C

1989 CarswellAlta 693

Icor Oil & Gas Co. v. Cdn. Imperial Bank of Commerce

Icor Oil & Gas Company Ltd., Colwyn Oil & Gas Ltd. and Target Petroleum Inc. (plaintiffs) v. Canadian Imperial Bank of Commerce and Royal Bank of Canada (defendants)

Alberta Court of Queen's Bench

Marshall J.

Oral reasons: September 27, 1989
Docket: Doc. 8903-17633

Counsel: *P. Owen, Q.C.*, and *B.C. Howell*, for Icor Oil and Gas Company Ltd. et al.

D.L. Kennedy and *J.H.H. Hockin*, for Canadian Imperial Bank of Commerce.

R.T.G. Reeson, for Clarkson Gordon Inc.

R.W. Calvert, for Petrowest.

P. Vaartnou, for Royal Bank of Canada.

Subject: Corporate and Commercial

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act

Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues — Grounds for varying order — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6, 11.

Creditors of three associated companies which were placed under the protection of the Act by ex parte order, sought a variation of the order, largely due to the provisions under s. 11 which stayed all legal proceedings by creditors. Held, the application was dismissed. Providing notice to all affected parties would have caused substantial delay, as companies' application was made under urgent circumstances. Any prejudice to one of the parties was rectified by the right to apply for variation or discharge. There was no requirement that the company be carrying on an active business. The companies planned to resume profitable operations as soon as possible and were not hopelessly insolvent. There was not considerable ground for suspicion on the part of creditors. Despite serious deficiencies in companies' accounting procedures, the companies were taking correctional steps. Despite the requirement under s. 6 requiring three-quarters in value of creditors approving the arrangement, companies were entitled to an opportunity to negotiate an attempt to restructure the companies to permit further consideration of the resulting plan by all creditors. An order must in its effect balance the interests of creditors and company, while permitting the company a period of time to be resuscitated and reorganize its affairs.

***Marshall, J.* [orally]:**

1 On September 21st I granted an ex parte order placing the petitioner companies, Icor Oil and Gas Company Limited, Colwyn Oil and Gas Limited, and Target Petroleum Inc., under the protection of the *Companies' Creditors Arrangement Act.* I shall refer to the companies as the petitioners, and I shall refer to the *Companies' Creditors Arrangement Act* as the *Act.*

2 On September 21st the Canadian Imperial Bank of Commerce, which I will refer to as the CIBC, and Petrowest Petroleum Ltd., who I will refer to as Petrowest, sought a variation of the order. I granted a variation by ordering installation of a monitor of the petitioner's financial activities. I adjourned the remainder of the application to vary the order until yesterday.

3 The petitioners are associated companies. Icor is the owner of all the shares of the other two petitioners. The petitioners are in the oil and gas business principally in Alberta. Target operated eight retail service stations in Alberta, along with wholesale fuel distributing outlets until September 15th. The board of directors of Icor and the president were replaced by a largely new board September 5th. The president was replaced by a new director, Henry Suderman.

4 The present board disclaims prior knowledge of the serious financial difficulties of the company, and the details of its financial activities. They are admittedly unable to meet their liabilities as they fall due, and the petitioners are accordingly insolvent. The directors of the petitioners have proposed for court approval, a compromise or arrangement with their creditors. This is the arrangement contemplated by the *Act.* The present plan exhibited in the affidavit of Mr. Chow is admittedly lacking in detail. The directors are not aware of the identity of all the unsecured creditors, and are still obtaining full details of the financial status of the petitioners.

5 The amounts of creditors claims are in dispute to some degree. Nevertheless, it appears that the assets of the three companies approximate $8,000,000 and their liabilities are of a similar amount. The major secured creditor is the CIBC, claiming over $2.2 million dollars, and holding an assignment of book debts, a debenture, and other security. Petrowest Petroleum has a claim it alleges to be in excess of $3.5 million. There is a dispute whether a portion or all of the claim is secured. Petrowest was the major supplier of fuel to Target's wholesale and retail operations.

6 The Royal Bank of Canada holds an assignment of book debts and security on a $600,000 debt of Icor.

7 The secured creditors apply to set aside the order granted September 18th, or to vary it by appointing a receiver or possibly a monitor to collect the accounts receivable, to preserve the assets of the petitioners, and provide a full accounting for them. I will refer to the three secured creditors as the applicants. Counsel appeared for one unsecured creditor, Cenex Petroleum. It claims approximately $120,000 and supports a proposed arrangement under the *Act.* Two other unsecured creditors also support the proposal. At this stage of proceedings it appears unlikely that some creditors are yet aware of the proposed arrangement.

8 The secured creditors attack the order, largely due to its provisions under s. 11 of the *Act* which stay all legal proceedings by creditors against the petitioners until further ordered. I summarize their arguments as follows:

9 One, the application by the petitioner should have been made on notice.

10 Two, the *Act* should not be invoked where; A) the business of the petitioners has ceased, and is unlikely to recommence; B) the petitioners are hopelessly insolvent: C) there are grounds for suspicion and complaint on the part of creditors.

11 Three, the petitioners have serious deficiencies in their accounting procedures.

12 Four, the proposal will not succeed, since the approval of 75 percent of the creditors is required under s. 6 of the *Act*. The CIBC and Petrowest have advised their approval, which appears crucial, will not be forthcoming.

13 Five, the petitioners efforts in reorganizing should not be financed in the interim period until the proposed arrangement is approved or rejected through the accounts receivable assigned to the CIBC and the Royal Bank.

14 With respect to the order being made ex parte, the *Act* provides for such, and similar applications in Alberta and elsewhere have been made ex parte. The application was made in urgent circumstances, and it is apparent that providing notice to all affected parties would have caused substantial delay. Any prejudice to a party is rectified by the right to apply for variation or discharge of the Order, as Richard, C.J., observed in *United Maritime Fishermen Co-operative, Re (sub nom. Canadian Co-operative Leasing Services v. United Maritime Fishermen Co-operative)* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.).

15 The applicants argue that the petitioners have ceased carrying on business, and are unlikely to recommence. They rely on the decision of Erkhart, J., in the Ontario Supreme Court in *Avery Construction Co., Re* (1942), 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.). In that case he found that company to be no longer in business, hopelessly insolvent, and that there was considerable ground for suspicion and complaint on the part of creditors.

16 The affidavit of Mr. Chow discloses that the retail and commercial sale of fuel by Target has ceased. However, Mr. Suderman, the president of Icor, states in his affidavit of September 25th, that the directors intend to resume commercial sales as quickly as possible; they have existing customers. The retail operation has been losing money, but the commercial sales were making money and represent 70% of the business. While the sales of fuel have closed since September 15th, there is some indication the petitioners have other income from less active business such as oil and gas leases. While I agree that the objection of the *Act* is to keep a company in business, I see no requirement in the statute or the cases, that the company seeking the protection of the *Act* must be carrying on an active business, particularly at the time the application under the *Act* is made.

17 The material before me indicates that the petitioners plan to resume their profitable operations as soon as possible. The applicants further state that the petitioners are, "hopelessly insolvent" as Erkhart, J., described the *Avery Construction Company Limited.* He found the company hopelessly insolvent, and that this, along with the other reasons, was a basis to dismiss an application for a stay of creditor's proceedings.

18 On the material before me I cannot conclude the petitioners are "hopelessly" insolvent. Unfortunately, the case cited does not disclose the facts which gave rise to the finding by the trial judge. I note that in the British Columbia case, *Re Northland Properties*, the liabilities were approximately double the assets, but the company was permitted to reorganize under the *Act*. I appreciate this is only one aspect of insolvency.

19 Similarly, the applicants argue that there is a considerable ground for suspicion and complaint on the part of

creditors. With respect to that argument, I cannot draw the conclusion, in this case. The petitioners have been very dilatory; the former president of Icor apparently promised a placement of capital toward the Petrowest account, and failed to keep this and other promises. The applicants suspect other improprieties in the conduct of the business. I believe, however, that none of these allegations are an impediment to the petitioners obtaining an order under the *Act*.

20 There is no doubt the petitioners have had serious deficiencies in their financial reporting and accounting procedures. Their auditor, Price Waterhouse, outlined 41 recommendations for improvements after the January 31st, 1989 year-end audit was completed. The directors have installed a new president and are taking steps to rectify the concerns. For this reason, in part, it appears desirable that there be an independent monitor of the financial transactions of the petitioners, in any event.

