have to undergo the critical eye of stakeholders as it had been drafted in great haste. As discussed part of AC's problems have been of longstanding and ought in fairness to have been functionally addressed well before now (an example of this would be the imperfect operational and functional merger of the old Air Canada and the old Canadian Airlines); I have indicated above the more recent impacts but did not there mention the pension deficit as to which OSFI took action in late March. It was appreciated by counsel during the hearing that on a practical and now routine basis, initial CCAA orders have broadly drafted stay provisions which may thereafter be tailored or whittled down as circumstances require. The broad stay is required to give initial stability to a crisis situation. Certainly the condition of AC at the time of the application was perilous; it required the stabilization that a broad stay provision would give.

22 I would note that the initial application material did not provide any information specifically with respect to the stay necessity. It is only with the affidavit affirmed July 8, 2003 by Louise-Hélène Sénécal, internal counsel at AC that AC has specifically dealt with the need for such a stay (as modified as suggested above). Ms. Sénécal was not cross-examined on this affidavit but that may have been the result or a function of the Regulators growing (and reasonably so in my view) impatient with getting their motions finally on. I

have no doubt that in a CCAA proceeding which has fewer fires to put out than this AC one, justification for the stay would be forthcoming on a more timely basis. However in my view it is not inappropriate for the court now to receive this type of "fresh evidence" and I note that the Regulators did not take much issue with its introduction.

Justification of the Stay Being Granted

23 The Sénécal Affidavit may be criticized as being too general. However it must be viewed in the context of the prevailing circumstances. AC is a large enterprise with at peak some forty thousand employees; it operates domestically and internationally; its facilities are widespread; it is involved in an industry which interacts with a very large number of regulatory authorities; its activities bring it into contact with an immense number of the travelling public, some of whom are veteran fliers and others who may be novices. From the material of the Regulators it appears that there are innumerable interfaces between these Regulators and AC as to various concerns. It would be relatively fruitless to specify each and every interface incident and advise in detail as to them.

24 As indicated above, AC has made progress in dealing with various of its problems. Perhaps the most important of these, at least to date, is the negotiation of revised collective agreements with its nine unions. That was accomplished in three weeks of intensive facilitation supervised by Winkler, J. (as to whom all concerned have expressed an immense debt of gratitude well deserved); that perhaps ought to be contrasted with the glacial pace of labour negotiations prior to the CCAA proceedings. These negotiations with the subsequent sanctioning of the amendments by the various memberships and the ongoing ancillary involvement with ongoing labour matters as a result have no doubt left AC's labour and legal departments breathless. The legal department (together with outside legal assistance) has also continued to be involved in negotiations relating to other areas and existing contracts. Based on a fair reading of the Sénécal Affidavit in these circumstances, I would conclude that the legal side resources of AC to deal with regulatory matters is under strain. If AC were not so heavily involved with regulatory matters as it appears that it is, then I would have expected better detail. However I am not of the view that the Sénécal Affidavit was a formalistic statement as referred to at paragraph 5 of *Versatech Group Inc.* It seems to me that with the arrangements that AC now has with the unions as to matters June 1, 2003 on and with its proposal as to the four pillars of safety, security, health and airworthiness (subject to my views below), AC is in the range of having regulatory matters impair its ability to deal with its business and its restructuring activities on an ongoing basis. I note that in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.), Gibbs J.A. for the British Columbia Court of Appeal stated at pp. 311-12:

... it would appear to be 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 negotiation period. The power is discretionary and therefore to be exercised judicially.

25 Blair, J. in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.) observed at p. 346 that the Court's power to grant a stay under sec-

tion 11(3) of the CCAA extended "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". See also *Noreen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) where Forsyth, J. at page 16 stated:

Surely a necessary part of promoting the continuance of a company is to give that company some time to stop and gather its faculties without interference from affected parties for a brief period of time. In my opinion, the distinction between creditors' contractual rights and the contractual rights of non-creditor third parties that Noreen asks me to draw is not a helpful one in these circumstances. Continuance of a company involves more than a consideration of creditor claims.

26 See also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77 where I observed:

However, I must be cognizant of the fact that activity on Sairex's part would likely require activity on Algoma's part -- thereby requiring the deployment of executive time in this manner which can be pursued after Algoma comes out from its C.C.A.A. shell, rather than such executives spending their time on the restructuring process or general operations of making and selling steel at a critical time. It would also result in legal expense and possible diversion of legal talent.

I would note that I mentioned "executive" time. To my view if regulatory matters can be reasonably dealt with on a managerial or lower level then that would not interfere with executive time. However that should not presuppose that such managerial or lower level resource might not be actively engaged in putting out more "immediate fires" than what might be considered "routine" regulatory matters. I would also observe that individually no one regulatory matter would likely be a "killer", but it is possible to die the "death of a thousand cuts" if one were to take on all of the matters in the aggregate.

27 The Regulators rely heavily on *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.*, supra. What Lane, J. said at page 752 was that he must weight the interests of affected parties. In that case he did so, but as he indicated at page 747: "I do not regard them [in *terrorem* examples] as useful because I do not regard my task as setting out a rule of general application. Rather, my task is to determine, on these particular facts and dealing with the specific legislation involved whether to exercise my discretion to lift the CCAA stay". In the present case, I am similarly not setting out a rule of general application. Further, as opposed to the situation which Lane J. faced, I specifically am not dealing with a list stay request as the Regulators have indicated they have made no such request.

