

Clerk's stamp:

COURT FILE NO. 1601-06131

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

Clerk's Stamp

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

**AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
CONNACHER OIL AND GAS LIMITED**

DOCUMENT **BOOK OF AUTHORITIES OF THE APPLICANT**

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT

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Book of Authorities In Support of June 27, 2017 Application

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4.	<i>Re Calpine Canada Energy Ltd.</i> , 2007 ABQB 504.
5.	<i>Re Air Canada</i> , 2004 CarswellOnt 469.
6.	<i>Re US Steel Canada Inc.</i> , 2016 ONSC 5215.
7.	<i>Re Grant Forest Products Inc.</i> , (2009) 57 CBR (5 th) 128 (Ont SCJ [Comm List]).
8.	<i>Re Lone Pine Resources Canada Ltd., et al.</i> , (Initial Order) granted September 25, 2013, Court File No 1301-11352 (ABQB).
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11.	<i>Nortel Networks Corp. (Re)</i> , [2009] OJ No 1044 (Ont SCJ [Comm List]).
12.	<i>Homburg Invest Inc, et al.</i> , (Order Granting Fifth Extension and Authorizing Extended KERP) dated August 24, 2012, Court File No. 500-11- 041305-117.
13.	<i>Re Timminco Ltd.</i> , 2012 ONSC 506.
14.	<i>Sierra Club of Canada v Canada (Minister of Finance)</i> , 2002 SCC 41.

TAB 1

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

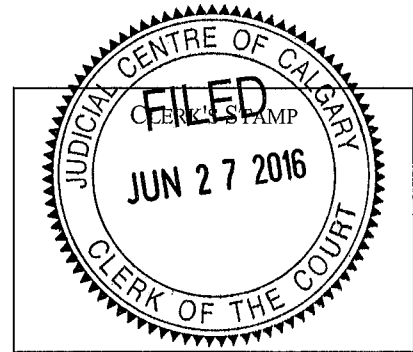
(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

TAB 2

I hereby certify this to be a true copy of
the original order

Dated this 27 day of June 2015
[Signature]
for Clerk of the Court



COURT FILE NUMBER

1601-01675

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS

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

**AND IN THE MATTER OF A PLAN OF
ARRANGEMENT OF ARGENT ENERGY
TRUST, ARGENT ENERGY (CANADA)
HOLDINGS INC. and ARGENT ENERGY
(US) HOLDINGS INC.**

DOCUMENT

**ORDER (STAY EXTENSION AND OTHER
RELIEF)**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

BENNETT JONES LLP
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Client File No.: 68859.14

**DATE ON WHICH ORDER WAS
PRONOUNCED:**

Monday, June 27, 2016

**LOCATION WHERE ORDER WAS
PRONOUNCED:**

Calgary Courts Centre

**NAME OF JUSTICE
WHO MADE THIS ORDER:**

The Honourable Mr. Justice D.B. Nixon

UPON the application of Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada"), and Argent Energy (US) Holdings Inc. ("Argent US", and

together with the Trust and Argent Canada, the "Applicants" or "Argent"); **AND UPON** having read the Application, the Affidavit No. 4 of Sean Bovingdon sworn June 17, 2016 (the "Bovingdon Affidavit No. 4"), the Third Report of FTI Consulting Canada Inc., the Court-appointed Monitor of the Applicants (the "Monitor"), and the Brief of the Applicants, all filed; **AND UPON** hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Syndicate (as defined in the Affidavit of Sean Bovingdon sworn February 16, 2016), and counsel for other interested parties;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Service of this Application and supporting documents is hereby declared to be good and sufficient, the time for notice is hereby abridged to the time provided, and no other person is required to have been served with notice of this Application.
2. Capitalized terms not otherwise defined herein shall have the meanings as defined in the Affidavits of Sean Bovingdon sworn and filed in these proceedings.

Stay Extension

3. The Stay Period as ordered and defined in paragraph 2 of the Initial Order filed February 17, 2016 and as extended pursuant to the Order (Stay Extension) granted on May 6, 2016, is hereby extended until and including August 31, 2016.

Distribution of Net Proceeds of the Transaction

4. The Monitor's intended actions in distributing the net proceeds of the Transaction that are attributable to the rolling stock and the leasehold interests of Argent US to the Syndicate, in accordance with the Order (Interim Distribution) granted herein on May 10, 2016, are hereby approved.

Expansion of the Monitor's Powers With Respect to the Trust

5. The expansion of the Monitor's powers in respect of the Trust as set forth below is hereby authorized and approved, effective June 30, 2016, on the terms and conditions set

out herein. Nothing in this Order shall derogate from the powers of the Monitor as provided for in the Initial Order or the CCAA.

6. In addition to the powers and duties of the Monitor set out in the Initial Order and the CCAA, and without altering in any way the limitations and obligations of the Trust as a result of these proceedings, the Monitor be and is hereby authorized and empowered to:
 - (a) preserve, protect and maintain control of the property of the Trust (the "Property"), or any parts thereof;
 - (b) oversee and direct the preparation of cash flow statements and to assist in the dissemination of financial and other information in these proceedings with respect to the Trust;
 - (c) receive, collect and take possession of all monies and accounts now owed or hereafter owing to the Trust, including proceeds payable pursuant to a sale of Property;
 - (d) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Monitor's name or in the name and on behalf of the Trust;
 - (e) exercise any rights which the Trust may have;
 - (f) provide instruction and direction to the advisors of the Trust;
 - (g) make any distribution or payments by the Trust required under any Order in these proceedings;
 - (h) assign the Trust into bankruptcy; and
 - (i) to perform such other duties or take any steps reasonably incidental to the exercise of such powers and obligations conferred upon the Monitor by this Order or any further Order of this Court.

7. The Monitor is directed to assign the Trust into bankruptcy at such time as the Monitor deems appropriate.
8. No provision in this Order is intended to appoint the Monitor as an officer, director or employee of the Trust. Additionally, nothing in this Order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, or receiver and manager of the Trust and that any distribution made to creditors of the Trust will be deemed to have been made by the Trust.
9. The Monitor shall continue to have the benefit of all of the protections and priorities as set out in the Initial Order and the CCAA, and any such protections and priorities shall apply to the Monitor in fulfilling its duties under this Order or in carrying out the provisions of this Order.

"D.B. Nixon"

The Honourable Mr. Justice B. Nixon
J.C.C.Q.B.A.

TAB 3

2012 ONSC 3767
Ontario Superior Court of Justice [Commercial List]

Cinram International Inc., Re

2012 CarswellOnt 8413, 2012 ONSC 3767, 217 A.C.W.S. (3d) 11, 91 C.B.R. (5th) 46

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

And In the Matter of a Plan of Compromise or Arrangement of Cinram International Inc., Cinram International
Income Fund, CII Trust and The Companies Listed in Schedule "A" (Applicants)

Morawetz J.

Heard: June 25, 2012
Judgment: June 26, 2012
Docket: CV-12-9767-00CL

Counsel: Robert J. Chadwick, Melaney Wagner, Caroline Descours for Applicants
Steven Golick for Warner Electra-Atlantic Corp.
Steven Weisz for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent
Tracy Sandler for Twentieth Century Fox Film Corporation
David Byers for Proposed Monitor, FTI Consulting Inc.

Subject: Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act
 [XIX.2](#) Initial application
 [XIX.2.a](#) Procedure
 [XIX.2.a.iv](#) Miscellaneous

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act
 [XIX.2](#) Initial application
 [XIX.2.b](#) Grant of stay
 [XIX.2.b.viii](#) Miscellaneous

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act
 [XIX.2](#) Initial application
 [XIX.2.h](#) Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group sought protection of Companies' Creditors Arrangement Act — C group brought application seeking initial order under Act, and relief including stay of proceedings against third party non-applicant; authorization to make pre-filing payments; and approval of certain Court-ordered charges over their assets relating to their DIP Financing, administrative costs, indemnification of their trustees, directors and officers, Key Employee Retention Plan, and consent consideration — Application granted — Applicants met all qualifications established for relief under Act — Charges referenced in initial order were approved — Relief requested in initial order was extensive and went beyond what court usually considers on initial hearing; however, in circumstances, requested relief was appropriate — Applicants spent considerable time reviewing their alternatives and did so in consultative manner with their senior secured lenders — Senior secured lenders supported application, notwithstanding that it was clear that they would suffer significant shortfall on their positions.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group brought application seeking initial order under Companies' Creditors Arrangement Act and other relief, including authorization for C International to act as foreign representative in within proceedings to seek recognition order under Chapter 15 of U.S. Bankruptcy Code on basis that Ontario, Canada was Centre of Main Interest (COMI) of applicants — Application granted on other grounds — It is function of receiving court, in this case, U.S. Bankruptcy Court for District of Delaware, to make determination on location of COMI and to determine whether present proceeding is foreign main proceeding for purposes of Chapter 15.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Stay against third party non-applicant — C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group sought protection of Companies' Creditors Arrangement Act — C LP was not applicant in proceedings; however, C LP formed part of C group's income trust structure with C Fund, ultimate parent of C group — C group brought application seeking initial order under Act, including stay of proceedings against C LP — Application granted — Applicants met all qualifications established for relief under Act — Charges referenced in initial order were approved — Relief requested in initial order was extensive and went beyond what court usually considers on initial hearing; however, in circumstances, requested relief was appropriate.

Table of Authorities

Cases considered by *Morawetz J.*:

Brainhunter Inc., Re (2009), 2009 CarswellOnt 7627 (Ont. S.C.J. [Commercial List]) — referred to

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — considered

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 3658, 56 C.B.R. (5th) 194 (Ont. S.C.J. [Commercial List]) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — referred to

Prizm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

Sino-Forest Corp., Re (2012), 2012 CarswellOnt 4117, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

Sulphur Corp. of Canada Ltd., Re (2002), 2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152, 35 C.B.R. (4th) 304 (Alta. Q.B.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 1466, 2012 ONSC 948, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 ONSC 106, 2012 CarswellOnt 1059, 89 C.B.R. (5th) 127 (Ont. S.C.J. [Commercial List]) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 “insolvent person” — considered

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) “company” — considered

s. 2(1) “debtor company” — considered

s. 3(1) — considered

s. 3(2) — considered

- s. 11 — considered
- s. 11.2 [en. 1997, c. 12, s. 124] — considered
- s. 11.2(1) [en. 1997, c. 12, s. 124] — considered
- s. 11.2(2) [en. 1997, c. 12, s. 124] — considered
- s. 11.2(4) [en. 1997, c. 12, s. 124] — considered
- s. 11.4 [en. 1997, c. 12, s. 124] — considered
- s. 11.51 [en. 2005, c. 47, s. 128] — considered
- s. 11.52 [en. 2005, c. 47, s. 128] — considered

APPLICATION by group of debtor companies for initial order and other relief under *Companies' Creditors Arrangement Act*.

Morawetz J.:

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

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

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

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

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

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

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

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

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

(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;

(ii) provides various digital media services through One K Studios, LLC; and

(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

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

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

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

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

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

14 Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

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

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

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

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

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

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

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

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

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

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

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

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

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

26 In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

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

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

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

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

31 The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are

protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

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

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

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

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

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

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

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

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

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

40 In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

(a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;

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

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

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

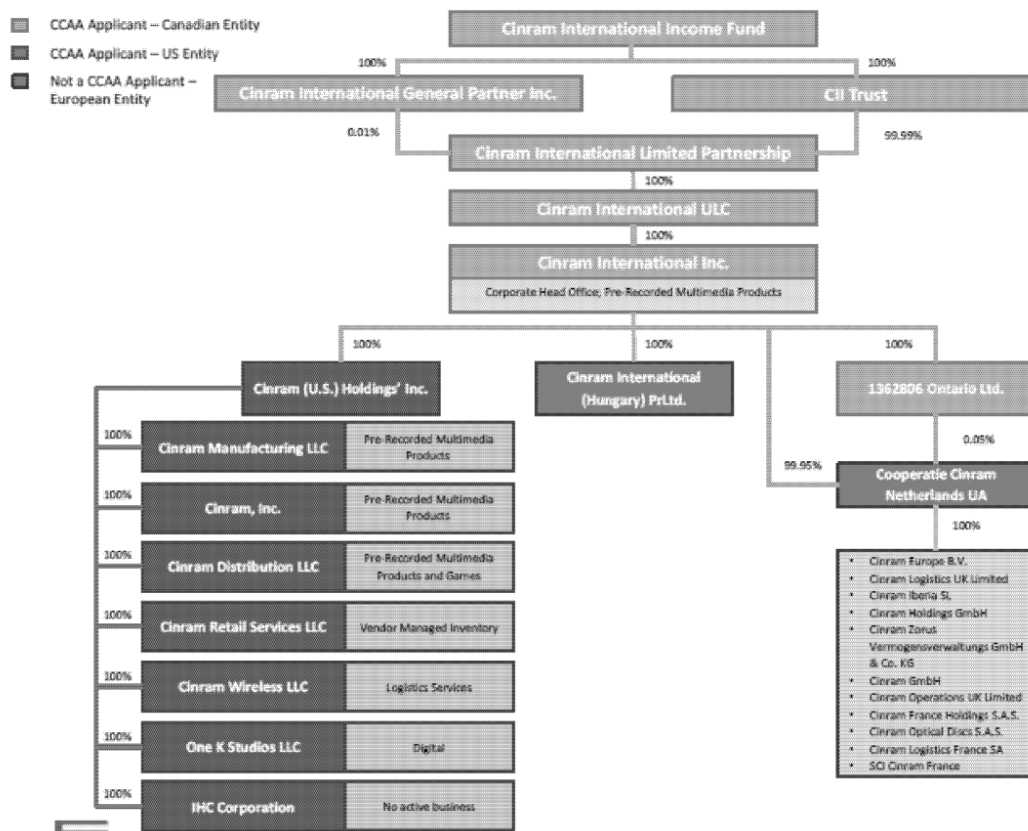
43 In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

Schedule "A"

Additional Applicants

Cinram International General Partner Inc.
Cinram International ULC
1362806 Ontario Limited
Cinram (U.S.) Holdings Inc.
Cinram, Inc.
IHC Corporation
Cinram Manufacturing LLC
Cinram Distribution LLC
Cinram Wireless LLC
Cinram Retail Services, LLC

One K Studios, LLC

Schedule "B"**Graphic 1
Schedule "C"****A. The Applicants Are "Debtor Companies" to Which the CCAA Applies**

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

CCAA, Section 3(1).

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

(1) The Applicants are Debtor Companies

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

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

“debtor company” means any company that:

(a) is bankrupt or insolvent;

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

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

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

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

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

(2) The Applicants are “companies”

45. The Applicants are “companies” because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

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

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

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

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

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

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

Global Light Telecommunications Inc., Re, *supra* at para. 17; Book of Authorities, Tab 2.

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

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

(3) The Applicants are insolvent

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

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

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

BIA, Section 2 (“insolvent person”).

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

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

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

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

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

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

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

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

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

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

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

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

a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and

b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.

CCAA, Section 3(2).

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

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

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

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

B. The Relief is Available under The CCAA and Consistent with the Purpose and Policy of the CCAA

(1) The CCAA is Flexible, Remedial Legislation

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

Nova Metal Products Inc. v. Comiskey (Trustee of), *supra* at paras. 22 and 56-60; Book of Authorities, Tab 4. *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 5; Book of Authorities, Tab 6.

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

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

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

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

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

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

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

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

In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

Lehndorff General Partner Ltd., Re, *supra* at para. 5; Book of Authorities, Tab 6. *Canwest Global Communications Corp., Re*, *supra* at para. 27; Book of Authorities, Tab 1.

CCAA, Section 11.

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

Lehndorff General Partner Ltd., Re, *supra* at paras. 5 and 16; Book of Authorities, Tab 6.