21 Counsel for the CIBC and Petrowest advised the court unequivocally that their clients would never approve the proposed arrangement with creditors. Since s. 6 of the *Act* requires that three-fourths in value of the creditors present and voting, must approve the arrangement before it can be sanctioned by the court, their approval appears vital to any approval of an arrangement under the *Act*. However, the petitioners respond, that the vetos are premature. The petitioners are entitled to an opportunity to negotiate an attempt to restructuring of the companies to permit further consideration of the resulting plan by all creditors. It is possible, as the petitioners point out, that a new lender may be found for the CIBC debt, or some satisfactory arrangement made. It appears to me, that if the petitioners overcome other obstacles, the objection of two recalcitrant creditors should not prevent the petitioners proceeding to attempt to work out an arrangement within the *Act*.

22 The CIBC strongly objects to the order given, since the continuing operations of the company are being financed by the receipt of accounts receivable assigned to the CIBC. The accounts receivable appear to be approximately 1.4 million for Target; that amount, it appears on August 31st, and most are aged under 60 days. The stay of proceedings against the CIBC prevents it immediately realizing collection of monies which are flowing into the petitioner's possession on each working day. The CIBC also holds debenture security of 1.5 million dollars. The material does not disclose whether the total claim of the CIBC of 2.2 million would be jeopardized if, in the worst case scenario, all the accounts receivable were utilized for working capital of the petitioners. It is likely, however, that the use of some accounts receivable for ongoing operations will ultimately impinge upon unsecured creditors, rather than the CIBC.

23 What is the scheme and purpose of the legislation in the *Companies' Creditors Arrangement Act*? Does the object of the *Act* permit an order which would cause the prejudice to the CIBC I have outlined? I quote from Justice Wachowich of this court in *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576, 5 W.W.R. 215 at 219 (Q.B.)

> This order is in accord with the general aim of the *Companies' Creditors Arrangement Act*. The intention was to prevent any manoeuvres for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive, and would further undermine the financial position of the company, making it like less likely that the eventual arrangement would succeed.

That is from page 220; I also quote from page 219.

> In order to resolve the issues raised in this application, I must consider the scope and intent of my 21st March ex parte order under the *Companies' Creditors Arrangement Act*. This *Act*, though little used, is one

> of a number of federal statutes dealing with insolvency, in common with the various other statutes it envisages the protection of creditors in the orderly administration of the debtor's affairs or assets.

He then quotes from the words of former Chief Justice of Canada, Duff, where he spoke for the court in *Re Companies' Creditors Arrangement Act; Attorney General of Canada v. Attorney General of Quebec*, [1934] S.C.R. 659:

> The aim of the *Act* is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority, which otherwise might not be valid prior to the initiation of proceedings in bankruptcy. Ex facie, it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation. The legislation is intended to have wide scope, and allows 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. The aim is facilitated by Section 11 of the *Act*, which enables the Court to ...

And he quotes the provision of s. 11.

24 These observations of Justice Wachowich have been approved and applied in various other courts. It appears that an order made must in its effect balance as far as possible the interests of the creditors and the company, while permitting the company a period of time to be resuscitated and reorganize its affairs.

25 The purpose of an order in the present situation is to maintain the status quo while the insolvent companies attempt to gain approval of their proposed arrangement. The preservation of the company, if possible, would be to the future benefit of all parties. While the present order will probably, at this time, result in some hardship to the CIBC and Petrowest, I am satisfied the petitioners fall within the ambit of the *Act*. They are entitled to an opportunity to attempt to restructure and recapitalize the companies, and to reschedule their debt. Appointment of a receiver would involve more extensive costs than are warranted, in my view. They are costs which would be similar to a liquidator in some respects.

26 The application to vary the order is accordingly dismissed.

27 Insofar as the application to permit filing of bankruptcy petitions, without further proceedings, there are limitations which will prejudice the creditors if the arrangement is not approved. I am persuaded that in balancing the parties interests, the creditor's rights are more vital in this matter. I accordingly grant leave to the CIBC to file a bankruptcy petition against each of the petitioners. No further steps are permitted without leave.

28 Mr. Vaartnou, what is your position with respect to leave to file a petition? Did you want a similar order?

29 Mr. Vaartnou: My Lord, I believe if there is one petition filed, that should be sufficient, that will fix it for all creditors.

30 I suppose that will give you leave in the event that the CIBC did not --

31 Mr. Vaartnou: Yes, that will be sufficient. If they did not pursue their petition, that we would have leave to follow up on it.

32 The Court: I wish to entertain further submissions respecting the powers of the monitor. Mr. Reeson, I should hear from you on that.

33 Mr. Reeson: My Lord.

34 The Court: I suppose, as I have indicated, I am concerned about the costs of the entire exercise. I think Mr. Dickson's concern about strangling the company with professionals is -- or has some application here. But, I suppose it would be useful if there was another staff member one in -- so there was one in Edmonton, one in Calgary. What is his position on that?

35 Mr. Reeson: My Lord, I have had the opportunity of discussing with my friends, the secured creditors anyway, the possibility that a monitor would be continued, what powers the monitor should have. Our only concern -- or my client's only concern is ensuring that whatever powers the monitor does have are clearly indicated in the order, and what his responsibilities are. What we had tentatively determined would be that Clarkson Gordon Inc., itself, would be appointed as monitor. I don't believe, My Lord, that using the whole ability of Clarkson Gordon Inc. will unduly increase the costs. In fact, I think it will end up in decreasing it, because of instead of my friend, Mr. Lane, at his hourly rate, doing all the work, he can get other people at lesser hourly rates, to do -- to do the work. And I think the overall burden as far as the costs are concerned will be decreased. Plus, It will give the opportunity to save on travel costs and whatnot if the whole Clarkson Gordon Inc. could be appointed. It was -- it would be appointed by the court as an interim monitor, pending further court order, because we are not sure exactly when the plan will be ratified, if at all. The general powers that we were talking about --

36 Mr. Kennedy: Excuse me, My Lord, I am sorry to interrupt Mr. Reeson. Again, I just simply point out to the court that it is the wish of the CIBC that Peat Marwick Limited, be the monitor.

37 The Court: I am quite aware of that, Yes.

38 Mr. Kennedy: Very good. Thank you, My Lord.

39 The Court: I am satisfied that Clarkson Gordon are the suitable people in the circumstances, although I appreciate they were -- they were retained by Petrowest, weren't they?

40 Mr. Kennedy: That is correct, My Lord.

41 The Court: Yes.

42 Mr. Kennedy: My friend advises me that they were retained by Petrowest sometime in the summer, June, I believe.

43 The Court: Well, I say that in part because Mr. Lane, particularly, had some familiarity with the operations of the -- of the companies, and I think in the circumstances he is the suitable person.

44 Mr. Kennedy: Thank you, My Lord.

45 Mr. Reeson: What we envisaged, My Lord, were general powers to monitor, review, and investigate, not only the petitioners but its subsidiaries and affiliates, concerning all financial matters and accounts, including all assets and liabilities. A power to investigate and review all past and future transactions between the petitioners and the petitioners and third parties. Again, in -- where the question, I think, arises is to what degree, if any, will

the monitor have any control over the cash-flow function of the company? In other words, over money coming in and money going out. Will -- will the monitor have any control at all over which trade creditors, if any, are paid? And that we express no opinion on. I guess that has to be determined by the court.

46 The Court: Well, what I envisage is that he would -- he would make a weekly report similar to the report he tendered yesterday, in which he would basically, as a monitor would, report anything which he felt was out of the ordinary. I have not envisaged him having any power over the expenditure of monies.

47 Mr. Reeson: All right. I leave that up to my friends to determine that, My Lord, any comments on that.

48 Mr. Vaartnou: My Lord, may I make one comment on that point about expenditures? The order, as it is presently framed, doesn't have any direction in it as to what payments can be made or can't be made. And --

49 The Court: I wish to address that, Mr. Vaartnou. I am going attempt to work out as, you know, something in the nature describing the expenditures which are permitted.

50 Mr. Vaartnou: Thank you.

51 Mr. Reeson: Clarkson would have the power to retain agents and professionals, including legal counsel, to assist in the performance of its duties. The reporting, we had envisaged reporting as necessary, but if weekly is required, to the court, that is certainly suitable. My Lord, what we were -- what we were --

52 The Court: Is that too often?

53 Mr. Reeson: It may be as far as the court. What we are were envisaging was a weekly report on the certain matters to the secured creditors, and then a periodic report at the discretion of the monitor to the court, as he thought it was necessary to advise the court of the information, he would file a report.