28 It seems to me that it is a reasonable conclusion that AC has made out a case for the continuance of the stay with the modifications noted above on a balancing of interests basis recognizing the focus feature. However with respect to the four pillars vis-a-vis the Regulators, I would adjust that proposal so that the Regulators, if they saw fit in any particular situation based on objective justifiable grounds, would be permitted to immediately enforce any regulatory order or equivalent. However, if AC were to be of the view that the

enforcement were unnecessary in the circumstances, then AC could apply to this court to have the reasonability of the Regulator's action determined. If this court were of the opinion that the action taken was unreasonable in the circumstances, then an appropriate penalty would be levied against the Regulator. I cannot foresee that such an application would ever come to pass, given the goodwill which exists between a regulator and one regulated, especially when the one regulated is in such a delicate financial condition. I may be spoken to about the appropriate language to be embodied in the order if perchance the sides were unable to agree.

Modus Vivendi

29 Again I come back to the need for AC and the Regulators to sit down and come to a modus vivendi, hopefully with a streamlined system. It will not do AC any good to delay dealing with matters which it could otherwise usefully deal with prior to emergence from the CCAA proceedings without undue strain on available resources. To do otherwise bears the risk of being knocked over by a tidal wave of pent up issues; similarly if matters are delayed, then there is the further problem that any third party complainants become more frustrated than they were when they made the complaints. The three Cs of the Commercial List: communication, cooperation and common sense might be usefully employed by AC and its personnel. I would observe that if there is a failure to communicate on a meaningful timely basis with respect to even matters which are outside the control of AC -- e.g., the weather, then travellers start to complain that AC is not doing enough to "control the weather". In other words, bad customer relationships spill over; but if they are attended to on a preventative basis (as opposed to a reactive basis), they can be more easily managed to the satisfaction of all concerned.

30 The PC advises that it has five active files, one of which is fully ready for the release of a prepared report. As I understand the legislation under which the PC operates, after an investigation the PC releases a non-binding report to the complainant and the company (here AC). The complainant can then choose to proceed further before the Federal Court. Based on that I can see no objection to the PC releasing that report, with the proviso that the complainant would have to obtain a lift of the stay from this court in order to proceed with a further Federal Court proceeding. Given that apparently there is a designated manager of privacy compliance, I would think it advisable for AC and the PC in their dialogue to review whether or not that compliance manager could be allowed to deal with the other four and possibly future privacy matters if not otherwise reengaged in more pressing current matters.

Conclusion

31 In conclusion, I would dismiss the Motions of the regulators. That of course is without prejudice to any Regulator moving to lift the stay. However, I assume that before that will happen, that AC and the Regulators would have exhausted their bona fide discussions on necessity, timeliness, prioritization and related matters. Each should approach the matter in a businesslike and flexible way, recognizing that it is important for AC to have the basis for maintaining the confidence of the public and to be seen to have that confidence with it on a team basis putting consumer requirements first as an ongoing principle to maintain good will and loyalty. This will take, as I have previously expressed, respect and trust flowing both ways (originally I expressed this mostly as to relations between management and

labour -- but in addition I now express it between the labour-management team and the Regulators.

J.M. FARLEY J.

* * * * *

Appendix

NOTE: This order is without prejudice to all parties' positions on the union motions, or to the Regulators' Motions.

THIS COURT ORDERS that effective upon the ratification of new and/or modified collective agreements (the "Modified Collective Agreements") with respect to any of the Applicants' bargaining units consequent upon the agreements reached during the mediation before Justice Winkler pursuant to the order of this Court dated May 9, 2003,

- (a) Proceedings in respect of events, actions or circumstances which occur on or after June 1, 2003 which arise from such Modified Collective Agreements (including, without limitation, grievances or arbitration procedures); and
- (b) Proceedings pursuant to Part I or Part II of the Canada Labour Code which arise from events, actions or circumstances which occur on or after June 1, 2003,

shall not be deemed to be stayed notwithstanding the Amended and Restated initial Order or any subsequent amendments thereof, provided however that (i) nothing prevents the Applicants from applying to this Court to stay any specific proceeding referred to in subparagraph (a) or (b) above, and/or the enforcement of any direction, decision or order of the Canada Industrial Relations Board made pursuant to Section 134 or 156 of the Canada Labour Code; and (ii) no proceeding may be taken in respect of any statutory offence provision under Part I or Part II of the Canada Labour Code without further order of this Court.

THIS COURT ORDERS that subparagraph 24(c) of the Amended and Restated Initial Order shall be deleted and replaced by the following:

- (c) terminate the employment of such of their unionized employees or temporarily lay off such of their unionized employees in accordance with the applicable Modified Collective Agreement; and terminate the employment of such of their non-unionized employees on such terms as may be agreed upon between the Applicant and each such employee, or failing such agreement, terminate such employment and deal with the consequences thereof in the Plan;

THIS COURT ORDERS that subparagraph 24(d) of the Amended and Restated Initial Order shall be deleted.

THIS COURT ORDERS that the unions and the Applicants meet forthwith to discuss a process for the resolution of pre-June 1, 2003 grievances, with the assistance of Mr. Justice Winkler if necessary.

THIS COURT ORDERS that the union motions be set down for hearing on August 7 and 8, 2003.

qp/s/qlfxs/qljjn/qlhcs