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

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

of circumstances, including:

- a. where it is important to the reorganization process;
- b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as “companies” within the meaning of the CCAA;
- c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and
- d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Woodward’s Ltd., Re (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10. *Lehndorff General Partner Ltd., Re*, *supra* at para. 21; Book of Authorities, Tab 6.

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

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

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

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

(3) Entitlement to Make Pre-Filing Payments

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

67. There is ample authority supporting the Court’s general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court’s practice of declaring a person to be a critical supplier and granting a charge on the debtor’s property in favour of such critical supplier. As noted by Pepall J. in *Canwest Global Communications Corp., Re*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court’s broad and inherent jurisdiction to make such orders that will facilitate the debtor’s restructuring of its business as a going concern.

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

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

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

Canwest Global Communications Corp., Re *supra*, at para. 43; Book of Authorities, Tab 1.

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

Prizm Income Fund, Re (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) at paras. 29-34; Book of Authorities, Tab 14.

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

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

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

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

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

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

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

(4) The Charges Are Appropriate

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

(A) DIP Lenders' Charge

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

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

11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

Timminco Ltd., Re, 211 A.C.W.S. (3d) 881 (Ont. S.C.J. [Commercial List]) [2012 CarswellOnt 1466] at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

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

11.2(4) Factors to be considered — In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for

additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrow funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

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

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

Re Catalyst Paper Corporation, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.

Angiotech, supra, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18

Fraser Papers Inc., Re [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

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

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

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

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

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD\$3.5 million to secure the fees of the

Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent, the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

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

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

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) *Priority*

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

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

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco Ltd., Re*, *Canwest Global Communications Corp., Re* and *Canwest Publishing Inc./Publications Canwest Inc., Re*.

Canwest Global Communications Corp., Re, *supra*; Book of Authorities, Tab 1.

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

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

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

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

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

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

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

- a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;
- b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;
- c. there is no unwarranted duplication of roles;
- d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and
- e. the Monitor is in support of the proposed Administration Charge.

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

(C) Directors' Charge

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

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

11.51(1) Security or charge relating to director's indemnification

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) Priority

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

11.51(3) Restriction — indemnification insurance

The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) Negligence, misconduct or fault

The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

CCAA, Section 11.51.

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

I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

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

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

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

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

- a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
- b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;
- c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;
- d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;
- e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
- f. the Monitor is in support of the proposed Directors' Charge.

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

(D) KERP Charge

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

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])] considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

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

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

Canwest Publishing Inc./Publications Canwest Inc., Re supra, at paras 59; Book of Authorities, Tab 16.

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

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

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

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

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

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

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

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

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

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

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

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

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

Application granted.

TAB 4

2007 ABQB 504
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2007 CarswellAlta 1050, 2007 ABQB 504, [2007] A.J. No. 923, 161
A.C.W.S. (3d) 369, 33 B.L.R. (4th) 68, 35 C.B.R. (5th) 1, 415 A.R. 196

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

In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada
Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources
Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC,
Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Heard: July 24, 2007

Judgment: July 31, 2007 *

Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Sean F. Collins, Jay A. Carfagnini, Fred Myers, Brian Empey, Joseph Pasquariello for
CCAA Debtors

Patrick McCarthy, Q.C., Josef A. Krueger for Monitor

Robert I. Thornton, John L. Finnigan, Rachelle F. Moncur for Ad Hoc Committee

Sean F. Dunphy, Elizabeth Pillon for ULC2 Trustee

Howard A. Gorman for ULC1 Noteholders Committee

Peter H. Griffin, Peter J. Osborne for U.S. Debtors

Peter T. Linder, Q.C., Emi R. Bossio for Fund

Ken Lenz for HSBC Bank USA, N.A., as ULC1 Indenture Trustee

Jay A. Swartz for Lehman Brothers

Rinus De Waal for Unsecured Creditors' Committee

Neil Rabinovitch for Unofficial Committee of 2nd Lien Debtholders

B.A.R. Smith, Q.C. for Alliance Pipelines

Douglas I. McLean for TransCanada Pipelines Limited

Subject: Insolvency

APPLICATION by debtors for approval of settlement.

B.E. Romaine J.:

Introduction

1 This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants

(collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

2 Both Courts approved the settlement. These are my reasons for that approval.

Background

3 Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG") and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The Monitor's 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the "CCAA Parties" and to those parties together with the Calpine Applicants as the "CCAA Debtors". Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U. S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Calpine Corporation ("CORPX"), the primary party in the U. S. insolvency proceedings, and its U.S. subsidiaries collectively as the "U.S. Debtors".

4 During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

5 In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following "material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors":

- a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 2% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;
- b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.\$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;
- c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;
- d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;
- e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;
- f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");
- g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;
- h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and
- i. Marker claims filed by the ULC1 Indenture Trustee.

6 In the Report, the Monitor describes the settlement process that led to this application as follows:

10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.

11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.

12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.

13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...

14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...

17. The [GSA] is subject to the following conditions:

- a. The approval of both this Court and the U.S. Bankruptcy Court;
- b. The execution of the [GSA]; and
- c. The CCRC ULC1 Notes being sold.

7 As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U. S. Debtors. The Report describes the "key elements" of the GSA as follows:

a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee's proof of claim ... against CORPX which results in a total claim against CORPX in the amount of US\$3.505 billion (the "ULC1 1.65x Claim"). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;

b The withdrawal of the BDCs advanced by the U.S. Debtors...;

c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;

d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;

e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees

will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors' creditors' claims:

- i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively "Alliance") for repudiation of certain long-term gas transportation contracts held by CESCA;
 - ii. The claims of NOVA Gas Transmission Ltd. ("NOVA") for the repudiation of certain long-term gas transportation contracts held by CESCA;
 - iii. The claims of TransCanada Pipelines Limited ("TCPL") for the repudiation of certain long-term gas transportation contracts held by CESCA;
 - iv. The claims of Calpine Power L.P. [the "Fund"] for the repudiation of the tolling agreement between [the Fund] and CESCA (the "CLP Toll Claim");
 - v. The claims of [the Fund] and Calpine Power Income Fund ("CPIF") relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the "Island Transfer Fee Claim"); and
 - vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the "Heat Rate Penalty Claim"); and
- f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;
- g. The settlement of the Greenfield Action;
- h. The withdrawal of the UL1 Indenture Trustee Marker Claim;
- i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;
- j. The resolution of the quantum of the cross-border intercompany claims...;
- k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;
- l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the "ULC2 Make-Whole Premium"). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;
- m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan...;
- n. Resolution of all jurisdictional issues between Canada and the U.S.; and
- o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. ("TTS").

8 The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of

the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

The Applications

9 The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

10 The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

11 The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "*Ad Hoc* Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the *Ad Hoc* Committee states that it "is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power, L.P.". Thus, the *Ad Hoc* Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the *Ad Hoc* Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the *Ad Hoc* Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the *Ad Hoc* Committee. I will refer to those parties opposing the GSA collectively as the "Opposing Creditors" hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

12 The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analysed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of \$7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:

...While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U. S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.

b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors' creditors. According to the Monitor's conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

The Ad Hoc Committee's Objections

13 The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S.\$650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

14 This submission is misleading. The \$650 million refers to two elements of the GSA: a payout to the U.S. Debtors of \$75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of \$575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's \$2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional \$50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

15 The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

16 As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

17 The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least \$175 million. The cited shortfall of \$175 million is again misleading, failing to take into account that the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCA, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCA of \$25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the

extent of approximately \$2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately \$23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

18 The shortfall, if any, to which the creditors of CESCO will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from \$142 million to \$378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth \$200 million or less, all of the CESCO creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's "high" recovery scenario, all creditors of CESCO will receive full payment even if the CLP Toll Claim is worth as much as \$300 million.

19 Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

20 The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

21 The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only \$25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX guarantees under the "low" scenario, and those only to the extent of a \$15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

22 The Ad Hoc Committee argues that CORPX's guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX's guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor's expectation that these claims will be paid in full, the U. S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

23 The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of the ULC2 noteholders, such payment being subject to further

Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders' claims.

24 Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

25 Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

26 I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment.. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately \$3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

27 As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly 3 ¹/₂ months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U. S. Court.

The Fund's Objections

28 As noted in its brief, the Fund "fully supports" the position of the Ad Hoc Committee. However, it says it has additional objections.

29 The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA's major creditor, the Fund is thereby prejudiced.

30 Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that \$15 million of the possible \$90 million priority claim to be paid to the U. S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

31 The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund's claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

32 The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX's guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility

that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the \$7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

33 The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application. The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of \$10.5 million on the "high" scenario basis or \$19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

The ULC2 Trustee's Objections

34 The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

35 The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

36 In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

37 I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the ULC2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

38 While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

39 With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

40 The ULC2 Trustee also objects to the timing of the payment of \$75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the \$75 million payment will not occur until the CCRC ULC1 Notes are sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

Analysis of Law re: Plan of Arrangement

41 It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 13.

42 The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J. [Commercial List]) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

43 The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

44 The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

45 The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

46 In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky ... contingent claimants, and... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan...without the right to vote on the proposal."

47 The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

48 These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction, except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U. S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanctioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

49 Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

50 It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

51 The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

52 The Opposing Creditors rely on *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (C.S. Que.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

53 There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

54 It is surely not the case that an arrangement or compromise need be labeled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

55 I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of \$25,000 in CCPL. The creditors of CESCA who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCA gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

56 The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) at paras. 11 and 23 and *Air Canada, Re* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

57 In *Playdium Entertainment Corp., Re*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la*

Croix-Rouge, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*.

58 Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium Entertainment Corp., Re* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

59 In *Air Canada, Re*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd.... In Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

60 The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

61 Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

62 This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

63 I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

64 The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

65 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, the Red Cross, under the Court's supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

66 Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

67 The objecting claimants in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

68 Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

69 He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

70 Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

71 Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA

and may also be "grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA'."

72 At para. 45, Blair J. made the following comments, which resonate in this application:

It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[Emphasis in *Red Cross*.]

73 Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price "would in the circumstances be folly".

74 While there are clear differences between the *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* sale transaction and the GSA in this case, what the *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, Air Canada, Re* and *Playdium Entertainment Corp., Re*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

75 That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this

is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

76 In this case, as in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

77 The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.) at para. 18. This was an appeal of an order made by Farley J. approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco's assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

78 At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...

In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

79 The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

Conclusion

80 Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately \$7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant

creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

81 I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved. Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analysed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

82 The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

Application granted.

Footnotes

- * Leave to appeal refused *Calpine Canada Energy Ltd., Re* (2007), 2007 ABCA 266, 2007 CarswellAlta 1097, 35 C.B.R. (5th) 27, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]).

TAB 5

2004 CarswellOnt 469
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2004 CarswellOnt 469, [2004] O.J. No. 303, 128 A.C.W.S. (3d) 1067, 47 C.B.R. (4th) 169

**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

Farley J.

Heard: January 16, 2004
Judgment: January 16, 2004
Docket: 03-CL-4932

Counsel: Sean F. Dunphy, Ashley John Taylor for Air Canada
Peter J. Osborne, Peter H. Griffin for Monitor
Howard Gorman for Ad Hoc Unsecured Creditors Committee
Aubrey Kauffman for Ad Hoc Committee of Various Creditors
Jay Swartz for Deutsche Bank
Mark Gelowitz for Trinity Time Investments
Robert Thornton, Gregory Azeff for GE Capital Aviation Services Inc.
J. Porter for Cerberus
Kevin McElcheran for CIBC
Murray Gold for CUPE
Ian Dick for AG Canada
James Tory for Air Canada Board
Joseph J. Bellissimo for Aircraft Lessor/Lender Group
Terri Hilborn for Unionized Retiree Committee
William Sasso, Sharon Strosberg for Mizuho International, PLC
Jim Dube for Deutsche Lufthansa A.G.

Subject: Insolvency; Corporate and Commercial

APPLICATION for approval of various agreements under *Companies' Creditors Arrangement Act*.

Farley J.:

1 These reasons deal with three matters which the court was asked to approve Air Canada (AC) entering into various agreements; simply put they were as follows:

- (1) the Merrill Lynch (ML) indemnity;
- (2) the entering into the amendments to the Trinity Agreement; and
- (3) the Global Restructuring Agreements (GRA).

ML Indemnity

2 There was no opposition to this. The court was advised that such an indemnity was customarily given and that the terms of this particular one were such as is normally given. I therefore approve AC granting such an indemnity to ML.

Trinity Amendments

3 As I understood the submissions this morning, Mizuho a member of the Unsecured Creditors Committee (UCC) was the only interested party which spoke out against the Trinity amendments. It continues to be dissatisfied with the process by which Trinity was selected as the equity plan sponsor. I merely point out, once again, that this process was not of the Court's choosing but rather one which AC commenced on notice to the service list and as to which there were no objections before Trinity was selected on November 8, 2003 (together with the "fiduciary out" provision contained in its proposal). Aside from the court approvals envisaged by that process, the court only became involved when it was appreciated that there were some difficulties with the practical implementation of the process.

4 I further understand that the Ad Hoc Committee of Various Creditors (CVC) withdrew its opposition yesterday along with its cross motion. The UCC (one assumes on some majority basis) supported the Trinity Amendments but indicated that, as a sounding board, it wished to continue sounding that it still had concerns about aspects of corporate governance and management incentives.

5 I have no doubt, if adjustments in any particular area make sense between the signatories (AC and Trinity) and to the extent that any beneficiaries are involved, that such adjustments will be made for everyone's overall benefit (everyone in the sense of AC including all of its stakeholders including creditors, labour, management, pensioners, etc.) not only for the short term interests but the long term interests of AC emerging from these CCAA proceedings as an ongoing viable enterprise on into the future, well able to serve the public (both Canadian and foreign). A harmonious relationship with trust and respect flowing in all directions amongst the stakeholders will be to everyone's long term advantage. With respect to corporate governance though, I am able to make a more direct observation. A director, no matter who nominates that person, owes duties and obligations to the corporation, not the nominator: see *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 123, aff'd (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.).

6 There was no evidence to show that the Board of AC in exercising its fiduciary duties did not properly consider on a quantitative and qualitative basis the factors (on a pro and con basis) relating to whether Cerberus had provided a Superior Proposal (as that was defined in section 9 of the Trinity Agreement approved earlier by this Court). Indeed there was no complaint from Cerberus in this respect. The Board's letter to me of December 22, 2003 carefully reviewed the considerations which the Board (with the assistance of Seabury and ML, together with the general oversight and views of the Monitor) gave in their deliberations with their ultimate decision that the Cerberus December 10, 2003 proposal was not a Superior Proposal with the result that the Board has selected Trinity to be the equity program sponsor in accordance with the Trinity amended deal. I approve AC executing the Trinity amended deal and implementing same, with the recognition and proviso that there may be further amendments/adjustments which may be entered into subject to the guidelines of my discussion above. I note in particular that the UCC helpfully pointed out that section 7.3 still needs to be modified, and that is being worked on. The Air Canada Pilots Association observed that there still needed to be some fine-tuning at para. 22 of its factum noting that: "These matters of the detailed implementation of the Amended Trinity Investment Agreement can all be resolved by good faith negotiations between Air Canada, Trinity and affected stakeholders, with the assistance and support of the Monitor"; I did not have the benefit of any submissions in this

regard (para.22) nor was any expected to either be given or taken as the parties all appreciated that this was not to be an exercise in "nitpicking".

7 At paragraph 71 of its 19th report, the Monitor stated:

71. The Monitor is of the continuing view that the Equity Solicitation Process must be completed as soon as possible. The restructuring process and many other restructuring initiatives have been delayed by approximately two months as a result of the continued uncertainty concerning the selection of the equity plan sponsor. The equity solicitation process must be concluded so that the balance of the restructuring process can be completed before the expiry on April 30, 2004 of the financing commitments from each of Trinity, GECC and DB pursuant to the Standby Agreement. The Monitor recommends that this Honourable Court approve the Company's motion seeking approval of the Amended Trinity Investment Agreement.