54 Yes. I certainly contemplated that a copy of the report would go to each secured creditor.

55 Mr. Reeson: If -- if the court desires a weekly report, we are certainly prepared to -- to prepare and file a weekly report, and to distribute it to everyone that is represented here today.

56 Yes. I can't see causing much difficulty to send a copy of the same report to the court and to all parties present.

57 Mr. Reeson: So that would be on a weekly basis, My Lord, Mr. Owen?

58 The Court: But as far as investigating past transactions, this seems to me could result in a pretty large scale undertaking, something similar to an audit, isn't -- isn't it, in asking him to look into --

59 Mr. Reeson: Well, the --

60 The Court: -- past transactions? I was just considering, really, the function of the monitor to monitor the on-going present transactions.

61 Mr. Reeson: Again, My Lord, I leave that up to my friends to make representations.

62 The Court: What is your position on that, Mr. Owen?

63 Mr. Owen: My Lord, you have made the very point that I had hoped to make. I was not privileged to these discussions that have apparently taken place between my friends on that side of the table since last night. And the outline of the monitor's duties proposed by my friend, Mr. Reeson, I have now heard for the first time. But it struck me, too, that - I am sorry, may I have a copy of it, if it is typed?

64 Mr. Reeson: All it was was some rough discussions based on our anticipation, My Lord, that you would perhaps continue the monitorship. We didn't know for sure you would, so we thought we should have some preparedness in case you were to appoint a monitor.

65 Mr. Owen: Well, it does sound very much, My Lord, as if there was going be a full-blown audit of this company's affairs, when we talk about the general powers to monitor, review, and investigate, all financial matters and accounts of the petitioners, all past and future transactions between the petitioners, and petitioners and third parties, and so on. And I had not understood that that was in Your Lordship's mind, nor do I, with respect, consider that that is essential. Because we do have the -- the report of the company's own auditors as at the year-end, which was January of this year, but the report itself, as was mentioned to you yesterday, Sir, was not issued until June. And there is no reference in Price Waterhouse's formal report to anything that has come to their attention during the interval between the year-end and the date of their report, as one finds occasionally in these things.

66 Now, we have -- my -- my instructions are that client has no objection to the monitor investigating anything subsequent to January, first, 1989, which is really the cut-off date of the previous Price Waterhouse report. If --if he runs into some transaction or --or other matter that -- that arouses his suspicion. But to go back to the beginning of time would certainly incur enormous costs, and does not appear to be warranted in the circumstances.

67 My main - the main object of the monitor, as I see it, My Lord, is that he keep an eye on the affairs of the company during this interim period so that there are no irregularities, so that there are no enterprises that could act to the detriment both of the company and its creditors.

68 Mr. Kennedy: My Lord, there is nothing nefarious in requesting the power to look into the past. Certainly if the monitor is going to be reviewing current receipts and outgoings, some of those will be related to the past. Some of the suppliers maybe will almost certainly be the same people. So the intention is that the monitor is able to fully inform himself in order to carry out his duties.

69 Mr. Vaartnou: My Lord, in relation to Mr. Owen's comment, I don't have a great deal of difficulty with using the January 29th cut-off date, other than if something should come to his attention that, you know, requires him to go back further than that. I don't know that that should necessarily be a magic date, but the intent would be that he would look at --

70 The Court: All right. I think that is -- that is quite reasonable that he should not extend his review prior to that. I gather January 31st was the year-end, was it?

71 Mr. Calvert: May I address the court on this point for just a moment, Sir?

72 The Court: Yes.

73 Mr. Calvert: The purpose of Mr. Lane having the power to do this is not to conduct a complete audit of all financial affairs. During the course of his review various transactions of --are unusual and require some backup;

those are the only matters that he proposes to do, as they come to his attention, and to investigate those particular matters. They are of particular importance in that they may well represent the asset liability position of the company. The effect of the order is that no steps can be taken by the creditors to investigate these matters, take actions, and do discoveries to find out whether there are -- have been transactions to associated companies which are improper which should be set aside, or where there may be payables to the company. Someone has to have the power to do that. I can think of, for example, the Ocappy (phonetic) transaction, we have looked at the report, and the financial statement of January 31st, 1989, indicates that Mr. Talbot's new company was to pay to Icor something in the magnitude of 600 -just under $700,000. The transaction was just before the year-end.

74 When we look at the amounts that are recorded as having been received, the amounts certainly don't correspond with that, and then there have been some set-offs credited, which under the agreement set forth in the annual report, as an example, were to have been assumed by Ocappy in any event. So -- in the Price Waterhouse report there is references to other transactions where there have been substantial advances to associated Talbot companies, without backup material and documentation. So these types of things have to be investigated, because they may represent assets that are available to my friend's clients, and also ultimately to the creditors for distri bution, and should be investigated. We now no longer have the power to do that ourselves through the discovery process or proceedings. And if Mr. Lane becomes aware of these types of transactions, he should be able to follow through, and certainly -- certainly those transactions precede January 31st, '89. And he has to report. It is a discretionary matter. He has to look at it, and if he sees something that requires investigation, he has to have the power to go back and look at it. And I presume that will be equally for the benefit of my friends, as well as the benefit of the creditors.

75 Mr. Owen: We agree generally with the sentiments expressed by my friend.

76 The Court: Very well, then, to --to further clarify his powers, then, I say that he has the power to review and investigate the -- the financial transactions of the -- of the companies. What about associated companies? Is that a -- I have no idea of the magnitude of these transactions.

77 Mr. Kennedy: There are several wholly owned United States subsidiaries. There is a lot of intercorporate transfers, and I think it would be appropriate to give the monitor, in his discretion as necessary to inform himself fully of the affairs of the petitioner or the petitioners, I should say, to investigate any affiliated companies as well.

78 Mr. Vaartnou: My Lord, I believe that would be a reasonable request. The Royal Bank, for one, does have security on the assets in the United States, through a subsidiary company, and it would be, as a creditor of that company, would be interested to --

79 The Court: That appears reasonable in that I gather these companies are all owned by Icor, aren't they, and there seems to be a significant amount of intercompany transactions.

80 Mr. Owen: By Icor or its parent, or its principal shareholder. Then nevertheless, My Lord, it would be most helpful if some words of restraint could be put into the order so that we do not get into a full-blown audit, or even what is in the vernacularly known as a fraud audit.

81 We are happy, in fact new management is happy, to go along with the idea of Mr. Lane, Clarkson, looking into the affairs of the company to determine whether or not there have been some irregularities, but only on a rather selective basis, not on the basis of examining every transaction that took place every day during the past

nine months, in the anticipation that they might find some irregularities.

82 The Court: Yes. I would appreciate hearing from counsel on this. It seems, you know, I see the function of the monitor to be primarily to ensure that the ongoing transactions are properly carried out, and that there is no suspicious activity in that respect. And certainly, as indicated, I don't see the function of a monitor to carry out an audit for the period since January.

83 Mr. Kennedy: That certainly is not the intention, Sir. And using your wording, if his role is to ensure that the ongoing operations are carried on properly, I think if he is going to ensure that, it will be necessary to allow him, in his discretion, to look at the affairs of affiliated companies, otherwise his hands may be bound for any intercorporate transfers that take place. There is more than just the three petitioners involved here, there is a whole myriad of corporations, which Icor either wholly owns has a substantial interest in, with intercorporate transfers appearing in the books already, and the evidence that is before Your Lordship, I think we would be doing a disservice to the monitor, if he is to be ensured, to be able to effectively monitor the ongoing transactions.

84 Mr. Vaartnous: My Lord, my comment would be that it may not be necessary to put this type of thing into the order. You can give your direction, and it is up to their professionals, it is in their discretion. When it comes time to tax their accounts, that is where, you know, if something has been - if they have gone too far, without getting the concurrence of Mr. Owen and his client, then that certainly would be a matter that could be raised at, you know, at their taxation, if they came to that. I mean that is a better way of doing it.

85 The Court: Well, I certainly would be appreciative if counsel could work out what I think I envision here. And I don't want -- I realize Mr. Lane wants very specific guidance here, too.

86 Mr. Reeson: That is correct, My Lord. I am a little concerned if it is too loosey-goosey, what does he do; what doesn't he do? Is he going to get paid for it or not get paid for it. I mean, we are at - we are at the court's disposal as to what we are to do. We will do whatever the court wants us to do, but I just want it specifically defined.

87 The Court: Perhaps --

88 Mr. Owen: Would it be in order, My Lord --

89 The Court: -- we can deal with other matters and take a short adjournment in order that you might consider that area further? Mr. Owen?

90 Mr. Owen: I was about to say, My Lord, would it be an order for Your Lordship to consider directing that counsel attempt to get together to agree on a wording defining the monitor's functions? I am a little concerned about the suggestion that a short adjournment might do it. It may take a little longer.

91 The Court: Half an hour? Three-quarters of an hour?

92 Mr. Owen: And if we can't -- if we cannot agree, that we then be at liberty to come back to you, Sir?

93 The Court: Yes.

94 Mr. Kennedy: My Lord, I believe that having participated in discussions this morning, that this may be one of the very few contentious issues.

95 The Court: Yes.

96 Mr. Kennedy: Perhaps we could leave this one until you are prepared to adjourn, and just deal with all of Mr. Reeson's other concerns, and then we can deal with this one contentious point.

97 The Court: Very good.

98 Mr. Kennedy: I think it is not that contentious, it is a matter of degree, and we can probably work on that.

99 Mr. Owen: Are there more concerns?

100 Mr. Reeson: No. And in fairness to Mr. Owen, this was not set in -- in concrete, My Lord. I mean, the reason to meet was we fully anticipated that if you wanted to extend the monitorship that you'd want some suggestions. So we were not trying to cover anything up or hide anything, we just wanted to be ready to suggest certain powers to you. We realize that it would still be open to the courts to determine what we --what the powers would be.

101 The Court: What about his costs? That should be addressed at this time?

102 Mr. Reeson: That is a good point, My Lord. Yes. And the costs not only for the future, but since he has been appointed under your September 21st order. Now, there is a little bit of --I was not there at the time, and so I don't know what transpired, or what direction you gave at that time.

103 The Court: I directed that it be dealt with today.

104 Mr. Reeson: Well, obviously, My Lord, it is our position that Mr. Lane has performed a service on behalf of everyone, he was appointed by the court, and therefore should be fully indemnified against the company, itself, and its assets in priority to any other creditor, for both the fees and disbursements he has incurred to date, and for his ongoing fees and disbursements, including professional fees.

105 Mr. Kennedy: There is no debate here, My Lord, from the CIBC.

106 Mr. Calvert: Nor from Petrowest, Sir.

107 Mr. Owen: As long as we can use some accounts receivable to pay Mr. Lane, we have no objection, Sir.

108 Mr. Calvert: Fair is fair, Sir.

109 Mr. Kennedy: I think Mr. Reeson is coming to that.

110 Mr. Reeson: That is correct, My Lord. We had anticipated that an account would be rendered on a monthly basis, and directly to the company, would be paid from the cash flow of the company. If not, it would -- it ultimately would form a first charge against the assets, similar to a receivership -- court-appointed receivership.

111 Mr. Kennedy: That is perfectly acceptable.

112 The Court: I will direct that it be paid in that fashion.

113 Mr. Reeson: Thank you, My Lord. There would be the usual provisions with respect to the access to all

books, records, and accounts of the petitioner, either in possession, custody of the petitioner, or in the possession of some other third party, so that -- and of course that will be limited to the extent that the actual duties of the monitor are defined. With also the expressed provision to be able to talk to other professional people that the lawyers and accountants that may be dealing with the petitioners.

114 Mr. Owen: That is perfectly acceptable, My Lord.

115 The Court: Yes. So ordered.

116 Mr. Reeson: There was some discussion, this was, to an extent, in your original order, My Lord, dealing with a segregation or non-commingling of the assets of the three petitioners, and a direction to - a continued direction to that effect.

117 The Court: Yes. Well, the provisions respecting the monitor in the order of the 21st of September will continue, otherwise. We are merely expanding on them, and there is a direction in that there be no commingling of the receipts.

118 Mr. Vaartnou: Of receipts. But I think there are other assets as well, you know, the oil we'd, for example, would not want to see certain oil and gas properties transferred from one company to another company at this point.

119 Mr. Kennedy: And there is some inventory, too, My Lord, and we would like all of that segregated.

120 Mr. Owen: No objection, Sir.

121 The Court: So ordered then.

122 Mr. Reeson: Now, the -- there was also some discussion this morning, My Lord, about a requirement concerning Price Waterhouse involvement and preparation of the monitoring plan, whether that be made mandatory or whether there should be a time period. I have no comment on that.

123 Mr. Owen: Not the monitoring plan, My Lord.

124 Mr. Reeson: Or, sorry, not the monitoring, the actual plan itself, sorry, and the CCA.

125 The Court: Well, that is all within the 45 days, isn't it?

126 Mr. Owen: Yes, My Lord.

127 The Court: Mr. Owen, I am not inclined to grant a further extension of time. I can appreciate that this application has caused some delay to the company, but it seems to me the petitioners, it is to everyone's advantage that they proceed with this reorganization plan as quickly as possible. And I suppose I'd hear some further argument, but I -- I really don't have a great --

128 Mr. Owen: We -- we accept your --

129 The Court: -- I don't have a great deal of -- idea just what exactly is involved in this, but I would hope what you plan to do in 45 days you will now do in 39 or whatever, 37, whatever.

130 Mr. Owen: What it does appear, My Lord, that if -- if at the end of the day we have reached a certain plateau, which will enable company officers to direct their minds to the affairs of the company, they will do whatever has to be done to produce the plan within the original time limit.

131 Mr. Kennedy: My Lord, if I may supplement what Mr. Reeson said with respect to Price Waterhouse, there was a representation made by counsel yesterday in two phases, that Price Waterhouse may get involved, and then in the afternoon he said Price Waterhouse definitely will get involved. A key objection of ours was that they did not have professional help, and they had a heck of a mess. What I think we would like to see is a direction that Price Waterhouse be involved in assisting them by a certain date, tomorrow, whatever. Make -- let -- let them put up what they said yesterday, Price Waterhouse will be involved. And if they are not involved to assist them, that some sanction exist, or something to that effect. I don't know if Price -- the potential involvement of Price Waterhouse was determinative in Your Lordship's decision or not. And I guess that is why we raise this particular point.

132 The Court: I can't say that it was, but it just seems to me the kind of situation, as you have pointed out, that the -- the assistance of such professionals is essential to any reorganization, and I don't think that the petitioners plan to do this without assistance of professionals. It is sort of been a case, I gather, of one thing at a time.

133 Mr. Kennedy: Very good, My Lord.

134 The Court: I am hesitant to impose any particular deadlines. I mean, if they -- if --

135 Mr. Kennedy: That is fine, My Lord. I was not certain if it was important in your mind in arriving at your decision.

136 The Court: It seems to me, you know, if they don't have that kind of assistance they are not going to get to first base with the plan, that is all it amounts to.

137 Mr. Kennedy: Very good, My Lord. Mr. Reeson has asked me, I believe to conclude the points.

138 Mr. Reeson: I just have two minor points, Mr. Kennedy.

139 Mr. Kennedy: Very good.

140 Mr. Reeson: Two more minor points, sort of housekeeping matters, My Lord. First of all a direction in the order that by assuming these duties the monitor is not assuming any liability for any liabilities of the corporations or petitioners itself. I am not sure at law where we stand, I don't think -- because we are not really in control, or will be in control, depending on your further order, of the business and day-to-day affairs of the company, I don't think the monitor would be assuming any such liabilities, but as a precaution I would like a direction to that effect.

141 The Court: Well, that is reasonable in respect --

142 Mr. Kennedy: As an officer of the court, I believe the interim monitor would be entitled to that type of protection.

143 The Court: Yes. I agree.

144 Mr. Reeson: And lastly, My Lord, before we get to the primary point, obviously an ability to apply for advice and directions from time-to-time, which, depending on how much we refine this next point, may or may not be necessary.

145 The Court: Well, I suppose I would not want to encourage litigation in the interim period here, but what I conceive to be part of the function of the monitor in reporting is that if there is something highly suspicious, any party would move for a review or variation of the existing order.

146 Mr. Reeson: My reason for requesting that, My Lord, is that, again, depending on how -- how much we refine this next major point, the monitor may phone me and say: I need to know whether I should be investigating this, or doing this, or going after this. And I may feel that the safe course of action to apply for advice and directions from the court.