8 I would therefore approve the Trinity amendments so that AC can proceed to enter into and implement the Amended Trinity Investment Agreement. I note that this approval is not intended to determine any rights which third parties may have.

GRA

9 As with the previous approvals, I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), at 201. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), Blair J. at p. 316 adopted the principles in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) as an appropriate guideline for determining when an agreement or transaction should be approved during a CCAA restructuring but prior to the actual plan of reorganization being in place. In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

10 The Monitor's 19th report at paragraphs 20-21 indicates that:

20. The GRA provides the following benefits for Air Canada:

- The retention of a significant portion of its fleet of core aircraft, spare engines and flight simulators, which are critical to its ongoing operations;
- The restructuring of obligations with respect to 106 of 107 Air Canada and Jazz air operating, parked and undelivered aircraft (effective immediately for 12 GECC-managed aircraft and upon exit from CCAA for the remaining 94 GECC-owned aircraft, except as indicated below), including lease rate reductions on 51 aircraft (of which 3 aircraft have been returned as of the current date), cash flow relief for 29 aircraft, termination of the Applicants' obligations with respect to 20 parked aircraft (effective immediately), the cancellation of 4 future aircraft lease commitments and the restructuring of the overall obligations with respect to 2 aircraft. Obligations with respect to the last remaining aircraft remain unaffected as it is management's view that this lease was already at market;
- Exit financing of approximately US\$585 million (the "Exit Facility") to be provided by GECC upon the Company's emergence from CCAA;

- Aircraft financing up to a maximum of US\$950 million (the "RJ Aircraft Financing") to be provided by GECC and to be used by Air Canada to finance the future purchase of approximately 43 regional jet aircraft; and
- The surrender of any distribution on account of any deficiency claims under the CCAA Plan with respect to GECC-owned aircraft only, without in any way affecting GECC's right to vote on the Plan in respect of any deficiency claim.

21. In return for these restructuring and financing commitments, the GRA provides for the following:

- Payment of all current aircraft rent by Air Canada to GECC, during the interim period until emergence from CCAA proceedings, at contractual lease rates for GECC-owned aircraft and at revised lease rates for GECC-managed aircraft;
- The delivery of notes refinancing existing obligations to GECC in connection with 2 B747-400 cross-collateralized leases (the "B747 Restructuring") including one note convertible into equity of the restructured Air Canada at GECC's option;
- The delivery of stock purchase warrants (the "Warrants") for the purchase of an additional 4% of the common stock of the Company at a strike price equal to the price paid by any equity plan sponsor; and
- The cross-collateralization of all GECC and affiliate obligations (the "Interfacility Collateralization Agreement") on Air Canada's emergence from CCAA proceedings for a certain period of time.

The Monitor concluded at paragraph 70:

70. The Monitor notes that, if considered on their own, the lease concessions provided to Air Canada by GECC pursuant to the GRA differ substantially from those being provided by other aircraft lessors. In addition, the Monitor notes that GECC has benefitted from the cross collateralization on 22 aircraft pursuant to the CCAA Credit Facility and Interfacility Collateralization Agreement, particularly as it relates to the settlement of Air Canada's obligations to GECC under the B747 Restructuring. However, the Monitor also notes that the substantial benefits provided to Air Canada under the GRA including the availability of US \$585 million of exit financing and US\$950 million of regional jet aircraft financing are significant and critical to the Company's emergence from CCAA proceedings in an expedited manner. In the Monitor's view the financial benefits provided to Air Canada under the GRA outweigh the costs to the Applicants' estate arising as a result of the cross collateralization benefit provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. Accordingly, the Monitor recommends to this Honourable Court that the GRA be approved.

11 The GRA was opposed by the UCC (again apparently on some majority basis as one of its members, Cara, was indicated as being in favour and I also understand that Lufthansa was also supportive); the UCC's position was supplemented by separate submissions by another of its members, CIBC. I agree with the position of the UCC that the concern of the court is not with respect to the past elements of the DIP financing by GE and the cross-collateralization of 22 aircraft that agreement provided for. I also note the position of the UCC that it recognizes that the GRA is a package deal which cannot be cherry picked by any stakeholder nor modified by the Court; the UCC accepts that the GRA must be either taken as a package deal or rejected. It suggested that GE, if the court rejects the GRA as advocated by the UCC, will not abandon the field but rather it will stay and negotiate terms which the UCC feels would be more appropriate. That may be true but I would observe that in my view the delay and uncertainty involved would likely be devastating for AC. Would AC be able to meet the April 30, 2004 deadline for the Trinity deal which requires that the GRA be in place? What would the effect be upon the booking public?

12 I note that the UCC complains that other creditors are not being given equal treatment. However, counsel for another large group of aircraft lessors and financiers indicated that they had no difficulty with the GRA. Indeed, it seems

to me that GE is in a somewhat significantly different position than the other creditors given the aforesaid commitment to provide an Exit Facility and an RJ facility. Trinity and Deutsche Bank (DB) with respect to their proposed inflow of \$1 billion in equity would be subordinate to GE; this new money (as opposed to sunk old money of the UCC and as well as that of the other creditors) supports the GRA. I note as well although it is "past history" that GE has compromised a significant portion of its \$2 billion claim for existing commitments down to \$1.4 billion, while at the same time committing to funding of large amounts for future purposes, all at a time when the airline industry generally does not have ready access to such.

13 With respect to the two 747 LILOs (lease in, lease out), there is the concession that AC will enjoy any upside potential in an after marketing while being shielded from any further downside. GE has also provided AC with some liquidity funding assistance by deferring some of its charges to a latter period post emergence. Further it has been calculated that as to post filing arrears, there will be a true up on emergence and assuming that would be March 31, 2004, it is expected that there would be a wash as between AC and GE, with a slight "advantage" to AC if emergence were later. I pause to note here that emergence sooner rather than later is in my view in everyone's best interests - and that everyone should focus on that and give every reasonable assistance and cooperation.

14 With respect to the snapback rights, I note that AC would be able to eliminate same by repaying the LILO notes and the Tranche Loans and AC would be legally permitted to eliminate this concern 180 days post emergence. I recognize that AC would be in a much stronger functional and psychological bargaining position to obtain replacement funding post emergence than it is now able to do while in CCAA protection proceedings. I would assume that such a project would be a financial priority for AC post emergence and that timing should not prevent AC from starting to explore that possibility in the near future (even before emergence). I also note that GE anticipates that the snapback rights would not likely come into play, given, I take it, its analysis of the present and future condition of AC and its experience and expertise in the field. I take it *as a side note* that GE from this observation by it will not have a quick trigger finger notwithstanding the specific elements in the definition of Events of Default; that of course may only be commercial reality - and that could of course change, but one would think that GE would have to be concerned about its ongoing business reputation and thus have to justify such action. Snapback rights only come into existence upon emergence, not on the entry into the GRA.

15 I conclude that on balance the GRA is beneficial to AC and its stakeholders; in my view it is fair and reasonable and in the best interests of AC. It will permit AC to get on with the remaining and significant steps its needs to accomplish before it can emerge. The same goes for the Trinity deal. I therefore approve AC's entering into and implementing the GRA, subject to the same considerations as to completing the documentation and making amendments/adjustments as I discussed above in *Trinity Amendments*.

16 Orders accordingly.

Application granted.

TAB 6

2016 ONSC 5215
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2016 CarswellOnt 14647, 2016 ONSC 5215

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE
OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

H. Wilton-Siegel J.

Heard: August 17, 2016
Judgment: September 12, 2016
Docket: CV-14-10695-00CL

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Lou Brzezinski, for Bob and Sharon Milbourne
Gale Rubenstein, for Province of Ontario

Subject: Insolvency; Public; Labour

Headnote

Bankruptcy and insolvency

Labour and employment law

Table of Authorities

Cases considered by H. Wilton-Siegel J.:

Bloom Lake General Partner Ltd., Re (2015), 2015 CarswellQue 6175, 2015 QCCS 3064 (Que. Bkcty.) — considered

Bloom Lake General Partner Ltd., Re (2015), 2015 QCCA 1351, 2015 CarswellQue 7720 (C.A. Que.) — referred to

Timminco Ltd., Re (2012), 2012 ONSC 506, 2012 CarswellOnt 1263, 95 C.C.P.B. 48, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 11 — considered

H. Wilton-Siegel J. :

1 At a hearing on August 17, 2016, the Court heard two motions. In the first motion, the applicant in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), U.S. Steel Canada Inc. ("USSC"), sought approval of a proposed second key employee retention plan (the "KERP 2") (the "KERP Motion"). In the second motion, the United Steel Workers International Union (the "USW"), USW Local 1005, USW Local 8782 and Representative Counsel for the non-unionized employees and retirees ("Representative Counsel") (collectively, the "Moving Parties") jointly sought an order requiring USSC to terminate its suspension of the funding of other post-employment benefits ("OPEBs") (the "OPEB Motion").

2 On August 19, 2016, the Court advised the parties that, for written reasons to follow, it would grant the KERP Motion and deny the OPEB Motion at this time provided USSC made a one-time contribution of \$2.7 million to a transition fund established by the Province of Ontario for the benefit of the retired employees of USSC (the "Transition Fund") or to another fund to be administered on the same terms as the Transition Fund. This Endorsement sets out the Court's reasons for these determinations.

Preliminary Matter

3 At the outset of the hearing, Representative Counsel sought an adjournment of the OPEB Motion to permit cross-examination on the affidavit of William Aziz ("Aziz"), the chief restructuring officer of USSC (the "CRO"), sworn August 11, 2016 (the "Aziz Reply Affidavit"), and to permit further negotiations to proceed regarding a possible settlement of both motions.

4 The Aziz Reply Affidavit responds to an affidavit of Paul Bishop ("Bishop"), the financial advisor to the USW, sworn July 20, 2016 (the "Bishop Affidavit"), which was included in the motion materials of the Moving Parties on the OPEB Motion. The Aziz Reply Affidavit was served on the Moving Parties on August 11, 2016.

5 The USW, USW Local 1005 and USW Local 8782 opposed the adjournment unless the KERP Motion was also adjourned. USSC opposed any adjournment of either the KERP Motion or the OPEB Motion.

6 The KERP Motion was originally scheduled to be heard on July 27, 2016. The Moving Parties short-served the materials for the OPEB Motion for a hearing on July 27 as well. The motions were adjourned at the encouragement of the Court with a view to determining whether the parties could agree on a disposition of both motions. While such an agreement was not reached, the discussions resulted in the USSC offer to make a one-time payment to the Transition Fund referred to below.

7 There was no basis for adjourning the KERP Motion further. USSC was entitled to have the KERP Motion heard as it has already been adjourned once. Representative Counsel did not actively seek an adjournment of the KERP Motion, its principal request being an adjournment of the OPEB Motion. In addition, there is nothing in the Aziz Reply Affidavit that was relevant to the KERP Motion. There was no also legal connection between the KERP Motion and the OPEB Motion. While each of the motions involved the application of a portion of the limited cash resources of USSC, this was addressed, as a practical matter, in the negotiations between the parties.

8 The adjournment of the OPEB Motion was denied for the following reasons.

9 First, there is no demonstrable need for a cross-examination of Aziz on the Aziz Reply Affidavit. Representative Counsel has not provided any specifics of the matters on which it would seek to cross-examine Aziz. It says merely that it seeks time to assess whether it wishes to cross-examine him. Moreover, there is no evidence that a cross-examination is necessary to elucidate further the position of USSC. The matters addressed in that affidavit are largely of a financial nature based on the financial performance of USSC. This is neither new nor disputed information. The Monitor has been reporting on a monthly basis regarding the financial performance of USSC since October 2015. As a result, the Moving Parties are in a position to understand and assess the testimony of Aziz in that affidavit. Consistent with this view, the USW, USW Local 1005 and USW 8782 were prepared to argue the motion without the benefit of any cross-examination. Moreover, as the Moving Parties acknowledge, the differences between the parties do not relate to the underlying financial information but rather to the "spin" that they put on such facts, as set out in their respective arguments.

10 Second, Representative Counsel acknowledged at the hearing that the principal purpose for the adjournment request was to permit further negotiations among the parties. Representative Counsel sought a more nuanced result than either of the two polar options presented to the Court by the parties. This is a laudable purpose that I would ordinarily support. However, in this case, however willing Representative Counsel would be to find an intermediate position, it is clear that the other parties have reached the end of their negotiations and that such an agreement is not possible. The Monitor is also of the view that a further narrowing of the positions between the parties is unlikely.

11 Third, as discussed in the OPEB Motion analysis below, there is a connection between the outcome of that motion and the current negotiations among the principal stakeholders of USSC and the prospective purchasers of the business of USSC on a going-concern basis. The other parties to the OPEB Motion are of the view that it would be desirable to have this motion heard at this time for this reason.

12 Accordingly, the motion of Representative Counsel for an adjournment of the OPEB Motion was denied.

The KERP Motion

13 On October 8, 2014, as amended by order dated January 21, 2015, the Court approved a key employee retention plan in respect of 29 employees in management and operational roles who it considered critical to the success of USSC's restructuring efforts and continued operations as a going concern (the "KERP 1"). KERP 1 provided for an overall maximum of \$2,570,378 to be payable to certain key employees upon the earlier of: implementation of a plan of arrangement, completion of a sale, termination of employment without cause, or June 30, 2016. Accordingly, as of June 30, 2016, all amounts owing under KERP 1 became due and were paid to these key employees.

14 USSC has now identified 34 employees in management and operational roles who it considers critical to the success of its current restructuring efforts and continued operations as a going concern. It says that it requires the services of these employees, among other things, to enable it to continue to operate as a going concern. This is essential to the completion of any going-concern transaction that may result from the sale and investor solicitation process currently being conducted by USSC (the "SISP"), and to provide transition services to any going-concern purchaser.

15 USSC has developed KERP 2 to retain such employees. KERP 2 provides for a cash retention payment equal to a percentage of each such employee's annual salary in two tiers, either 50% or 25% of annual salary. KERP 2 provides for an overall maximum amount payable under the plan of \$1,572,051. The cash payment will become payable upon the earlier of the following events: termination of employment without cause, implementation of a plan of arrangement or completion of a sale of all or substantially all of the assets of USSC, in either case as approved by the Court and resulting in a continuation of going-concern operations, the substantial completion of liquidation in the event a going concern sale cannot be completed, the date an employee's services are no longer needed for such a liquidation as determined by the Monitor, and June 30, 2017.

16 KERP 2 provides for a payment of 75% of the retention payments on the closing of a sale of all or substantially all of the assets of USSC, or on implementation of a plan of arrangement, if in either case the transaction results in a continuation of going-concern operations. The remaining 25% is payable three months after closing of any such transaction, or earlier in the event of termination without cause of an employee. If an employee covered by KERP 2 is not offered employment by a going-concern purchaser, the entire retention payment will be made upon closing of the transaction. In the event of a liquidation, the cash retention payments will be equal to 75% of the maximum amounts established in respect of the employees covered by KERP 2. As was the case with KERP 1, USSC proposes to pay the KERP 2 amount to the Monitor to be held in trust pending the occurrence of any payment condition.

17 The Court's jurisdiction to authorize KERP 2 is found in its general power under s. 11 of the CCAA to make such order as it sees fit. The following factors identified in case law support approval of KERP 2 as fair and reasonable in the present circumstances.

18 First, the evidence supports the conclusion that the continued employment of the employees to whom KERP 2 applies is important for the stability of the business and to assist in the SISP. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

19 USSC advises that the employees identified for KERP 2 have lengthy histories of employment with it and specialized knowledge that cannot be replaced. Of the 34 employees covered by KERP 2, twenty-four were key employees in KERP 1. USSC advises that the number of employees considered to be key employees has increased since KERP 1 as a result of USSC's increasing independence from United States Steel Corporation ("USS"). The evidence strongly suggests that, if the employees were to depart USSC, it would be necessary to replace them on an immediate basis but that it would be very difficult, if not impossible, to identify adequate replacements in view of USSC's current circumstances.