147 Mr. Kennedy: I think we can handle both of your concerns with a clause to the effect that the monitor is entitled to apply for advice and directions, and any party may apply to the court on such notice, et cetera, et cetera, for any relief that is deemed just. I think that would deal with both -- both --

148 Mr. Reeson: Yes. The ability of any party to do that is in the existing order, so that would be preserved. But I just wanted to make sure that the monitor can apply to -- to --

149 Mr. Kennedy: Right. I think it would be appropriate to include the monitor.

150 The Court: Yes. I agree. The monitor will have that right.

151 Mr. Reeson: Those are my -- I think we are back to the major issue.

152 Mr. Owen: My Lord, just before my friend starts, I am not quite clear, forgive me, on what Your Lordship has just agreed to?

153 The Court: Well, the monitor may make application to the court if he is not sure of something that arises in the course of his, you know, something highly suspicious arises, or he has some concern about something being on the -- on the fringe of what his work is, whatever, he can apply for advice and direction.

154 Mr. Owen: If that is what it is, then I have no problem at all. But I thought that there was an addendum that any party could come back to the courts to -- to reopen matters, and that is the thing that -- that --

155 Mr. Kennedy: That is in the existing order, and I don't think that has been varied.

156 Mr. Owen: Okay.

157 The Court: Well, I contemplate that, if it seems --

158 Mr. Owen: If it does not go beyond what is in the existing order, I have no problems.

159 The Court: Yes. All right.

160 Mr. Kennedy: My Lord, I guess that the last point we have to resolve for this issue, other than the one that maybe we can stand down for in a few moments, but the last major point is the one that you raised yourself, one that you wanted to address, and that is just how the receivables will be dealt with on a day-to-day basis, and I

suppose the inventory and other assets as well. What we would suggest is, and we -- we discussed this amongst ourselves this morning as perhaps being appropriate, is that if the petitioners carry on business, that they may in the ordinary course, pay trade creditors respecting goods and services supplied to the petitioners on or after September 18th, but excluding any amounts for professionals for legal or accounting services.

161 Also, they may pay employees of the petitioners respecting obligations occurring on or after September 18th, and --

162 The Court: What was the last one?

163 Mr. Kennedy: May pay employees of the petitioners respecting any obligations accruing on or, after September 18th, but excluding any payments to officers or directors.

164 The Court: Well, I don't know why officers that are actively engaged in the business of the company shouldn't be paid?

165 Mr. Kennedy: We just don't know how much they are paying Mr. Suderman, I guess is the problem, and it may be an extraordinary amount. We -- I guess there is potential there for some abuse.

166 The Court: Yes, there --

167 Mr. Kennedy: And perhaps we could say: Any payments to officers and directors must be approved by further order of the court?

168 The Court: Mr. Owen, what is your position?

169 Mr. Owen: Mr. Suderman is -- as he has deposed in his affidavit, Sir, is the president, chief executive officer, and proposes to spend substantially all of his time on the affairs of his company to put it back together over the next six months. He has, I am instructed, a contract with the company, a six month contract. I am not familiar with its terms. I suspect it has in it a rate of remuneration appropriate to that position. I submit that, of course, he has to be paid his salary.

170 I am also a bit concerned about the suggestion that the company is not entitled to pay its solicitors, or its accounting advisors out of its ordinary receivables, and that we are to be excluded from the trough. I submit that that is not realistic. I submit that the company is going to need a good deal of help. It has, of course, on an emergency basis, used our office during the past ten days to get us this far, to get it this far, and it is going to require further legal, and particularly accounting assistance. And it is difficult to see how the plan can be refined to the point where it stands a chance of acceptance without that kind of professional help.

171 Mr. Kennedy: Perhaps I can assist the court by offering to surrender on those points, if I can finish my submissions with respect to the receivables. And this particular issue, or these issues may become moot. What I would suggest is that any payments that the court does allow be from newly injected capital, or from collected accounts receivable from bona fide third parties above the September 18th level, so in case they could pay their solicitors; they could pay their accountants; they could pay the officers. If the receivables and inventory levels are topped up to what they were on September 18th, then there would be no difficulty at all.

172 The Court: I don't understand what you mean by the September 18th level?

173 Well, that would -- that would be the date of the -- the date of the status quo, the date that you granted your original order, My Lord. Nobody knows what the September 18th level is now. Certainly when Price Waterhouse gets involved, and when Clarksons gets in there with both -- both feet, the receiveable levels for all of the petitioners on September 18th will be known. Once the levels are back up to that -- that -- that point, after the petitioners resume operations, then anything above that is theirs to operate with, including paying their solicitors, their accountants, as they see fit.

174 The Court: Well, Mr. Owen, have you any -- any kind of an estimate of what the Price Waterhouse costs might be for their involvement in -- in the plan?

175 Mr. Owen: May I just consult with my client, Sir?

176 Mr. Kennedy: And I guess, just to finish my submissions, so that Mr. Owen can address it completely --

177 Mr. Owen: Just -- just -- I would like to hear what you have to say.

178 Mr. Kennedy: I am sorry. Very good.

179 The Court: Just one matter. I don't believe I did clarify that --that Mr. Lane may utilize others within Clarkson Gordon, and that is perfectly reasonable. I'd hope he would run the operations as leanly as possible while carrying out the intention of -- of the order.

180 Mr. Reeson: I think Mr. Lane fully understands that, My Lord.

181 Mr. Owen: The complication with Price Waterhouse is this, My Lord: they are an unsecured creditor of the company in an amount of approximately $75,000 for their last year's audit. And it has taken a good deal of persuasion on the part of Mr. Suderman to try to entice them to come back to do this job of assisting the company in -- in formulating a plan. Mr. Suderman's understanding is that they, Price Waterhouse are willing to allow their old debt to simply stand with other unsecured creditors, but that they do wish to be paid, just like Clarksons, for ongoing work.

182 They have suggested a fee of approximately $25,000. But, of course, like all professionals, they are not able to put a definite dollar figure on it, depending on what is asked of them, or complicated accounts.

183 I -- Mr. Suderman instructs me that his own rate of remuneration is unduly low, having regard to the kind of situation he finds himself in, or the company finds himself in, itself. He is -- he is prepared to disclose it, I imagine, although he is concerned that some veiled dispersion may once again have been cast upon his position, and upon the possibility of some extraordinary amounts going out to him, or to other officers. His contract calls for a salary of $6,000 a month, plus expenses. Which, in the circumstances of his enterprise, and the kind of thing that is expected of him, does not appear to be out of the way.

184 Mr. Kennedy: Again, My Lord, this may be a moot issue. The point is Your Lordship's judgment is based and premised upon the fact that the petitioners are going to fire up operations and get going again. As soon as they do, no doubt there will be receivables above the September 18th level in order to ensure that everybody gets paid.

185 The Court: But I also am satisfied that your client's security is going to be -- is going to be affected by the order, and it certainly my -- my direction, in effect, that the receivables are going to finance the operations of the

company, and certainly the employment of someone like Mr. Suderman is absolutely crucial to the success of the reorganization. So I just don't have any difficulty with him being paid that kind of money.

186 Mr. Kennedy: Very good. Now we know what it is, and it is on the record.

187 The Court: And also any other officer such as, I gather, Mr. Chow, who is in fact actively engaged with the company. What I would like to say, you know, is directors that are merely directors should not be paid, but those who are actively assisting the ongoing operations of the company on a, not daily, a full-time basis, those should be remunerated. And as far as Price Waterhouse, there again I think that this is crucial to the reorganization, and I don't find those fees, I realize it is only an estimate, but I don't find them objectionable, and -- and I, subject to any further argument, I -- I would order that they be --

188 Mr. Vaarthou: In terms of the accounting and legal fees, perhaps if those are going to be paid, then perhaps there is a right of taxation on those accounts.

189 The Court: For accounting too?

190 Mr. Vaarthou: For the accounting as well?

191 Mr. Kennedy: That would seem to be an acceptable middle ground, My Lord.

192 The Court: I think that is reasonable, then.

193 Mr. Owen: Of course. And I suppose that would apply to all professionals, including Clarksons?

194 The Court: Yes.

195 Mr. Kennedy: If I may paraphrase the point I believe we are at then, My Lord, with respect to this particular issue, the last issue, before we stand down and address that last minor issue, and correct me if I am wrong, it is a mere paraphrase: If the petitioner is to continue to carry on business in their ordinary course, they may pay trade creditors respecting goods and services which are supplied, including professionals for legal and accounting services, subject to the right of taxation, and they may also pay their employees. And I guess this is the point at which I stop. I am afraid that there may be six month accrued holiday pay that will go or something like that. Perhaps if there is some type of direction, ongoing amount, something like that?

196 The Court: How do the employees stand? I gather when I made the September 18th order that they are were all current?

197 Mr. Owen: I am instructed that both the employees and Revenue Canada are up-to-date.

198 Mr. Kennedy: Then with that being on the record, if it isn't the case we will be back. I guess there is no point to continue further. Have I properly paraphrased to Your Lordship?

199 The Court: Well just to be clear, now, that -- that is the direction of what the company can pay?

200 Mr. Kennedy: That -- that is correct, My Lord.

201 The Court: Now, what about that, Mr. Owen? Does that pose any -- any difficulties in the ongoing operation? They can pay -- did you say trade creditors? I think that was said?

202 Mr. Kennedy: Yes, that was how I defined it, My Lord.

203 The Court: Yes.

204 Mr. Kennedy: And that was with the assistance of Mr. Vaartnou.

205 The Court: And employees and officers, as I outlined, that are --that are -- does it pose any difficulty to say in full-time employment with the companies, or do you have any that are half here and half somewhere else? You do?

206 Mr. Owen: Well, there are some directors who are performing employee's services for the company.

207 The Court: That is fine. As long as -- I was --

208 Mr. Owen: And as long as there is not a blanket prohibition against directors?

209 The Court: No. If they are, I guess my inquiry is: are they fulltime?

210 Mr. Owen: No, Sir.

211 The Court: They are not?

212 Mr. Owen: No. They are called upon by Mr. Suderman upon occasion, and will continue to be called upon to perhaps negotiate a supply contract to -- to -- to commission an engineering report, and that sort of thing. They will not be, in any sense, on the regular payroll. But they may be performing services for the company which would warrant some -- some remuneration.

213 Mr. Kennedy: That falls in under trade creditors, perhaps then, My Lord, if they are going to be providing contractual services.

214 The Court: They are providing services. That seems to be a solution.

215 Mr. Calvert: I perhaps have one comment on that, Sir.

216 Mr. Owen: Okay.

217 Mr. Calvert: We know that certain of them have resigned their position as directors, and I am not certain how active they were. They appeared, from the previous transactions, to have been relatively inactive until the recent takeover. Perhaps at some point if they are not, in fact, working on a fulltime basis for these companies, they should put in a little something into these companies themselves, other than being fully compensated for whatever hours they happen to put into it, with what is in essence the creditor's money.

218 The Court: We are talking about a reasonably brief period, though, here, and it seems to me if they -- they render an account for services they perform in a particular area, of course it is up to them to justify the bona fides of the account, I know that is not going to be easy to ascertain, but --

219 Mr. Owen: My Lord, forgive me for once again seeking clarification. We have now established the perimeters of the persons of -- who may be paid by the company during the interim. I take it that there is no direction as to the source of those funds?

220 The Court: From the cash --

221 Mr. Owen: My friend earlier --

222 The Court: -- from the cash flow of the company.

223 Mr. Owen: That is right. But that includes cash flow from whatever operations?

224 The Court: That is right.

225 Mr. Owen: Thank you.

226 Mr. Kennedy: I understood that, My Lord. Again, I will try to keep my paraphrase shorter this time. If the petitioners continue to carry on business in their ordinary course, they may pay trade creditors and employees respecting goods and services supplied to the petitioners on or after September 18th 1989. That blocks any clearing up of any past accounts.

227 The Court: Well, I was not necessarily addressing September 18th, as it appears to me there might be somebody rendered, you know, a trade creditor from September 10th, whatever, they should be paid if they are an ongoing trade creditor with the company.

228 Mr. Kennedy: Now, that could be a very major concern. For example, they could write a $3,000,000 cheque to Petrowest.

229 Mr. Calvert: Which would be fine.

230 Mr. Kennedy: It is normal in these types of circumstances, and this is more in -- in-- in akin with an interim receivership position under the *Bankruptcy Act*. It is normal to continue ongoing payments to suppliers, but some suppliers, no doubt will say, you better clear up that $75,000 account, or else I am not supplying you. That type of situation, I think, would be unacceptable.

231 The Court: That occurred to me, Mr. Kennedy. What is the situation? I -- I don't have much information, of course, regarding the nature of these creditors, other than those that are before the court. But there may be just that, some people that -- maybe they are the only supplier in Western Canada that says, you got to pay up that bill from June before we provide you more or whatever.

232 Mr. Owen: I am instructed as of last night and this morning, that negotiations are well under way to find an alternate supplier, and that that alternate supplier is a new supplier who will not impose the condition of which my friend speaks, i.e.: that an old debt must be paid before a new credit can be extended, because there is no old debt. So -- and -- and I think it --

233 The Court: Are you prepared to live, then, with -- with payment of debts which arise after September 18th, creditors?

234 Mr. Kennedy: That would be on or after, My Lord.

235 Mr. Owen: Yes, Sir.

236 The Court: Yes. All right. Good.

237 Mr. Kennedy: Very good. I think we have arrived at the final wording of that last point.

238 Mr. Owen: I wonder if I might make one -- there have been many, many suggestions coming from this side of the table. I wonder if I might add one? It pertains to the very subject we have just talked about, and it is a request put forward by counsel for the alternate supplier, who is concerned about the position of his client in the worst case scenario, if the plan should fail to meet approval or be sanctioned.

239 The Court: Excuse me, this is the supplier of fuel you are speaking of?

240 Mr. Owen: Yes, Sir.

241 The Court: Or proposed supplier of fuel?

242 Mr. Owen: Yes.

243 The Court: Yes.

244 Mr. Owen: It covers - may I read the proposed clause, Sir?

> A bona fide commercial transaction entered into between the petitioners and a supplier shall not be invalidated on the grounds that it occurred during the period between the filing of the within petition and the implementation of the plan.

245 Now, it had occurred to me, My Lord, that that goes without saying. But it is a matter of some concern to counsel for the -- for the potential supplier. I am told that a clause of that nature has been employed by him in another context to forestall any possibility of a case where after the plan is implemented, or worst still, if it is not implemented, someone will look back and say, you should not have been buying gas, you should not have been purchasing supplies at all during this period.

246 In view of earlier rulings that -- that have been made, and the permission granted to the company, and the terms of my friend's submission, it may be surplusage, but I am asked to kindly put to the -- that the request that this go in, so that counsel for the potential supplier can give an opinion that the potential supplier is able to provide supplies, noteably gas and diesel, to the company in the 45-day interim, or until the plan is approved or -- or voted down.

247 Mr. Kennedy: Subject to comments from my friends, and the only word that I think Mr. Hockin and I would add is, it says, any bona fide commercial transaction, et cetera, we would say, any bona fide unsecured commercial transaction. I think particular Mr. Calvert would not want a supplier taking security during this interim period.

248 Mr. Calvert: I would like also to respond to this particular matter, Sir. The -- although I have seen this clause of this proposal -- until it was handed to me a moment ago, Sir, through my client had some experience with what takes place in the supply contracts, and one of things that on occasion has taken place, and in this situation may in fact be taking place, is that the customer has to place a large sum of funds, or an amount of money in trust with the supplier, and that supplier then, by the contract has that --

249 The Court: Yes, a sort of bond or whatever.

250 Mr. Calvert: -- has a preferential treatment over the sum of money. And it is not quite like a COD basis, and they end up in a preferred position because of that security being posted. And the -- I don't have a copy of the contract to agree at this point to this type of proposal. It does place some peril to Petrowest, and the other creditors for that matter.

251 The Court: In what respect?

252 Mr. Calvert: Well, certainly if -- if the transaction by that order is deemed to be a valid transaction, $450,000, that figure is specific, because I think before the September 8th agreement they had gone out and tried to secure a customer, and apparently had to post a very substantial amount of money to have someone supply a product. This commercial transaction seemed invalid. Receivables that are apparently being received by the company, go into company and then go onto that supplier, and that is a valid transaction. The plan is not accepted, or the bankruptcy proceedings, that --that creditor, that new supplier is then going to get this large amount of receivables. And that -- because I don't have the contract, I don't know if they are required to post any kind of security, but certainly that would be the impact.