20 Second, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the USSC's operations, the employees to be covered by KERP 2 would likely consider other employment options if KERP 2 were not approved. USSC says that certain of the key employees could depart imminently and others are likely to depart in the longer term if they are not provided with an incentive to remain in the form of KERP 2. More generally, it would be expected that, given that the CCAA proceedings have continued for almost two years, key employees will look for more stable long-term employment. USSC advises that approximately 48 salaried staff employees have departed in the past six months, including one employee who was covered by KERP 1.

21 Third, the evidence supports the conclusion that the continued employment of the employees to whom KERP 2 applies is important for the stability of the business and to assist in the successful conclusion of a going-concern sale or plan of arrangement, if feasible. In particular, seven of the key employees perform sales functions. Their departure would cause direct harm to USSC's ability to generate revenue, given that USS no longer performs any sales function on behalf of USSC. The sales function is also important to the business of USSC's major customers. In addition, the retention of key employees will be critical to any transition plan regarding a continuation of going-concern operations. USSC advises that at least one prospective purchaser in the SISP has indicated that a second key employee retention plan is important to it for this purpose.

22 Fourth, the KERP 2 was developed through a consultative process involving USSC's management, USSC's outside labour and employment counsel, and USSC's board of directors. USSC's board of directors, including the independent director, supports KERP 2. The business judgment of the board of directors is an important consideration in approving a proposed key employee retention plan: see *Timminco Ltd., Re*, 2012 ONSC 506, [2012] O.J. No. 472 (Ont. S.C.J. [Commercial List]) at para. 73.

23 Fifth, both the Monitor and the CRO support KERP 2. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor advised in its Twenty-Ninth Report dated August 15, 2016 (the "Twenty-

Ninth Report") that it is satisfied that each of the employees covered by KERP 2 occupies an important management or operational role, is a seasoned employee of USSC with deep knowledge of its business which cannot be readily replaced, and is critical to USSC's strategic direction and day-to-day operations and management as well as to completion of a successful restructuring. The Monitor also advises that it has reviewed the role and responsibility for each individual employee and the proposed quantum under KERP 2 for each employee and is satisfied that the amount and terms of the proposed KERP 2 are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings. The CRO advised that he believes it is in the best interests of USSC to make KERP 2 available to the employees covered by the plan and that the aggregate amount payable under KERP 2 is reasonable.

24 Sixth, the terms of KERP 2, as described above, are effectively payable upon completion of the restructuring process.

25 Based on the foregoing considerations, the KERP Motion is granted.

The OPEB Motion

26 By order dated October 9, 2016, the Court authorized the suspension of payments by USSC in respect of all OPEBs except for life insurance, along with the suspension of certain other payments (the "Cash Conservation Order"). On the basis of this order, USSC has suspended payments of the OPEBs, among other obligations, since that date.

27 As mentioned, this motion was originally scheduled to be heard on July 27, 2016. It was adjourned at the encouragement of the Court to permit discussions between the parties regarding a possible settlement of both the KERP Motion and the OPEB Motion. The parties did not reach an agreement. However, in connection with these discussions, each of USSC and the Moving Parties served "with prejudice" offers.

28 The USSC offer proposed a one-time payment of \$2.7 million to the Transition Fund, or to another fund to be administered on the same terms. The Moving Parties' offer provided for reinstatement of OPEBs until December 31, 2016, to be followed by a case conference to discuss whether the OPEBs should continue to be suspended after that date.

29 At the hearing of the OPEB Motion, the parties proceeded on the basis that the positions of the parties were narrowed to those reflected in their respective offers.

30 Accordingly, the Moving Parties sought an order requiring USSC to reinstate payment of OPEBs on a going-forward basis to the end of 2016, with payment thereafter to be addressed in a case conference at that time. USSC opposed this motion on the basis that its offer of a one-time payment to the Transition Fund appropriately balances the payment of the OPEBs with ensuring USSC's operational capabilities during the SISP process and furthering the prospects of the SISP.

The Evidence of the Parties

31 The parties have provided affidavit evidence of their respective advisors. The following summarizes the evidence in these affidavits, which counsel for the USW and USW Local 8782 accurately notes is at least as much argument as factual evidence. In addition, I have set out the principal recommendations of the Monitor in its Twenty-Ninth Report.

The USW

32 The USW relies on the Bishop Affidavit. Bishop states that, in his opinion, reinstatement of OPEB funding would not materially diminish USSC's forecast cash balance during 2016 and should not change USSC's and the Monitor's expectation that there will be no need to draw on the "debtor-in-possession" loan currently in place (the "DIP Loan") at any time in 2016.

33 Bishop bases this conclusion largely on his view that USSC has underestimated its cash flow forecasts, or perhaps more precisely outperformed its cash flow forecasts, since the commencement of these proceedings and continues to do so. In particular, Bishop has provided charts that demonstrate in his view that, contrary to expectations at the time that

payment of the OPEBs was suspended, USSC could have continued to pay OPEBs after October 9, 2015 and would still have had sufficient liquidity to continue operations through 2016 without drawing on the DIP Loan.

Representative Counsel

34 Representative Counsel relies on an affidavit of William Missen ("Missen"), a former senior officer of USSC who retired in 2004. Missen observes, as did Bishop, that the actual cash on hand at December 31, 2015 far exceeded the forecast amount at the time that payment of the OPEBs was suspended and that USSC has not drawn on the DIP Loan despite its forecast at the time.

35 Missen states that, in his opinion, USSC has sufficient cash on hand and forecasted earnings before interest, taxes, depreciation and amortization ("EBITDA") to allow reinstatement of the OPEBs without requiring a draw on the DIP Loan to fund such payments.

USSC

36 USSC relies on the Aziz Reply Affidavit. Aziz states that he believes that it is necessary, and in the best interests of achieving a successful restructuring, not to order reinstatement by USSC of the OPEBs. Aziz essentially makes six points in support of this position.

37 First, he says that actual EBITDA of USSC tracked exactly the forecast to May 31, 2016 made at the time of the Cash Conservation Order, and that it was only in June and July 2016 that actual EBITDA exceeded the forecast amount. He says these results are reflected in the fact that income from operations was positive only in June 2016. Accordingly, during the period October 1, 2015 to June 30, 2016, USSC had a cumulative negative income of \$139.7 million and a cumulative negative EBITDA of \$61 million. Further, Aziz says that the factors that resulted in increased gross margins since May 2016 — principally lower costs for key raw materials, higher steel prices, and a lower dollar — are subject to volatility, particularly steel prices which are forecast by many industry observers to decline during the rest of 2016. On the basis of the foregoing, Aziz says that, in his opinion, the historical record over this period, including the recent performance of USSC, does not indicate a reliable upward trend of financial performance over that which was forecast in September 2015, including in particular any reliable trend in the level of anticipated cash contributed from operations as reflected in EBITDA.

38 Second, while USSC acknowledges that its cash position has improved since October 2015, Aziz says this is largely due to the conversion of working capital, principally raw material inventory, into cash and the deferral of approximately \$14 million of capital expenditures that were included in the forecast at the time of the Cash Conservation Order. Over the period October 2015 to the end of June 2016, USSC's net cash position exceeded the forecast by \$92 million while its working capital and capital expenditures was \$54 million less than forecast. Of the difference of \$38 million, \$23 million is accounted for by the EBITDA difference in June 2016 compared to the forecast at the time of the Cash Conservation Order, and \$8 million is accounted for by the absence of interest payments on the DIP Loan, which was not drawn on during the period. Aziz says that, essentially, the existing cash is "spoken for" in the form of a necessary raw material inventory buildup in anticipation of winter, necessary capital expenditures, and payment of post-filing payables to suppliers who have extended credit to USSC.

39 Third, Aziz says there are a number of benefits to the USSC restructuring process from its current cash position that must also be taken into account. These include: (1) allowing USSC to operate reliably and without interruption; (2) avoiding a draw on the DIP Loan with its attendant interest costs and pressure from priority creditors who perceive an erosion of their security; (3) providing the liquidity to make seasonal raw materials inventory purchases and necessary capital expenditures; (4) affording USSC flexibility in its negotiations with prospective purchasers in its SISF process without an artificial deadline driven by cash-flow constraints; (5) permitting better payment terms from suppliers; and (6) assuring certainty of supply to USSC's customers. He suggests that conservation of cash is necessary for these reasons,

which collectively enhance the prospects of a successful going-concern restructuring process that would address the concerns of all stakeholders to the maximum extent feasible.

40 Fourth, Aziz suggests that any consideration of the resumption of payment of unsecured obligations should be taken in light of the prior ranking of secured and other priority claims. In particular, Aziz refers to the USSC secured claim of U.S. \$118.7 million, post-filing payables to suppliers, which were \$95.5 million at June 30, 2016, and potential statutory liens on the USSC properties, including municipal taxes.

41 Fifth, Aziz says that reinstatement of the OPEBs may trigger an event of default under the DIP Loan. This suggestion is speculative. I have not taken it into consideration in reaching the Court's determination on this issue.

42 Lastly, Aziz says that it is difficult to predict the actual cost of OPEB coverage if OPEBs were reinstated by USSC and that the actual cost could be higher than the historical average of \$3.6 million per month due to pent up demand and a time-limited incentive if reinstatement were ordered for a limited time prior to completion of any transaction.

The USW Reply to the Aziz Reply Affidavit

43 In a reply affidavit sworn August 15, 2016 (the "Bishop Reply Affidavit"), Bishop makes the following statements.

44 First, Bishop says the USSC financial results reflect the cost of certain raw materials under long-term contracts which ended in February 2016. He calculates the negative impact on cash flow associated with these contracts during the period October 1, 2015 to February 28, 2016 to have been \$44 million.

45 Second, he suggests the positive EBITDA in June 2016 and the anticipated positive EBTIDA for July 2016 represents a "significant change" in USSC's financial performance.

46 Third, he says that, in the absence of a working capital "roll forward" or forecast to the end of 2016, Aziz has failed to show mathematically that USSC would not have sufficient liquidity to meet its operational needs if it funded the OPEBs.

47 Ultimately, Bishop relies on his earlier statement that USSC could have continued to pay for the OPEBs after October 9, 2016 and still have more liquidity than it forecast during the period October 1, 2015 to May 31, 2016 at the time of the Cash Conservation Order.

The Monitor

48 In its Twenty-Ninth Report, the Monitor addressed the financial performance of USSC and the status of the SISP in the context of the Moving Parties' motion to require reinstatement of the OPEBs. The Monitor is of the opinion that the proposed one-time contribution by USSC to the Transition Fund, pending the outcome of the negotiations currently taking place under the SISP, "represents an appropriate balancing of the interests of USSC's operating and restructuring priorities with the interests of the OPEB [b]eneficiaries." It says such a contribution "is appropriate in light of USSC's financial position, priority claims and the on-going SISP." The Monitor recommends against reinstatement of the OPEBs, apart from the proposed payment of \$2.7 million by USSC to the Transition Fund, for the following reasons.

49 First, in the Monitor's estimation, USSC's financial position remains uncertain, notwithstanding an improvement in steel prices in the last several months. It states that the increase in USSC's cash position over the forecast at the time of the Cash Conservation Order is principally due to a reduction of working capital and the increase of post-filing trade credit.

50 Second, the Monitor says that any decision to reinstate the OPEBs should take into consideration the legal priorities of other claimants. These include post-filing payables that need to be paid to continue operations and the claims of its secured creditors, including statutory liens and construction liens that remain to be adjudicated.

51 Third, in the Monitor's view, reinstatement of the OPEBs could be detrimental to a successful SISP outcome involving a going-concern sale. It says the long-term treatment of the OPEBs is best negotiated between a going concern bidder and the affected stakeholders.

The Positions of the Parties

52 The Moving Parties say essentially that, however the current cash position of USSC arose, there is sufficient cash to reinstate the OPEBs on a monthly basis without negatively affecting the operational and restructuring activities of USSC. They say that, to the extent that USSC has failed to demonstrate quantitatively that it cannot afford to reinstate the OPEBs, it has failed to satisfy the onus on it. They also suggest that the Court should draw an adverse inference from the absence of such evidence and, in particular, from the absence of a forecast of month-end working capital for the period to December 31, 2016.

53 USSC says that its current financial position is largely unchanged from its financial position at the date of the Cash Conservation Order. It says that, while it has accumulated substantial cash, its current cash position reflects factors other than a cash contribution from operations. It says that these factors do not reflect an improvement in its financial position. USSC submits that the Court should give priority to the payment of OPEBs only if the operational and restructuring activities of USSC are not materially adversely affected. USSC also submits that the Moving Parties bear the onus of proof on this motion and suggests that they have failed to satisfy that onus.

Analysis and Conclusions

54 The issue of the possible resumption of the OPEBs is a matter on which the Court has considerable sympathy for the affected stakeholders. The possibility of a resumption of payments if economic circumstances permitted was contemplated in the Court's Endorsement dated October 14, 2015. The Court stated the following at para. 137:

... It is possible that the operating experience in the new environment will reveal some possible alternatives. I would encourage USSC to be alert to such possibilities as it moves forward. The restoration of the OPEBs should be a priority together with its operating and restructuring priorities.

55 However, as the passage indicates, any consideration of the resumption of payments must take into account USSC's operating and restructuring priorities. Such considerations are of particular significance at the present time given the status of the SISP. I will analyse the applicable considerations on this motion after first addressing the test implied by this passage.

The Legal Test

56 The Moving Parties submit different standards for application by the Court, in each case based on the statements of the court in *Bloom Lake General Partner Ltd., Re*, 2015 QCCS 3064, [2015] Q.J. No. 6111 (Que. Bkcty.), at para. 104, leave to appeal dismissed, 2015 QCCA 1351, [2015] Q.J. No. 7736 (C.A. Que.) and the Court's Endorsement dated October 14, 2015.

The Tests Proposed by the Moving Parties

57 Representative Counsel submits that the Court should order reinstatement of OPEB payments unless the evidence demonstrates that such payments will result in the bankruptcy of USSC. While those were the circumstances in *Bloom Lake*, I do not think that the trial court judge considered that the authority of the court was so limited, or that he purported to set out a test that was limited to such circumstances. Nor do I think that such an inflexible test is consistent with the role and authority of a court in CCAA proceedings, which are not directed toward avoiding the bankruptcy of a debtor company, but rather toward furthering a restructuring of the company as a going concern if possible. The test proposed by Representative Counsel is also not reflective of the decision of the Court in its Endorsement as is discussed further below. The USW describes the approach of this Court as making it a priority that OPEBs be reinstated unless it

is demonstrated that such action will adversely affect USSC's operating priorities or will adversely affect its restructuring process. It also suggests that this is the test that was articulated in *Bloom Lake*. I also do not agree with this formulation of the applicable legal standard on this motion as is discussed below.

Analysis of the Court

58 In its Endorsement, the Court contemplated a consideration of the extent to which it was feasible to reinstate some or all of the OPEBs relative to the impact of any such decision on the operating priorities of USSC at such time and the current status of its SISP. In broad terms, the Court envisaged a need to balance the competing objectives of payment of some or all of the OPEBs, maintenance of USSC's operations as a going concern consistent with its business plan, and furtherance of the SISP.

59 With respect to the reinstatement of the OPEBs, any such reconsideration could canvas a range of alternatives. In this case, the Moving Parties seek reinstatement of all of the OPEBs, whereas USSC proposes a one-time payment. With respect to the maintenance of USSC's operations, the Court's Endorsement specifically contemplated, as a practical matter, that any such decision would require a change in USSC's operating experience, by which was meant an improvement in USSC's profitability, as a condition of such an order. In other words, the existence of cash not accompanied by an improvement in the anticipated operating performance relative to the cash flow forecast at the time of the Cash Conservation Order would not be sufficient to support such relief. Such an approach implies that the onus of demonstrating such a change rests with the Moving Parties. With respect to considerations pertaining to the SISP, the Court must take into account the potential for any impact, adverse or otherwise, on the prospects for a successful outcome of the restructuring process.