253 Mr. Owen: But, My Lord, with the greatest of respect, if the worst came to the worst, then the bankruptcy trustee would either have gas in the tanks, or unexpended security money to look to. The position would be exactly the same. There is, in my submission, no danger, because the -- the security, if you like, is not handed over to the supplier, it is merely posted as in the nature of the letter of credit and drawn upon. And if -- if the company's affairs fall apart, then there would be either merchandise or unexpended credit for the receiver to pick up.

254 The Court: This supplier is not asking for security, though, is he?

255 Mr. Owen: Once again, I must take instructions. This all happened in the last 12 to 18 hours.

256 Mr. Kennedy: I guess in saying, unsecured, My Lord, I was including any type of security deposit as well.

257 The Court: Uh hum.

258 Mr. Owen: All I can say at this point, according to my instructions from Mr. Suderman, the potential supplier has not asked for the kind of up-front money that my friend has alluded to.

259 The Court: Well, I -- I don't see any difficulty with the order, with that clause. I would have thought it was implied, too. There was one -- one -- you mentioned it should state unsecured?

260 Mr. Kennedy: Yes.

261 The Court: Yes.

262 Mr. Kennedy: Bona fide, unsecured commercial transaction, et cetera. Other than that, Mr. Hockin and I have no difficulty.

263 The Court: And this, just for clarity, of course, is any - any supplier after the present date?

264 Mr. Vaartnou: Yes.

265 Mr. Kennedy: Of course.

266 Mr. Owen: Very good, Sir.

267 Mr. Kennedy: Very good.

268 Mr. Vaartnou: The one comment I have, if it could be set out in the order, is that the petitioners be directed to not dispose of any of their other assets. I mean, they can obviously make payment of these expenses, but what we don't want to see is major oil and gas properties being sold during the stake-off period, because that goes to directly what our security position is.

269 Mr. Kennedy: That, too, was on my list, My Lord, and if you could include that, based on some of the evidence that went in yesterday?

270 The Court: That -- that is for clarification, really. That is reasonable. When -- certainly when it comes to any realty, and what else would the -- well I suppose we could define what -- what they may sell in the -- in the interim period, and that would be?

271 Mr. Kennedy: Perhaps we could say, out of the ordinary course of business, because they are in the business of selling gasoline, and cigarettes out of convenience stores. If we -- I don't know if Mr. Reeson would be satisfied with the monitor having that -- that type of veto power or not?

272 The Court: Well, I -- I hesitate to impose something like that on him. As I see it, that is beyond what I contemplate.

273 Mr. Reeson: I agree, My Lord. I don't want to put too much onus on the monitor. And again, I guess it is depends on to what extent the monitor will or will not control the day-to-day business activities, and I think that is the fundamental issue which still has to be determined here.

274 The Court: Well, I suppose something like vehicles or whatever would be a concern. It is --

275 Mr. Owen: I wonder --

276 The Court: Yes?

277 Mr. Owen: -- if I might ask my associate, Miss Howell, to address the court on this point, because she has just been taking instructions from Mr. Suderman.

278 Ms. Howell: My Lord, they would intend, during this interim period, to sell off some excess vehicles, trucks that they have, because they don't need them. And they also would like the ability to sell off the eight service stations, because they are not going to reopen them, which will free up more cash. Any disposition or proposed sale of something like an oil and gas property they would present to my friends and bring back to the court for permission. But they would like the ability to sell the service stations and the trucks to free up some more cash to carry on their operations.

279 Mr. Vaartnou: My Lord?

280 Mr. Kennedy: Go ahead.

281 The Court: Well, I think any sale of realty we can say would require approval.

282 Mr. Kennedy: My Lord, the entire scheme of the *Act* is that they aren't allowed to liquidate, that is addressed firmly in all the cases. This is a liquidation. And that is the very kind of thing I was concerned about yesterday when I raised that point. Mr. Vaartnou --

283 Mr. Vaartnou: The -- the suggestion was made by Mr. Reeson, and it may be one that meets with Mr. Kennedy's approval, is that if they do that, that I think firstly they should advise us as to what they propose to do in terms of the disposition, you know, the price of that they are proposing to sell it.

284 The Court: Method they propose to sell by.

285 Mr. Vaartnou: And then have that money placed aside into a trust account, so that it is not -- in other words, if -- if the idea is to liquidate some assets and set some cash aside, then that is fine. They are going to have enough cash to carry on business, or they should have enough cash, in any event, from the receivables. But if the idea is to liquidate some of these assets so that they don't need them, and they can get a better price now than later, then, you know, generally I don't have a problem with that, as long as the creditor's claims to that money isn't -- they are not affected.

286 The Court: Or preserved.

287 Ms. Howell: The difficulty, Sir, is that some of these assets are causing them ongoing expenses, such as the leasehold properties, and they should get rid of them now.

288 Mr. Kennedy: That is fine under the situation and the conditions explained by Mr. Vaartnou.

289 The Court: He is saying, as I understand, that, you know, the petitioner should advise of the way they are proceeding to do this, and -- and then I suppose if there is a dispute about that, you can make application for approval. But -- and that the proceeds will be held. That seems reasonable in this period.

290 Mr. Calvert: Sir, for clarification, Sir, that would be -- they may attempt to sell, but no sale without the consent of the creditors, unless an application to the court and approval by the court?

291 Mr. Owen: No.

292 Mr. Calvert: The because the whole point, as my friend, Mr. Kennedy has stated, is to -- not to liquidate, but to preserve these assets, and these assets are secured assets, are covered by debenture security in favour of the creditors, and those are now potentially going disappear.

293 The Court: Well, certainly they can say, give something like ten days notice of their - an offer of what they intend to do, and if that is -- I suppose if it is not acceptable to creditors, then an application will have to be made.

294 Mr. Kennedy: But in any event, the proceeds will be held in trust?

295 The Court: And the proceeds should be held.

296 Mr. Reeson: I guess, then, we should say the net sale proceeds, is that admittable? There are probably going to be costs in disposing of it. They may have to pay an auction company, if that is the route you go.

297 The Court: Yes. That is right.

298 Mr. Kennedy: It should not be net of things like legal fees, I would not think.

299 Mr. Owen: All right, Sir.

300 Mr. Vaartnou: Just for clarification on that point, though, the assets that we are going to allow them to sell are things such as vehicles, or if they have a lease that they want to get rid of, not the oil and gas properties. Those types of things, they are -- in my submission, they should come to court and get approval on that, if they intended to make any disposition of those types of assets.

301 And the reason why I make those points is that there are some oil and gas properties in Icor where our client has security. There was a suggestion made yesterday in argument that some of those oil and gas properties, it had been the intention to transfer those onto another one of the companies where we don't have security. Well, if that type of a disposition occurs, that, of course, goes directly to our client's security position. And I -- I would ask that if -- if they have a proposal to sell any oil and gas properties, or any other assets of -- with a -- of a real property nature, that those -- that court approval be obtained for that.

302 Ms. Howell: No difficulty with that, Sir, if we propose to sell something major. The difficulty is if we have to come to court for the sale of every truck.

303 Mr. Kennedy: Why don't we set a threshold value of perhaps $10,000, or whatever would deem acceptable?

304 The Court: I suppose some of the trucks might be worth more than that, though and --

305 Mr. Kennedy: In that case, we would be very concerned about it, that the -- that it may not be a straight bona fide sale.

306 Mr. Owen: I just don't understand why my friend continues to throw out these unwarranted comments. There is no suggestion anywhere that this company will do anything but act in a bona fide, straight forward manner. And, of course, to realize --

307 The Court: Lawyers become cynical, Mr. Owen.

308 Mr. Owen: Pardon?

309 The Court: Lawyers become cynical.

310 Mr. Owen: Well, cynical --cynicism may be appropriate every now and again, but to -- to, you know, to take these cheap shots throughout the proceedings is, I do submit, is unwarranted, unsubstantiated, because the company -- it is in the company's interests to get the best price possible for these assets, just as much as it is in the creditor's interests.

311 Mr. Kennedy: I don't think it is even necessary to respond to that. The evidence is there. There is a lot of smoke is what has been identified.

312 The Court: Well, --

313 Mr. Kennedy: Perhaps Mr. Reeson has an understanding of the wording that has been arrived at, and if he doesn't, I -- I believe I will give it a go.

314 The Court: The -- as far as the sale of these properties, we can say that no -- no oil and gas properties will be sold without the approval of the court during that period, and --and otherwise the petitioner will give notice, ten days notice of his intention to sell anything. And if there is an objection on the part of any of the creditors present, they shall - they can make application.