60 I consider this approach to be consistent with the decision in *Bloom Lake* upon which the Moving Parties rely. Insofar as the trial judge in *Bloom Lake* applied a test, it is set out in para. 104 thereof, where he stated that "[t]he Courts have consistently recognized a jurisdiction to suspend the obligation to make special payments and OPEB payments when 'necessary to enhance the liquidity to promote the survival of a company in financial distress.'" What is "necessary to enhance the liquidity to promote the survival of a company in financial distress" in any given situation will depend on the circumstances of each case. In *Bloom Lake*, the debtor company had ceased operations. All that was necessary was funding to permit the conduct of a sales and investment process. In the present circumstances, it is necessary to fund the continuing operations of USSC to maximize the prospects of a successful SISP that will provide the greatest possible benefit to all of the stakeholders, including in particular the Moving Parties.

61 Accordingly, I am of the view that the determination of the OPEB Motion requires a balancing of the three competing objectives set out above subject to the condition of demonstration of a material improvement in the anticipated profitability of USSC over the period of payment of the OPEBs sought by the Moving Parties.

Analysis of the Relevant Considerations

62 It is important to recall the circumstances in which, and the purpose for which, the Cash Conservation Order was made in October 2015. At that time, USSC was facing the prospect of a termination of its operating business unless it could adopt its business preservation plan. The purpose of USSC's business preservation plan was to conserve cash with a view to continuing to operate the USSC business for a further year or more while conducting a new sales and investor solicitation process.

63 At that time, the OPEB beneficiaries were faced with the immediate termination of their OPEB benefits if USSC ceased operations and no prospect of any reinstatement under a liquidation scenario. The only alternative was a suspension of payment of a number of obligations, including OPEB benefits, pursuant to USSC's business preservation plan in the hope that a new sale and investment process would result in a going-concern transaction which would include a resumption of OPEB payments.

64 Accordingly, the starting point for the analysis of the present motion must be whether there has been any fundamental change in the profitability of USSC from that anticipated at the date of the Cash Conservation Order which would warrant a direction of the Court to USSC to resume OPEB payments. This is consistent with the legal standard described above. Accordingly, I have proceeded on the basis that the evidence must demonstrate such a fundamental change on a balance of probabilities in order to warrant an order which would, in effect, vary the Cash Conservation Order.

Has A Fundamental Change Occurred in USSC's Financial Performance and Prospects?

65 While the Moving Parties argue forcefully that the financial forecasts on which the USSC business plan was based in October 2015 were significantly different from the circumstances that actually arose, I am not persuaded that this is the case. The actual performance of USSC was bound to depart from the forecast. I am not persuaded, however, that the actual performance of USSC since October 2015 has departed materially from that which was forecast at the time of the Cash Conservation Order.

66 The strongest evidence for this conclusion is the historical experience of cash contribution to earnings as evidenced by the EBITDA performance. As mentioned, for the period October 1, 2015 to May 31, 2016, actual EBITDA was essentially the amount forecast as of the time of the Cash Conservation Order. On an aggregate basis, EBITDA only exceeded the forecast amount in June and in July (for which the financial results were not available at the date of the hearing).

67 I am not persuaded on the evidence before the Court that the financial performance of USSC in May, June and July, insofar as it was known at the date of the hearing, evidences a material improvement in the profitability of USSC. The Monitor says in the Twenty-Ninth Report that caution is required in assessing the likelihood that this recent financial performance represents a fundamental improvement in USSC's operating performance because of the volatility of its business and the inherent challenges of the steel industry, including significant excess production. It indicates that USSC's recent order experience in June and July may reflect a trend of decreasing orders. In addition, the Aziz Reply Affidavit states that forward prices reflect an anticipated decline in steel prices by the end of 2016. Bishop did not contradict that evidence.

68 Bishop's evidence to the contrary was that EBITDA results reflected higher than market prices for raw materials inventory through to the end of February 2016. However, it is overly simplistic to base a conclusion regarding USSC's current level of profitability on an adjustment of one figure to a portion of USSC's historical results, rather than considering the totality of the evidence regarding the profitability of its operations. As Bishop notes in the Bishop Affidavit, at the time of the Cash Conservation Order, USSC estimated that, after implementation of its business preservation plan, its cash resources would be depleted by \$6 to \$8 million per month. While Bishop says that this has clearly not been the case, the actual average monthly reduction in cash from operations, as reflected in the EBITDA performance to June 30, 2016 of a cumulative negative \$61 million, was approximately \$7 million.

69 Given the legal standard set out above, and the Court's determination that the evidence does not support a finding that there has been a fundamental improvement in the profitability of USSC's business, there is no basis for the relief sought by the Moving Parties on the OPEB motion. The remainder of the Endorsement sets out the Court's views on three other considerations that also support the Court's determination in the event it were held that a finding of a fundamental improvement in the profitability of USSC should not be a condition of any order requiring a reinstatement of the OPEBs.

Does USSC Hold Excess Cash?

70 The alternative, and principal, argument of the Moving Parties is that, even if the Court finds that there has been no material improvement in USSC's profitability over that forecast at the time of the Cash Conservation Order, the cash position of USSC has departed from that forecast to such an extent that USSC could resume the payment of the OPEBs without materially adversely affecting its operational or restructuring priorities over the foreseeable payment horizon

for the OPEBs. They say that the Court should therefore order a resumption of the OPEBs based on the level of cash that USSC currently holds.

71 I have the following observations and findings on this submission.

72 First, the principal argument in the Bishop Affidavit is, as mentioned, that USSC has underestimated its cash flow forecasts, or perhaps more precisely outperformed its cash flow forecasts, since the commencement of these proceedings and continues to do so. In particular, the Moving Parties have chosen to place great emphasis on the difference between the amount of cash on hand at December 31, 2015 and the amount forecast at the time of the Cash Conservation Order.

73 The decision to pick one date in time, particularly a date that is now more than seven months from the date of the hearing of this motion, is not only misleading but indicative of the argumentative nature of the alleged evidence in the Bishop Affidavit and therefore reason to approach such evidence with caution. Further, the fact that USSC has underestimated its cash position since the date of the Cash Conservation Order is no predictor of its cash position, or financial performance, in the future. Moreover, the current cash position is not by itself a basis for a resumption of payment of the OPEBs if USSC requires such cash for its operations. This is addressed below.

74 Second, for its part, USSC points to significant benefits to USSC from its current cash position that it says must be considered in connection with any resumption of payments of unsecured liabilities, including the OPEBs.

75 From an operational perspective, the existence of an adequate cash position is necessary to provide assurance to USSC's customers of continued supply of product. In addition, the current cash position has contributed to favourable credit terms from suppliers and removed the need for a draw, and consequential interest payments, on the DIP Loan. These factors contribute to an increased likelihood that USSC will be able to continue to operate on an independent basis until an agreement may be reached with a purchaser for a going-concern transaction.

76 Most importantly from USSC's perspective, the existing cash position allows USSC to conduct the SISP in an orderly manner in two respects. First, it allows negotiations with prospective purchasers to proceed without artificially imposed deadlines pertaining to USSC's financial performance. Such circumstances maximize the prospects for a successful going-concern restructuring which, as a practical matter, is the best if not the only course of action that would envisage a resumption of OPEB payments on a longer-term basis. In addition, by removing the possibility of erosion of the security position of its priority creditors, USSC is able to pursue the orderly conduct of the SISP without the distraction of creditor-initiated proceedings.

77 However, the issue before the Court is not the benefit of liquidity in the abstract, which is not disputed. Bishop agrees that "holding sufficient liquidity is essential."

78 Third, the issue on this motion is more narrowly focused on the extent to which USSC requires liquidity in the present circumstances and whether its current position would permit a resumption of payment of the OPEBs without detrimentally affecting its operational and restructuring priorities.

79 The Moving Parties say, in effect, that USSC has built the need for excess cash into its forecasts or, alternatively, it has, and will continue to, regularly exceed the very conservative cash flow forecasts that it has prepared with the result that there is a cash "cushion" in its financial condition, present and future. The Moving Parties say that USSC has the onus of demonstrating that this is not the case and that all of the cash that it currently has on hand will be required in its operations. They say that USSC has failed to satisfy this onus and, accordingly, the Court should order reinstatement of the OPEBs as a priority matter.

80 For its part, USSC says that it has based its position on its going-forward analysis of its working capital requirements. Essentially, it says all of the current cash will be applied in its operations through to the year-end, other than cash requirements to provide a reasonable cushion for unanticipated events in a volatile market. USSC argues that the extent of the liquidity that it requires is a matter of business judgment. Accordingly, it says that the Court should

respect the considered judgment of USSC management and its board of directors absent evidence of negligence or other improper behaviour.

81 These positions raise four issues that I will address in turn.

82 First, it is incorrect and misleading to limit the focus of the inquiry to the present cash position and the existence of any cash "cushion." The issue for the Court must be the anticipated future operating performance of USSC over the rest of 2016 viewed as a totality. This requires an understanding of the anticipated use of all of USSC's current assets, including but not limited to its cash, raw materials, and inventory, and the adequacy of such assets over this period. Such an understanding is informed in part, but not entirely, by the historical experience, including the source of the current cash position and the explanation for the difference between USSC's forecast and actual cash position.

83 In this regard, as the Aziz Reply Affidavit sets out, and the Monitor confirms, it is significant that the increase in USSC's cash position is not the result of an improved financial performance except in respect of the most recent operating experience. In para. 41 of the Twenty-Ninth Report, the Monitor analysed the actual cash flow of USSC for the period from October 1, 2015 to June 30, 2016 against the forecast cash flow at the time of the Cash Conservation Order. Of the \$92 million difference, only \$23 million was due to an improvement in cash contributed from operations, being the favourable experience in June 2016. The balance represented primarily the reduction of working capital assets, the negotiation of credit terms from suppliers post-filing, the deferral of capital expenditures, and the absence of interest on the DIP Loan.

84 These factors are, in large measure, both short-term and interrelated. The absence of interest payments on the DIP Loan is primarily the result of the conversion of working capital into cash and the deferral of capital expenditures rather than a consequence of an improvement in the operating experience of USSC, as discussed above. During the remainder of 2016, the reduction of working capital assets will reverse as raw materials inventory will build up again. The favourable credit terms from suppliers are only possible with a favourable cash position. The deferral of capital expenditures cannot last indefinitely and, in the event an agreement is reached in the SISP on a going-concern transaction, may be required as a condition of closing.

85 Second, while the Court has been provided with a cash flow projection to the end of 2016, it has not been provided with a working capital forecast over the same period. It is understood, however, that such forecasts are available to the Moving Parties on a monthly basis. I am therefore not prepared to draw an adverse interest from the absence of such financial forecasts in the record before the Court. However, the information before the Court does require a close scrutiny of the anticipated cash requirements of USSC over this period.

86 Third, while I acknowledge that the considered assessment of USSC management and its board of directors is an important consideration for the Court, I do not accept that the business judgment rule governs the present circumstances in an unqualified manner. Under the CCAA, a court has an obligation and a mandate to scrutinize the decisions of a debtor company through the prism of the rights of the affected stakeholders.

87 On the other hand, the issues on this motion involve an understanding and assessment of USSC's business plan for the remainder of 2016. The specific question of the capacity of USSC to resume payment of the OPEBs, given its expectations for this period as incorporated into its business plan and cash flow forecasts, is necessarily a matter of judgment rather than simple mathematics, as Bishop suggests. In these circumstances, in assessing the appropriateness of USSC's business decisions, the Court must necessarily rely heavily on the assessment and recommendations of the Monitor regarding financial matters, including the necessary level of liquidity to be incorporated into USSC's business plan. The Court cannot be its own financial advisor. In this regard, it must also rely heavily on the Monitor's assessment of the extent to which that business plan has the capacity to absorb additional obligations, such as a resumption of payment of the OPEBs.

88 The Monitor advises in the Twenty-Ninth Report, and confirms the evidence of USSC, that USSC sustained EBITDA losses through May 31, 2016 in line with the forecast at the time of the Cash Conservation Order and that, despite positive cash flow performance in June and July relative to the forecasted cash flow, the financial position of USSC remains uncertain. In addition, the Monitor confirmed, and set out in detail in its Report, that although USSC's cash position at the end of June 2016 was greater than projected at the time of the Cash Conservation Order, this is principally due to the factors described above and is not indicative of a material beneficial change in the financial condition and prospects of USSC at the present time.

89 The Monitor also states that the post-filing payables as of June 30, 2016 were \$95.5 million, principally representing trade credit owed to suppliers and accrued employee obligations. These payables will ultimately need to be paid out of the cash on hand, which was \$131.4 million as of June 30, 2016. This amount is before any reduction in cash that will occur in connection with additional raw materials inventory purchases ahead of the winter season. The Monitor also notes that payment of the post-filing payables and secured claims of USSC, including certain construction lien claims that have not yet been adjudicated, would result in a significant cash deficiency. Payment of the OPEBs to the end of the year would conservatively add approximately \$20 million to such obligations.

90 Having reviewed both the historical performance of USSC and its forecast working capital requirements, the Monitor recommends against reinstatement of the OPEBs, among other reasons, based on USSC's working capital requirements for the remainder of 2016. This is an important consideration for the Court. In effect, the Monitor concludes that there is a significant possibility that resumption of payment of the OPEBs would materially adversely affect USSC's operational performance given its current level of profitability.

91 Based on the foregoing analysis, I see no basis for rejecting this conclusion which the Court therefore adopts.

Additional Considerations Relative the SISP

92 It is also important to recognize two other considerations that relate to the context in which this motion is brought forward.

93 First, the timing of this motion relative to the SISP, and the circumstances that would exist depending upon the outcome of that process, are important factors to be taken into account. In general terms, USSC and the principal stakeholders, including the USW and to a lesser extent Representative Counsel, are holding discussions with prospective purchasers. It is currently expected that the outcome of these negotiations will be known within 4-6 weeks.

94 If the SISP process results in a going-concern transaction, it is anticipated that the agreement with the successful bidder will, among other things, address the future of the OPEBs. The most appropriate outcome of the present motion would, under such circumstances, be an order that is consistent with the agreement reached between the stakeholders, including the Moving Parties and the proposed purchaser, regarding OPEBs. Moreover, as the Monitor has indicated in its recommendations, the present motion should not constrain the current discussions between the stakeholders and the prospective bidders. In this regard, it is also important to note the Monitor's assessment that, in this context, an order reinstating the OPEBs "could be detrimental to a successful SISP outcome."

95 Conversely, if the SISP process does not result in a going-concern transaction, USSC will have to address alternative transactions, which would include an orderly liquidation of its assets. In this context, it would be necessary to address the status of the claims of the OPEB beneficiaries relative to the priority claims of other creditors before any decision on payment of those claims could be made. I recognize that it is of little consolation to the OPEB beneficiaries that, in such circumstances, they would be in the same position that they would have been in if the Cash Conservation Order had not been issued and USSC had ceased operations after October 2015. However, Representative Counsel has advised on a number of occasions of a priority claim that it intends to assert in respect of the same parties as pension beneficiaries. In addition, the Moving Parties have advised that they have conduct-related claims against USS which they may pursue in such event.

96 For its part, in such scenario, the Court would be required to address the priorities of the claims of the stakeholders as they have been determined as of that time. For this reason, as well, the Court must be mindful of the impact of any decision on the status of all stakeholder claims if this alternative scenario were to occur. Given that any such scenario would arise in the very near term, the Court cannot approve any action that would potentially adversely affect the security of priority creditors until the outcome of the SISP is known. The latitude that often exists at the outset of a restructuring process does not exist in the present circumstances given the status of the SISP. The Court cannot look to the anticipated benefits of a restructuring over the longer-term to offset the potential for adverse impacts in the short-term.