315 Mr. Kennedy: And in any event, the proceeds shall be held in trust.

316 The Court: And the proceeds shall be held.

317 Mr. Vaartnou: It should be a notice to these three creditors, the two banks and the Petrowest.

318 The Court: Yes.

319 Mr. Vaartnou: I don't think it is necessary to go beyond that.

320 The Court: No.

321 Mr. Reeson: Held in trust by whom, My Lord? Just to try to define it as much as we can? Mr. -- Mr. Owen's account is fine with us, as far as we are concerned.

322 Mr. Kennedy: It might be best, for ease of administration. I don't know if you want to take on that responsibility, though. It is up to you.

323 The Court: How many trucks are there?

324 Mr. Owen: If it -- if it will assist, we will put it into our trust account, in an interest-bearing trust account, and I will make my peace with the office manager.

325 The Court: There is still the matter of your clarifying, and I hope counsel can work out the wording we discussed there. Do you want to speak to costs at this time?

326 Mr. Kennedy: Perhaps before we move to costs, just one other point. Your Lordship raised the general issue that you want to ensure that the monitor has the ability to carry out his duties. Would that include the blocking of any payments pending a court application to determine whether it falls within the ambit of your order?

327 The Court: I guess I should hear argument on that.

328 Mr. Reeson: My Lord, from the position of the intended monitor, we would not like that power. We would prefer to report to the court.

329 The Court: Yes. I think you pretty well -

330 Mr. Reeson: Advising that we suspect the transaction as being an improper one.

331 The Court: Yes.

332 Mr. Reeson: And if notice will go to the creditors, an application can be made and dealt with at that time. I think it is putting an --

333 The Court: I appreciate that maybe something like closing the barn door, but I -- I agree. I think that it

would impose a great deal of obligations on him if he has to be looking over the shoulder of the person writing the cheques.

334 Mr. Vaartnou: My Lord, I am wondering if we could impose an obligation on him, though, that -- or allow him to review the payment or, you know, whatever, so that he, you know, at least has access that information, if there is --

335 The Court: He has all that, does he not?

336 Mr. Owen: He has that. He has it.

337 Mr. Kennedy: He does.

338 The Court: That is what I understand.

339 Mr. Kennedy: I guess my concern is that there may be another Treasury Branch situation where they would get paid in priority to another creditor or even a secured creditor. Like you say, the barn door will be closed, and there is really nothing we can do about it. If there was some type of notice period or something for any --

340 The Court: I just think that is going to be unworkable here, really, Mr. Kennedy.

341 Mr. Kennedy: -- any payment to --

342 The Court: I would just hope that he would put a red flag on his report, and we'll be back in court fairly soon.

343 Mr. Kennedy: Yes, My Lord.

344 Mr. Owen: My Lord, at some stage I have a minor housekeeping matter to address you on. Would this be a good time?

345 The Court: Good.

346 Mr. Owen: It is the matter of the notice to be given of the order that will be made today, and to whom notice should be given, and in what manner. I -- I would --

347 The Court: Service of the order?

348 Mr. Owen: Yes, Sir, in effect. The difficulty is that we -- we are, of course, able to serve copy of the -- of the order upon counsel of record. We also have a list of some of the creditors, but not necessarily all. They are still working out that list and trying to make sense out of everything. And my proposal would be, Sir, that -- that therefore notice of Your Lordship's order be given, as I say, to counsel of record, to all creditors whose address is known to the company at this time, and possibly also by a single insertion in the Edmonton Journal and the Calgary Herald.

349 The Court: None of you have anything to say about that, I suppose? That -- that appears reasonable. Make that order.

350 Mr. Owen: Very good, Sir.

351 Mr. Reeson: Sir, just want to --what was the advertisement in the paper?

352 Mr. Kennedy: I don't know if the advertisement is really required, My Lord?

353 The Court: It isn't, I suppose, under the *Act*, but it is an attempt to communicate that --

354 Mr. Kennedy: Very well. It may actually -

355 The Court: It is up to you whether you want to advertise.

356 Mr. Owen: We are not -- the only reason, My Lord, is that we don't know what creditors may be lurking out there, and this is a means of notifying them. I -- I -- the company is not particularly anxious to do it for its own sake.

357 The Court: I suppose it is in everybody's interest that the creditors come forward, though, that exist.

358 Mr. Owen: All right, Sir.

359 The Court: Do you want to address costs at this time?

360 Mr. Kennedy: I think that may be appropriate, and I suppose it all boils down to, I understand, and in my submissions yesterday, I understood that they could not give us notice of the application, because I would have appointed a receiver immediately, or had the CIBC do that, I understand that. My concern was that the court was not fully advised on Monday, September 18th, of how the CIBC might be prejudiced. Your Lordship has seen fit to include a measure of protection for the CIBC and the other creditors, except for the surprise element that was necessary for them.

361 We have now had an opportunity to address all of our concerns, and I -- I would suspect at this point that perhaps we should let each party be responsible for their own costs. We now have had an opportunity to address our concerns before the court. The court has appointed a monitor with rather extensive powers, and has varied the earlier order. I don't think an award of costs at this point in either direction would serve any purpose at all.

362 The Court: Anything further?

363 Mr. Calvert: Mr. Kennedy has expressed my sentiments, My Lord.

364 Mr. Vaartnou: My only comment would be that if -- if the plan doesn't work out, that -- that our costs could still come through our security, if there is security available to one of the banks.

365 Mr. Kennedy: I would agree with that. We are secured for our solicitor-client costs, and I had assumed that anyhow.

366 Mr. Reeson: My Lord, just a clarification, as far as the costs of my client are concerned, it is understood, I assume, that his costs from September 21st onward will be covered as an indemnification against the estate, and that would include his professional legal fees of counsel acting on his behalf?

367 The Court: Yes. And his attendance at court yesterday and today, and yours.

368 Mr. Reeson: All right. Thank you, My Lord. Is it opportune at this time to attempt to summarize what we

have agreed to, or should be we just try and hash it out afterwards?

369 Mr. Kennedy: I believe it is all in the transcript, and everybody has kept pretty complete notes. And, again, the day is slipping away. Perhaps we can rely upon the transcript.

370 Mr. Reeson: All right. So -- just one issue I don't believe that we have, or I am not sure if we have come to final agreement on it, as far as the powers of Mr. Lane or Clarkson and Company, is basically a monitoring power --

371 The Court: Well, I am still hoping that counsel would work out the wording of that order, that aspect.

372 Mr. Reeson: Okay. All right. All right, My Lord.

373 The Court: What I suggest is that if you are not able to work it out by 2 o'clock, you come back at 2 o'clock.

374 Mr. Kennedy: Very good, My Lord.

375 Mr. Owen: Thank you, Sir.

376 Mr. Calvert: Just before we retire, then, Sir, the -- to the Royal Bank you granted a leave to apply further for the filing of a petition, in the motion filed by Petrowest? Similarly there was a request that we be at liberty to file a petition, and if that could also be adjourned, as well as the other relief that we have not address?

377 The Court: Yes. Fine.

378 Mr. Calvert: Thank you.

379 The Court: What about costs? Mr. Owen, what is your position respecting costs?

380 Mr. Owen: I shared the observations made by Mr. Kennedy.

381 The Court: Very good, then, costs will be paid by each party, other than Mr. Reeson's costs, each party will pay their own costs, then, for both applications then.

382 Mr. Kennedy: My Lord, with respect to 2 o'clock, perhaps you would appreciate somebody from one of our offices advising Your Lordship?

383 The Court: Just a telephone call would be fine to my secretary, or you -- you would not need to return for that. We won't require a Reporter, if necessary, to come back for that? Surely not.

384 Mr. Kennedy: Not for that one point, I don't think we will.

385 The Court: On that one point.

386 Mr. Owen: I would expect, My Lord, that we might get so far as to draw up a formal order embracing all the aspects of your judgment, including the one that we have to workout.

387 Mr. Kennedy: I don't share that optimism. Perhaps by the end of the day. In any event, the order is effective in its major aspects as of now, and we just have this one minor aspect left.

388 The Court: Yes.

389 Mr. Owen: That is fine. Thank you, Sir.

390 The Court: As far as my -- I contemplate being in at least part of the afternoon and all day tomorrow for execution of the order, if that is required.

END OF DOCUMENT