97 The second consideration is more administrative in nature but could nevertheless be material. The Moving Parties suggest that the monthly amount involved if OPEB payments were resumed would be approximately \$3.6 million. This is based on the historical experience before USSC suspended payment of the OPEBs. However, in the current environment there can be no certainty regarding the likely level of claims for several reasons. These include the fact of past claims that have been denied by the Transition Fund, as well as the natural influence of a future date for termination of OPEB claims on the timing and level of claims as that date approaches. In short, the Moving Parties ask the Court to direct USSC to assume an unquantifiable obligation. On the other hand, the USSC proposal involves a fixed amount. Further, based on its experience since it was established, the existing Transition Fund is in a better position to anticipate the level of eligible claims that would be made if eligible coverage were extended to other categories of claims. In this connection, it is useful to consider the one-time contribution proposed by USSC of \$2.7 million. On the one hand, such a payment does not satisfy the Moving Parties' request in terms of either amount or duration. On the other hand, it recognizes that USSC has recently experienced favourable economic results in June and July 2016 of which the Monitor attributes \$12.2 million to higher than anticipated gross margins in respect of the period to June 30, 2016. It is appropriate that the OPEB beneficiaries share in some of this favourable performance as have the existing employees. Such a payment will, together with the recent payment of the Province, permit a possible expansion of the coverage under the Transition Fund to address some of the coverage gaps in the Fund. Further, the amount contemplated is a material contribution toward the amount that the Moving Parties suggest is the likely cost of OPEBs during the period in which negotiations regarding the restructuring of USSC are expected to conclude. It would then be possible to assess the future status of the OPEBs based on the outcome of these negotiations.

98 The two considerations addressed in this section indicate that any payments made on account of the OPEBs that are authorized at this time should be fixed in amount and be of fixed duration. Put another way, there is a real sense in which this motion is premature and should be heard after the outcome of the SISP is known. The Moving Parties suggest that payments should be ordered to at least the end of 2016. This would obligate USSC to pay the OPEBs well beyond the date on which it is anticipated that the outcome of the SISP will be determined. The USSC offer involves a one-time payment pending the outcome of the SISP. I conclude that the two considerations addressed in this section argue against a resumption of payment of the OPEBs at the present time and in favour of the contribution to the Transition Fund proposed by USSC, given that the Court effectively has to choose between the two offers of the parties.

Conclusion

99 As mentioned, the determination of this motion requires that the Court choose between the two positions of the Moving Parties and USSC on the basis of its estimation of the best balance of competing considerations. These considerations are the furtherance of USSC's operational and restructuring priorities, and payment of the OPEBs. This is not an easy decision given the impact on the OPEB beneficiaries, who are certainly entitled to the sympathy not only of the Court but of all the stakeholders. Based on the test implied by the Court's Endorsement dated October 14, 2015, however, there is no basis for ordering a resumption of payment of the OPEBs. The evidence does not support a finding that there has been a fundamental improvement in the profitability of USSC's business since the date of the Cash Conservation Order.

100 Even if such a determination were not a condition of such relief, the combination of factors discussed above weighs against such relief. In particular, the Monitor is of the view that the USSC contribution of \$2.7 million to the

Transition Fund is appropriate in light of USSC's financial position, among other considerations, and recommends against reinstatement of the OPEBs. Given the considerations discussed above, I agree with that recommendation in concluding that the position of USSC best balances the competing priorities at play on this motion. Accordingly, the OPEB Motion should be denied at this time provided that USSC makes a one-time contribution of \$2.7 million to the Transition Fund or to another fund to be administered on the same terms as the Transition Fund.

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TAB 7

2009 CarswellOnt 4699
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2009 CarswellOnt 4699, [2009] O.J. No. 3344, 179 A.C.W.S. (3d) 517, 57 C.B.R. (5th) 128

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS
INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP
(Applicants)

Newbould J.

Heard: August 6, 2009
Judgment: August 11, 2009
Docket: CV-09-8247-00CL

Counsel: A. Duncan Grace for GE Canada Leasing Services Company
Daniel R. Dowdall, Jane O. Dietrich for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc.,
Grant U.S. Holdings GP
Sean Dunphy, Katherine Mah for Monitor, Ernst & Young Inc.
Kevin McElcheran for Toronto-Dominion Bank
Stuart Brotman for Independent Directors

Subject: Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.3](#) Arrangements

[XIX.3.b](#) Approval by court

[XIX.3.b.iv](#) Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court —
Miscellaneous

Applicant companies were leading manufacturer of oriented strand board — Parent company was G Inc — L was executive vice-president of G Inc — He owned no shares in G Inc — Employee retention plan ("ERP") agreement between G Inc. and L provided that if at any time before L turned 65 years of age, termination event occurred, and he was to be paid three times his then base salary — Agreement provided that obligation was to be secured by letter of credit and that if company made

application under Companies' Creditors Arrangement Act, it would seek order creating charge on assets of company with priority satisfactory to L — In initial order, ERP agreement was approved and ERP charge on all of property of applicants as security for amounts that could be owing to L under ERP agreement was granted to L, ranking after administrative charge and investment offering advisory charge — Initial order was made without prejudice to G Co. to move to oppose ERP provisions — G Co. brought motion for order to delete ERP provisions in initial order on basis that provisions had effect of preferring interest of L over interest of other creditors, including G Co. — Motion dismissed — ERP agreement and charge contained in initial order were appropriate and were to be maintained — To require key employee to have already received offer of employment from someone else before ERP agreement could be justified would not be something that is necessary or desirable — ERP agreement and charge were approved by board of directors of G Inc., including approval by independent directors — Once could not assume without more that these people did not have experience in these matters or know what was reasonable — Three-year severance payment was not so large on face of it to be unreasonable or unfair to other stakeholders — Though ERP agreement did not provide that payment should not be made before restructuring was complete, that was clearly its present intent, which was sufficient.

Table of Authorities

Cases considered by *Newbould J.*:

MEI Computer Technology Group Inc., Re (2005), 19 C.B.R. (5th) 257, 2005 CarswellQue 3675, [2005] R.J.Q. 1558 (C.S. Que.) — distinguished

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1519 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — considered

Warehouse Drug Store Ltd., Re (2006), 24 C.B.R. (5th) 275, 2006 CarswellOnt 5128 (Ont. S.C.J.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

MOTION by creditor for order to delete employee retention plan provisions in initial order.

Newbould J.:

1 KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

2 GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

3 The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

4 The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

5 Grant Forest has total funded debt obligations of approximately \$550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately \$400 million. The second lien lenders are owed approximately \$150 million.

6 Grant Forest has unsecured trade creditors of over \$4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. \$6.5 million.

7 The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately \$50 million for debt financing provided to the business.

Analysis

8 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, West Law, 2009, it is stated:

In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key

employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

9 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

10 I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

11 The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

12 Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

13 It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.). In that case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from *Warehouse Drug Store Ltd., Re*, [2006] O.J. No. 3416 (Ont. S.C.J.), that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

14 I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Nortel Networks Corp., Re*, [2009] O.J. No. 1188 (Ont. S.C.J. [Commercial List]), Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that

is necessary or desirable.

15 In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

16 It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

17 It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

20 The first lien security holders owed approximately \$400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

21 With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of

the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately \$400 million are consenting and the second lien lenders owed approximately \$150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately \$50 million, supports the KERP provisions for Mr. Lynch.

22 In his work, *Canadian Insolvency in Canada*, *supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated “staged bonuses”. While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

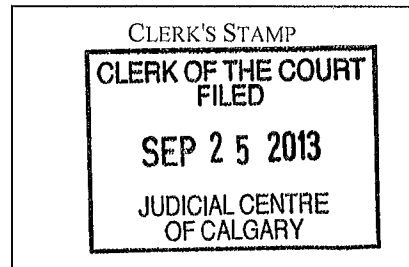
23 In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

24 I have been referred to the case of *MEI Computer Technology Group Inc., Re* (2005), 19 C.B.R. (5th) 257 (C.S. Que.), a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor’s counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

25 The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

Motion dismissed.

TAB 8



COURT FILE NUMBER

1301-11352.

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS

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

I hereby certify this to be a true copy of
the original Order

dated this 25th day of Sept 2013
[Signature]
for Clerk of the Court

IN THE MATTER OF THE **BUSINESS**
CORPORATIONS ACT, R.S.A. 2000, c. B-9, as
amended

AND IN THE MATTER OF LONE PINE
RESOURCES CANADA LTD., LONE PINE
RESOURCES (HOLDINGS) INC., LONE PINE
RESOURCES INC., WISER OIL DELAWARE,
LLC AND WISER DELAWARE LLC.

DOCUMENT

CCAA INITIAL ORDER

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

BENNETT JONES LLP
Barristers and Solicitors
4500 Bankers Hall East
855 – 2nd Street SW
Calgary, Alberta T2P 4K7

Attention: Chris Simard
Telephone No.: (403) 298-4485
Fax No.: 403-265-7219
Client File No.: 68261-10

**DATE ON WHICH ORDER WAS
PRONOUNCED:**

September 25, 2013

**LOCATION WHERE ORDER WAS
PRONOUNCED:**

Calgary

**NAME OF JUSTICE
WHO MADE THIS ORDER:**

The Honourable Mme. Justice K.M. Eidsvik

UPON the application of Lone Pine Resources Canada Ltd., Lone Pine Resources (Holdings) Inc., Lone Pine Resources Inc., Wiser Oil Delaware, LLC and Wiser Delaware, LLC (collectively the "Applicants"), AND UPON having read the Originating Application, the Affidavit of Tim Granger sworn September 25, 2013 (the "Granger Affidavit"); the consent of PricewaterhouseCoopers Inc. to act as Monitor, the pre-filing report of PricewaterhouseCoopers Inc., all filed; AND UPON noting that the secured creditors (including the Syndicate (as defined in the Granger Affidavit)) who are likely to be affected by the charges created herein do not oppose or alternatively consent to the charges created herein; AND UPON hearing counsel for the Applicants, counsel for PricewaterhouseCoopers Inc., counsel for the Syndicate, and counsel to the Initial Consenting Noteholders (as defined in the Granger Affidavit); IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:
 - (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property");

- (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "Business") and Property;
 - (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order;
 - (d) shall continue to have access to its cash accounts with the Syndicate, but shall have its operating facility capped and the Facility Commitment reduced to the amount outstanding at the date of this Order; and
 - (e) be authorized to make inter-company transfers and advances to pay costs, expenses and amounts otherwise authorized herein.
5. To the extent permitted by law, the Applicants shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:
- (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and
 - (b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings and to pay the reasonable fees and disbursements of counsel to the Initial Consenting Noteholders (Goodmans LLP and Stroock & Stroock & Lavan LLP), at their standard rates and charges. The payment of any reasonable fees and disbursements of counsel to the Initial Consenting Noteholders shall not, without the consent of the DIP Lender, exceed:
 - (i) \$800,000, plus taxes, for pre-filing and post-filing amounts, up to the date of the sanction of a CCAA Plan by the Court; or (ii) in the event that this Court sanctions a CCAA Plan by December 31, 2013, \$800,000, plus taxes, for post-

filing amounts from the date of this Initial Order to the date of implementation of a CCAA Plan.

6. The Engagement Letter entered into between RBC Dominion Securities Inc, a member company of RBC Capital Markets (the "Financial Advisor") and Lone Pine Resources Canada Inc. ("LPR Canada") and Lone Pine Resources Inc. ("LPRI") dated July 3, 2013 (the "RBC Engagement Letter") is hereby approved and LPR Canada and LPRI are authorized and directed to continue the engagement of the Financial Advisor as an Assistant thereunder and to comply with all of their obligations thereunder.
7. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:
 - (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;
 - (b) payment for goods or services actually supplied to the Applicants following the date of this Order; and
 - (c) payment for goods or services actually supplied to the Applicants by those parties deemed by the Applicants (in consultation with the Monitor) to be Critical Suppliers whether supplied prior to or following the date of this Order. The Critical Suppliers are hereby granted a charge (the "Critical Suppliers' Charge") on the Property to secure all obligations owed to them as Critical Suppliers by the Applicants relating to the provision of goods and services on and after the date of this Order, to a maximum amount of \$1.5 million. The Critical Suppliers' Charge shall have the priority set out in paragraphs 42 and 44 hereof.
8. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

- (i) employment insurance,
- (ii) Canada Pension Plan, and
- (iii) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

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

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

9. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the

Applicants from time to time for the period commencing from and including the date of this Order ("Rent"), but shall not pay any rent in arrears.

10. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:
 - (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;
 - (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property;
 - (c) not to grant credit or incur liabilities except in the ordinary course of the Business; and
 - (d) to pay monthly interest, but not principal, accruing due to the Syndicate and to pay the reasonable fees and disbursements of the Syndicate Advisor (as defined below) and counsel to the Syndicate.

RESTRUCTURING

11. The Applicants shall subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 36) or the Support Agreement dated September 25, 2013, entered into between the Applicants and the Initial Consenting Noteholders (the "Support Agreement"), have the right to:
 - (a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding \$500,000 in any one transaction or \$2,000,000 in the aggregate (or in excess of these amounts, by order of this Court);
 - (b) terminate the employment of such of its employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon

between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and

- (c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

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

12. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.
13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:
 - (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

- (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

- 14. Until and including October 24, 2013, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

- 15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:
 - (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on;

- (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;
 - (c) prevent the filing of any registration to preserve or perfect a security interest; or
 - (d) prevent the registration of a claim for lien.
16. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity. Nothing in this Order shall affect the rights or remedies under the CCAA of counterparties to "eligible financial contracts" as defined in the Regulations to the CCAA.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all persons having:
- (a) statutory or regulatory mandates for the supply of goods and/or services; or
 - (b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such

agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

19. Except as provided in paragraph 4(d) of this Order, no creditor of the Applicants (including the Syndicate) shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 15 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. The Applicants shall indemnify its directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or willful misconduct.

22. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of \$1,000,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 42 and 44 herein.
23. Notwithstanding any language in any applicable insurance policy to the contrary:
- (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and
 - (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

APPOINTMENT OF MONITOR

24. PricewaterhouseCoopers Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.
25. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:
- (a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;
 - (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such

other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

- (c) assist the Applicants, to the extent required by the Applicants, in its dissemination to the DIP Lender and its counsel of financial and other information as agreed to between the Applicants and the DIP Lender which may be used in these proceedings, including reporting on a weekly basis;
- (d) advise the Applicants in its preparation of the Applicants' cash flow statements and reporting required by the DIP Lender and the Syndicate, which information shall be reviewed with the Monitor and delivered to the DIP Lender and the Syndicate and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the DIP Lender and the Syndicate;
- (e) advise the Applicants in their development of the Plan and any amendments to the Plan;
- (f) advise the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Applicants' Property, Business and financial affairs or to perform its duties arising under this Order;
- (h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

- (j) perform such other duties as are required by this Order or by this Court from time to time.
26. The Applicants and the Monitor shall in a timely manner provide to Alvarez & Marsal Canada ULC (the "Syndicate Advisor") the information set out in paragraph 25 above. In addition, the terms of the Engagement Letter between the Syndicate's Counsel and the Syndicate Advisor (as consented to by LPRI and LPR Canada) dated August 9, 2013 are hereby approved (subject to the deletion of the existing paragraph 7 thereof and replacement with the following revised paragraph 7). LPRI and LPR Canada, with the assistance of the Monitor, are directed to continue performing their obligations thereunder:

7. Confidentiality

A&M shall keep as confidential all non-public information received from Norton, the Agent, the Senior Lenders or the Company in conjunction with this engagement, except: (i) confidential information obtained by A&M and delivered to Norton, the Agent or the Senior Lenders or their respective advisors in connection with this engagement; or (ii) as required by legal proceedings. A&M, Norton and the Agent acknowledge that Canadian and United States securities laws prohibit any person who has received from an issuer any material, non-public information from purchasing or selling securities of such issuer or from communicating such information to any other person under circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell such securities. The Company specifically authorizes the Agent to divulge such information pursuant to any court proceeding commenced by or to which the Agent and/or Senior Lenders is a party in connection with the exercise of any of the Agent's or Senior Lenders' remedies against the Company including, without limitation, enforcing the security held by the Agent and the Senior Lenders from the Company.

27. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or

might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

28. The Monitor shall provide any creditor of the Applicants and the DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.
29. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.
30. The Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a regular basis.
31. The Monitor and its legal counsel shall pass their accounts from time to time.
32. The Monitor, counsel to the Monitor and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the

"Administration Charge") on the Property, which charge shall not exceed an aggregate amount of \$1,000,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 42 and 44 hereof.

33. The Financial Advisor and counsel to the Initial Consenting Noteholders shall be entitled to the benefits of and are hereby granted a charge (the "Subordinated Advisor Charge") on the Property, as security for their respective professional fees and disbursements incurred with respect of these proceedings (and, in the case of the Financial Advisor, in accordance with the RBC Engagement Letter). The Subordinated Advisor Charge shall have the priority set out in paragraphs 42 and 44 hereof. The Subordinated Advisor Charge shall also secure the amounts payable under the Backstop Agreement, as defined in the Granger Affidavit.

DIP FINANCING

34. The Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from J.P. Morgan Securities L.L.C. on its own behalf and on behalf of a group of lenders (collectively the "DIP Lender") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures (with any capital expenditure being in accordance with the Applicants' cash flow statements set out from time to time), provided that borrowings under such credit facility shall not exceed \$10,000,000.00 unless permitted by further order of this Court.
35. Such credit facility shall be on the terms and subject to the conditions set forth in the Term Sheet agreed between the Applicants and the DIP Lender dated as of September 20, 2013 (the "DIP Term Sheet"), as attached to the Granger Affidavit.
36. The Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform

all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. The DIP Lender shall be entitled to the benefits of and is hereby granted a charge (the "DIP Lender's Charge") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The DIP Lender's Charge shall have the priority set out in paragraphs 42 and 44 hereof.
38. Notwithstanding any other provision of this Order:
 - (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;
 - (b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender shall be entitled immediately to cease making advances to the Applicants and, upon 5 days notice to the Applicants and the Monitor, may exercise any and all of its other rights and remedies against the Applicants or the Property under or pursuant to the DIP Term Sheet, Definitive Documents and the DIP Lender's Charge, including without limitation, set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the DIP Term Sheet, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

- (c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.
39. The DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

KERP AND THE KERP CHARGE

40. The Key Employee Retention Plan described in the Granger Affidavit including Exhibit "24" and the Confidential KERP Summary attached as Exhibit "25" to the Granger Affidavit (the "KERP") is hereby authorized and approved and the Applicants are authorized and directed to make the payments contemplated in the KERP.
41. The beneficiaries of the KERP are hereby granted a charge (the "KERP Charge") on the Property to secure all obligations under the KERP. The KERP Charge shall have the priority set out in paragraphs 42 and 44 hereof.

VALIDITY AND PRIORITY OF CHARGES

42. The priorities of the Directors' Charge, the Administration Charge, the DIP Lender's Charge, the KERP Charge and the Subordinated Advisor Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$1,000,000);

Second – DIP Lender's Charge;

Third – Directors' Charge (to the maximum amount of \$1,000,000); and

The following charges shall be subordinated to the security granted to the Syndicate (as defined in the Granger Affidavit):

Fourth – KERP Charge (to the maximum amount of \$2,499,272);

Fifth – Subordinated Advisor Charge (to the maximum of \$3,800,000 with respect to the fees and disbursements of the Financial Advisor pursuant to the RBC Engagement Letter); and

Sixth – Critical Suppliers' Charge, to a maximum of \$1.5 million.

43. The filing, registration or perfection of the Directors' Charge, the Administration Charge, the DIP Lender's Charge, the KERP Charge, the Subordinated Advisor Charge or the Critical Suppliers' Charge (collectively, the "Charges") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
44. (i) Each of the Directors' Charge, the Administration Charge, the DIP Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person, and (ii) the KERP Charge, the Subordinated Advisor Charge and the Critical Suppliers' Charge shall constitute a charge on the Property and shall rank in priority to all Encumbrances in favour of any Person, other than the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the security granted to the Syndicate.
45. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Charges, unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of the Charges, or further order of this Court.
46. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by:
 - (a) the pendency of these proceedings and the declarations of insolvency made in this Order;

- (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;
- (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;
- (d) the provisions of any federal or provincial statutes; or
- (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:
 - (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the DIP Term Sheet or the Definitive Documents, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party;
 - (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the Applicants entering into the DIP Term Sheet, or execution, delivery or performance of the Definitive Documents; and
 - (iii) the payments made by the Applicants pursuant to this order, including the DIP Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

47. Payments under the Subordinated Advisor Charge to the Financial Advisor shall be made in accordance with the terms of the RBC Engagement Letter but not prior to the closing of any transaction contemplated in the RBC Engagement Letter.

ALLOCATION

48. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Charges amongst the various assets comprising the Property.

SERVICE AND NOTICE

49. The Monitor shall (i) without delay, publish in the Calgary Herald and the Toronto Globe & Mail a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than \$1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.
50. The Applicants and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor may post a copy of any or all such materials on its website at <http://www.pwc.com/car-lpr>, which shall be established for informational purposes.

SEALING

51. The Confidential Affidavit of Tim Granger, sworn September 25, 2013 (including the unredacted RBC Engagement Letter (Exhibit "14" of the Granger Affidavit) and the Confidential KERP Summary (Exhibit "25" of the Granger Affidavit) shall be sealed on the Court file, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*.

GENERAL

52. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
53. The Applicants are hereby directed to report to this Honourable Court at the first stay extension application, to be scheduled on or before October 24, 2013 (the "First Extension Application"), as to the Applicants' progress in arranging for an asset-backed loan ("ABL") facility as part of the CCAA plan currently being contemplated by the Applicants. The Syndicate may, at the First Extension Application, in the absence of the Applicants achieving any of the milestones contained in the DIP Term Sheet, upon the occurrence of the termination of the Support Agreement (as defined in the Granger Affidavit), or at such other time as it deems advisable, seek any motion or relief in respect of the Applicants or their assets and Property.
54. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.
55. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

56. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and Lone Pine Resources Canada Ltd. is authorized and empowered to act as the foreign representative of the Applicants in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
57. Lone Pine Resources Canada Ltd. is hereby authorized, as the foreign representative of the Applicants and of the within proceedings, to apply for foreign recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code, and to take such actions necessary or appropriate in furtherance of the recognition of these proceedings in any such jurisdiction.
58. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.
59. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Time on the date of this Order.

"K.M. Eidsvik"
J.C.Q.B.A.

TAB 9

[Clerk's stamp:

CLERK OF THE COURT

FILED

APR 23 2015

JUDICIAL CENTRE
OF CALGARY

COURT FILE NUMBER 1501-03351

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, R.S.C. 1985,
c. C-36, as amended

APPLICANT LARICINA ENERGY LTD.,
LARICINA GP HOLDING LTD., and
1276158 ALBERTA INC.

DOCUMENT **ORDER (Stay Extension, KERP, KERP Charge,
Retention Payment, Sealing Order, Procedure for
Future Applications, Amendment and Restatement
of Initial Order)**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT
Osler, Hoskin & Harcourt LLP
Suite 2500, 450-1st Street SW
Calgary, Alberta T2P 5H1
Solicitors: A. Robert Anderson, Q.C.
Phone: 403.260.7004
Fax: 403.260.7024
Email: randerson@osler.com
Matter: 1151294

DATE ON WHICH ORDER WAS PRONOUNCED: April 22, 2015

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice
S.J. LoVecchio

LOCATION OF HEARING: Calgary Courts Centre
601 – 5th Street SW
Calgary, AB

UPON the application of Laricina Energy Ltd., Laricina GP Holding Ltd., and 1276158 Alberta Inc. (collectively, "**Laricina**" or the "**Applicant**"); AND UPON reading the Affidavit of Glen C. Schmidt, sworn on April 18, 2015 (the "**Schmidt Affidavit**"), the Concurrent Confidential Affidavit of Glen C. Schmidt, sworn on April 18, 2015 (the "**Concurrent Confidential Schmidt Affidavit**"), the Affidavit of Tim Lisevich, sworn on April 19, 2015, and the Confidential Affidavit of Tim Lisevich, sworn on April 19, 2015; AND UPON reading the first report (the "**First Report**") of the court-appointed Monitor, PricewaterhouseCoopers Inc. (the "**Monitor**") dated April 21, 2015; AND UPON hearing counsel for the Applicant, the Monitor, the Noteholder, the Directors, and Ad Hoc Committee of Shareholders (the "**Committee**"), OSUM and prospective special counsel for the Applicant; AND UPON noting that all capitalized terms not defined herein have as their definitions those provided in Exhibit 1 to the Schmidt Affidavit; AND UPON reference being made to Laricina's Counterclaim, the Claim/Counterclaim Process, the 2013 Retention Plan and the KERP, all as described in the Schmidt Affidavit; AND UPON being satisfied that the Applicant has acted and continues to act in good faith and with due diligence and that the circumstances exist that make this Order appropriate; AND UPON it appearing that Applicant, Noteholder, Committee and Monitor should be given until June 30, 2015 to consult together in good faith with a view to attempting to reach a consensus on how to proceed with the Applicant's intended restructuring including a process for repayment of indebtedness to the Noteholder; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.
2. The Applicant shall serve by courier, fax transmission, e-mail transmission, or ordinary post, a copy of this Order on all parties present at this Application and on all parties who received notice of this Application or who are presently on the service list established in these proceedings, and such service shall be deemed good and sufficient for all purposes.

JUNE HEARING

3. The Applicant shall bring an application to be heard on June 30, 2015 at 10:00 a.m. (or such other date and time as the Applicant, Noteholder, Committee and Monitor may agree) regarding its intended restructuring process and shall provide particulars of its calculation (which it shall not finalize until it has consulted with CPPIB Credit, the Committee and with the Monitor), of cash available to partially repay the Note Obligations while still retaining sufficient cash-on-hand for the Applicant's forecasted funding needs for operations and its intended restructuring process (including an amount for contingencies).

STAY EXTENSION

4. The Stay Period, as defined in paragraph 16 of the Order (the "**Initial Order**") granted on March 30, 2015, is hereby further extended up to and including July 7, 2015.

KEY EMPLOYEE RETENTION PLAN

5. A KERP for Key Employees generally described in the Schmidt Affidavit, is hereby approved up to a limit of \$2,321,062 in the aggregate, subject to the agreement of Laricina, the Monitor and the Noteholder, or further order of the Court, on the terms of the KERP. Once agreed to by the parties noted in the preceding sentence, or ordered by the Court, Laricina is hereby authorized to make the payments provided for thereunder, when due.
6. The KERP beneficiaries are hereby granted a KERP Charge to a maximum of \$2,321,062 on the Property (as such term is defined in paragraph 4 of the Initial Order) to secure the KERP payment obligations. The filing, registration or perfection of the KERP Charge shall not be required, and the KERP Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the KERP Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.
7. The KERP Charge shall constitute a charge on the Property and shall rank immediately next in priority to the Administration Charge (as such term is defined in paragraph 32 of

the Initial Order) and any security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, “**Encumbrances**”) in favour of any person.

8. Except as otherwise expressly provided for herein, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the KERP Charge, unless the Applicant also obtains the prior written consent of the Monitor and the beneficiaries of the KERP Charge, or upon further order of this Court.
9. The KERP Charge shall not be rendered invalid or unenforceable and the rights and remedies of the KERP Charge beneficiaries thereunder shall not otherwise be limited or impaired in any way by:
 - (a) The pendency of these proceedings and the declarations of insolvency made in the Initial Order;
 - (b) Any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the “**BIA**”), or any bankruptcy order made pursuant to such applications;
 - (c) The filing of any assignments for the general benefit of creditors made pursuant to the BIA;
 - (d) The provisions of any federal or provincial statutes; or
 - (e) Any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an “**Agreement**”) which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:
 - (i) Neither the creation of the KERP Charge nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;

- (ii) None of the Key Employees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the KERP Charge; and,
- (iii) The payments made by the Applicant pursuant to this Order, and the granting of the KERP Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

CASH REPAYMENTS TO THE NOTEHOLDER

10. Subject to both paragraph 10 of the Initial Order and to further Order of the Court, no repayments shall be made by the Applicant to the Noteholder except by agreement of the Applicant, the Monitor, the Noteholder and the Committee, provided however that such parties shall engage in discussions regarding a second interim cash repayment by the Applicant to the Noteholder. The Noteholder shall be entitled at any time on or after June 30, 2015 to seek an Order for approval of a second interim cash repayment calculated in accordance with paragraph 11 of the Initial Order.

APPROVAL OF RETENTION PAYMENTS

11. The Applicant is hereby authorized to pay the amounts payable under the 2013 Retention Plan to existing Laricina employees. Such amounts shall not exceed \$1,303,157 in aggregate, and are payable on the earlier of May 20, 2015, or such date as the applicable Laricina employees are terminated without cause.

SEALING OF CONFIDENTIAL INFORMATION

12. The Concurrent Confidential Affidavit of Glen C. Schmidt including the Confidential Exhibits thereto, and the Confidential Affidavit of Tim Lisevich, sworn April 18 and April 19, 2015 respectively, including the Confidential Exhibits thereto (collectively the “**Confidential Affidavits**”) shall be sealed on the Court file and not form part of the public record.

13. The Clerk of this Honourable Court shall file the Confidential Affidavits in a sealed envelope attached to a notice that sets out the style of cause of these proceedings and states that:

THIS ENVELOPE CONTAINS CONFIDENTIAL MATERIALS FILED BY
LARICINA ENERGY LTD., LARICINA GP HOLDING LTD., AND 1276158
ALBERTA INC.; and

THE CONFIDENTIAL MATERIALS ARE SEALED PURSUANT TO THE
SEALING ORDER ISSUED BY THE HONOURABLE MR. JUSTICE S. J.
LOVECCHIO ON APRIL 22, 2015.

14. The Applicant is empowered and authorized, but not directed, to provide the Confidential Affidavits (or any portion thereof, or information contained therein) to any interested party, entity or person that the Applicant considers reasonable in the circumstances subject to confidentiality arrangements satisfactory to the Applicant.
15. The Confidential Affidavits shall remain on the Court file in accordance with this Order pending the termination of the within CCAA proceedings, or such other insolvency proceedings as may be undertaken with respect to the Applicant, whichever occurs later (the latter event being referred to herein as the “**Insolvency Proceedings**”). Within five (5) business days of the termination of the Insolvency Proceedings, the Applicant shall file the Confidential Affidavits with the Court, failing which the Court Clerk shall be at liberty to do so.
16. Leave is hereby granted to any person, entity or party affected by this Order to apply to this Honourable Court for a further Order substituting, modifying or varying the terms of paragraphs 12 to 16 of this Order, with such Application to be brought on notice to the Company and any other affected party in accordance with the Alberta Rules of Court.

PROCEDURE FOR FUTURE APPLICATIONS

17. Subject to further order of this Court in respect of urgent motions, all motions in this proceeding are to be brought on not less than eight (8) business days’ notice to all Persons on the service list. Each Notice of Motion shall specify a date (the “**Initial Return Date**”) and time for the hearing.

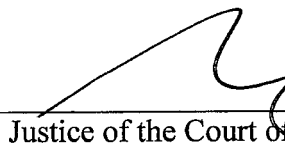
18. Any interested Person wishing to object to the relief sought in a motion must serve responding motion material or a notice stating the objection to the motion and the grounds for such objection (a **“Notice of Objection”**) in writing to the moving party, the Applicant and the Monitor, with a copy to all Persons on the service list, no later than 5 p.m. (Calgary time) on the date that is four (4) business days prior to the Initial Return Date (the **“Objection Deadline”**).
19. If no Notice of Objection is served by the Objection Deadline, the judge having carriage of the motion (the **“Presiding Judge”**) may determine:
 - (a) whether a hearing is necessary;
 - (b) whether such hearing will be in person, by telephone or by written submissions only; and
 - (c) the parties from whom submissions are required(collectively, the **“Hearing Details”**). In the absence of any such determination, a hearing will be held in the ordinary course.
20. If no Notice of Objection is served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the Persons on the service list of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to this Court in a timely manner, which may be contained in the Monitor’s next report in the proceeding.
21. If a Notice of Objection is served by the Objection Deadline, the moving party, following good faith consultations with each of the parties that has served a Notice of Objection by the Objection Deadline and the Monitor (together with the moving party, the **“Interested Parties”**) regarding the timing and date of the scheduling appointment, shall seek a scheduling appointment before the Presiding Judge to be held prior to the Initial Return Date or on such other date as may be mutually agreed by the Interested Parties to establish a schedule for the motion, including a schedule for delivery of materials and the hearing of the contested motion, and to address such other matters, including interim relief, as this Court may see fit. Notwithstanding the forgoing, the Interested Parties may

mutually agree to proceed with the contested motion on the Initial Return Date or on any other date as may be mutually agreed by all such parties and to a schedule in relation thereto.

AMENDED AND RESTATED ORDER

22. The Initial Order shall be amended and restated (with amendments to be effective from and after April 22, 2015) to incorporate:

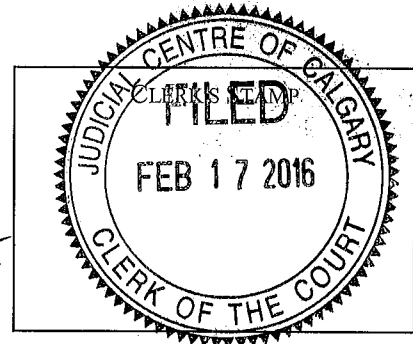
- (a) Inclusion of the Committee and any other shareholders of the Applicant who appear in these proceedings and request to be added to the Service List, in the provisions of the Initial Order that provide for consultation by the Applicant with the Noteholder;
- (b) The provisions regarding the KERP Charge in paragraphs 5 to 9 above; and
- (c) The procedure for future applications in paragraphs 17 to 22 above.


Justice of the Court of Queen's Bench of Alberta

TAB 10

I hereby certify this to be a true copy of
the original Order

Dated this 17 day of February 2016
[Signature]
for Clerk of the Court



1601-01675

COURT FILE NUMBER

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS

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

AND IN THE MATTER OF A PLAN OF
ARRANGEMENT OF ARGENT ENERGY
TRUST, ARGENT ENERGY (CANADA)
HOLDINGS INC. and ARGENT ENERGY
(US) HOLDINGS INC.

DOCUMENT

CCAA INITIAL ORDER

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

BENNETT JONES LLP

Barristers and Solicitors
4500 Bankers Hall East
855 – 2nd Street SW
Calgary, Alberta T2P 4K7

Attention: Kelsey Meyer / Sean Zweig
Telephone No.: 403.298.3323 / 416.777.6254
Fax No.: 403.265.7219 / 416.863.1716
Client File No.: 68859.14

**DATE ON WHICH ORDER WAS
PRONOUNCED:**

Wednesday, February 17, 2016

**LOCATION WHERE ORDER WAS
PRONOUNCED:**

Calgary

**NAME OF JUSTICE
WHO MADE THIS ORDER:**

The Honourable Mr. Justice D. B. Nixon

UPON the application of Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada"), and Argent Energy (US) Holdings Inc. ("Argent US", and

together with the Trust and Argent Canada, the "Applicants"), **AND UPON** having read the Originating Application, the Affidavit of Sean Bovingdon sworn February 16, 2016 (the "Bovingdon Affidavit"); the consent of FTI Consulting Canada Inc. to act as Monitor (the "Monitor"); and the pre-filing report of FTI Consulting Canada Inc., all filed; **AND UPON** noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the charges created herein; **AND UPON** hearing counsel to the Applicants, counsel to the Monitor and counsel to the Syndicate (as defined in the Bovingdon Affidavit) who advanced funds under a credit agreement dated October 25, 2012 (as amended from time to time, the "Credit Agreement");

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are entities to which the CCAA applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:
 - (a) remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property");

- (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "Business") and the Property; and
 - (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.
- 5. To the extent permitted by law, the Applicants shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:
 - (a) all outstanding and future wages, salaries, employee benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
 - (b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges; and
 - (c) payment for goods or services actually supplied to the Applicants prior to the date of this Order by those parties deemed by the Applicants (with the consent of the Monitor and the Syndicate) to be critical suppliers, provided that the total of all such payments shall not exceed USD \$315,000.
- 6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:
 - (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account

of insurance (including directors and officers insurance), maintenance and security services; and

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

7. The Applicants shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

- (i) employment insurance,
- (ii) Canada Pension Plan, and
- (iii) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

- (b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and
- (c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured

creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order ("Rent"), but shall not pay any rent in arrears.
9. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:
 - (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;
 - (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and
 - (c) not to grant credit or incur liabilities except in the ordinary course of the Business.
10. Notwithstanding the provisions of paragraph 9 hereof, the Applicants are authorized and directed to pay to the Syndicate any interest and other costs and expenses which may become due and owing under the terms of the Credit Agreement, including the reasonable costs and expenses of the Syndicate's legal counsel and other advisors (the "Syndicate's Advisors") arising both before and after the making of this Order.

RESTRUCTURING

11. The Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 34), have the right to:

- (a) with the consent of the Interim Lender (as hereinafter defined in paragraph 32), permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding \$100,000 in any one transaction or \$500,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;
- (b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and
- (c) pursue all avenues of refinancing and offers for their Business or the Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a) above),

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

12. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA,

and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:
 - (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and
 - (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. Until and including March 18, 2016, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively

being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

- (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on;
 - (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;
 - (c) prevent the filing of any registration to preserve or perfect a security interest; or
 - (d) prevent the registration of a claim for lien.
16. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all persons having:
- (a) statutory or regulatory mandates for the supply of goods and/or services; or

- (b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

- 19. Notwithstanding anything else contained in this Order, no creditor of the Applicants shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

- 20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants or of Argent Energy Limited (the "Directors and Officers") with respect to any claim against the Directors and Officers that arose before the date hereof and that relates to any obligations of the Applicants or Argent Energy Limited whereby the Directors and Officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the

Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. The Applicants shall indemnify the Directors and Officers against obligations and liabilities that they may incur as directors and or officers of the Applicants and Argent Energy Limited after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or willful misconduct.
22. The Directors and Officers shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of USD \$200,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 40 and 42 herein.
23. Notwithstanding any language in any applicable insurance policy to the contrary:
 - (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and
 - (b) the Directors and Officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

APPOINTMENT OF MONITOR

24. FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its

obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

25. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:
- (a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;
 - (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;
 - (c) assist the Applicants, to the extent required by the Applicants, in their dissemination to the Interim Lender and its counsel on a weekly basis of financial and other information as agreed to between the Applicants and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;
 - (d) advise the Applicants in the preparation of the Applicants' cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the Interim Lender;
 - (e) advise the Applicants in their development of the Plan and any amendments to the Plan;
 - (f) advise the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
 - (g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of

the Applicants to the extent that is necessary to adequately assess the Applicants' Property, Business and financial affairs or to perform its duties arising under this Order;

- (h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person;
- (j) report to and respond to inquiries of the Syndicate (or its designated financial advisor) with respect to the CCAA proceedings, with or without the presence or the consent of the Applicants; however copies of any written reports provided to the Syndicate by the Monitor shall be provided to the Applicants; and
- (k) perform such other duties as are required by this Order or by this Court from time to time.

26. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

27. The Monitor shall provide any creditor of the Applicants and the Interim Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.
28. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.
29. The Monitor, counsel to the Monitor, counsel to the Applicants and the Syndicate's Advisors shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and the Syndicate's Advisors on a regular basis.
30. The Monitor and its legal counsel shall pass their accounts from time to time.
31. The Monitor, counsel to the Monitor, the Applicants' counsel, and the Syndicate's Advisors, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of USD \$500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor, such counsel and such other advisors of the Syndicate, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 40 and 42 hereof.

INTERIM FINANCING

32. Argent US is hereby authorized and empowered to obtain and borrow under a credit facility from the Syndicate, including The Bank of Nova Scotia, in its capacity as agent for and on behalf of the Syndicate (collectively, in such capacity, the "Interim Lender") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed \$7,300,000.00 unless permitted by further order of this Court.
33. Such credit facility shall be on the terms and subject to the conditions set forth in the Interim Financing Credit Agreement agreed between the Applicants and the Interim Lender dated as of February 17, 2016 (the "Interim Financing Credit Agreement"), as attached to the Bovingdon Affidavit.
34. The Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the Interim Financing Credit Agreement or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Interim Financing Credit Agreement and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.
35. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "Interim Lender's Charge") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall have the priority set out in paragraphs 40 and 42 hereof.
36. Notwithstanding any other provision of this Order:

- (a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;
 - (b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon three days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Interim Financing Credit Agreement, Definitive Documents and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lender to the Applicants against the obligations of the Applicants to the Interim Lender under the Interim Financing Credit Agreement, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and
 - (c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.
37. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

KERP, KEIP AND THE KERP AND KEIP CHARGE

38. The KERP and the KEIP (each as defined in the Bovingdon Affidavit) are hereby authorized and approved and the Applicants (and any other person that may be appointed to act on behalf of the Applicants, including without limitation, any trustee, liquidator, receiver, interim receiver, receiver and manager or other person acting on behalf of any

such person) are authorized and directed to perform the obligations under the KERP and KEIP, including making all payments to the beneficiaries of the KERP and KEIP of amounts due and owing under the KERP and KEIP at the time specified and in accordance with the terms of the KERP and KEIP.

39. The beneficiaries of the KERP and KEIP are hereby granted a charge (the "KERP and KEIP Charge") on the Property, which charge shall not exceed an aggregate amount of USD \$1,035,000 in respect of the KERP plus any additional amounts that become payable under the KEIP, to secure all obligations under the KERP and KEIP. The KERP and KEIP Charge shall have the priority set out in paragraphs 40 and 42 hereof.

VALIDITY AND PRIORITY OF CHARGES

40. The priorities of the Directors' Charge, the Administration Charge, the Interim Lender's Charge and the KERP and KEIP Charge, as among them, shall be as follows:

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

Second – Interim Lender's Charge;

Third – Directors' Charge (to the maximum amount of USD \$200,000); and

Fourth – KERP and KEIP Charge (to the maximum amount of USD \$1,035,000 in respect of the KERP, plus any additional amounts that become payable under the KEIP).

41. The filing, registration or perfection of the Directors' Charge, the Administration Charge, the Interim Lender's Charge, or the KERP and KEIP Charge (collectively, the "Charges") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
42. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims

of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.

43. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Charges, unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of the applicable Charges, or further order of this Court.
44. The Charges, the Interim Financing Credit Agreement and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:
 - (a) the pendency of these proceedings and the declarations of insolvency made in this Order;
 - (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;
 - (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;
 - (d) the provisions of any federal or provincial statutes; or
 - (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:
 - (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the Interim Financing Credit Agreement or the Definitive Documents,

shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party;

- (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the Applicants entering into the Interim Financing Credit Agreement, or execution, delivery or performance of the Definitive Documents; and
- (iii) the payments made by the Applicants pursuant to this order, including the Interim Financing Credit Agreement or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

45. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Charges amongst the various assets comprising the Property.

SALE SOLICITATION PROCESS

46. The letter agreement dated January 15, 2016 between The Oil & Gas Asset Clearinghouse, LLC ("OGAC"), Argent US and Argent Canada is hereby approved and Argent US and Argent Canada are authorized and directed to continue the engagement of OGAC as an Assistant thereunder and to comply with all of their obligations thereunder.
47. The sale solicitation process (the "Sale Solicitation Process") attached as Schedule "A" to this Order be and is hereby approved, and OGAC, the Monitor and the Applicants are authorized and directed to perform each of their obligations thereunder and to do all things reasonably necessary to perform their obligations thereunder.
48. Each of the Monitor and OGAC, and their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and

all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the Sale Solicitation Process, except to the extent such losses, claims, damages or liabilities result from the gross negligence or willful misconduct of the Monitor or OGAC, as applicable, in performing its obligations under the Sale Solicitation Process (as determined by this Court).

49. In connection with the Sale Solicitation Process and pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Applicants, OGAC and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sale transactions (each, a "Transaction"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Applicants, OGAC or the Monitor, as applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants, OGAC or the Monitor, as applicable, or ensure that all other personal information is destroyed.

SERVICE AND NOTICE

50. The Monitor shall (i) without delay, publish in the Calgary Herald and the Houston Chronicle a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than \$1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated

amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

51. The Applicants and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at <http://cfcanada.fticonsulting.com/argent> and shall post there as soon as practicable:

- (a) all materials prescribed by statute or regulation to be made publically available; and
- (b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

SEALING

52. The Confidential Summary (Exhibit "20" of the Bovingdon Affidavit) shall be sealed on the Court file, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*. The Confidential Summary shall be kept confidential and shall not form part of the public record, but rather shall be placed, separate and apart from all contents in the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

GENERAL

53. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
54. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.
55. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.
56. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding of Argent US and Argent Canada, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.
57. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as the foreign representative of Argent US and Argent Canada in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
58. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or

parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

59. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Time on the date of this Order.

"D. B. Nixon"
The Honourable Mr. Justice B. Nixon
J.C.C.Q.B.A.

SCHEDULE "A"

Procedures for the Sale Solicitation Process

On February [17], 2016, Argent Energy Trust (the "**Trust**"), Argent Energy (Canada) Holdings Inc. ("**Argent Canada**") and Argent Energy (US) Holdings Inc. ("**Argent US**", and together with the Trust and Argent Canada, the "**Applicants**") obtained an initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act* ("**CCAA**") from the Alberta Court of Queen's Bench (the "**Court**"). The Initial Order, among other things, approved the Sale Solicitation Process (the "**Sale Solicitation Process**") set forth herein to determine whether a Successful Bid (as defined below) can be obtained. FTI Consulting Canada Inc. (the "**Monitor**"), as the foreign representative of the Applicants pursuant to the Initial Order, will take the necessary steps to have the Sale Solicitation Process and these procedures (the "**Sale Procedures**") recognized under chapter 15 of the *United States Bankruptcy Code* ("**Ch. 15**").

DEFINED TERMS

60. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Initial Order. In addition:
- (a) "**Business Day**" means a day, other than a Saturday or Sunday, on which banks are open for business in Calgary, Alberta and Houston, Texas.
 - (b) "**OGAC**" means The Oil & Gas Clearinghouse, LLC.
 - (c) "**Secured Creditor**" means The Bank of Nova Scotia, as Administrative Agent, pursuant to the Amended and Restated Credit Agreement dated October 25, 2012, as amended from time to time, between Argent US and the lenders thereto.
 - (d) "**Syndicate**" means the syndicate of lenders pursuant to the Amended and Restated Credit Agreement dated October 25, 2012, as amended from time to time, the Administrative Agent of which is The Bank of Nova Scotia.

SALE SOLICITATION PROCESS

61. The Sale Procedures set forth herein describe the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning Argent US and its assets, the manner in which bidders and bids become Qualified Bidders and Qualified Bids (each as defined below), respectively, the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder(s) (as defined below) and the approval thereof by the Court. The Monitor shall supervise the Sale Solicitation Process and in particular shall supervise OGAC in connection therewith. The Applicants are required to assist and support the efforts of the Monitor and OGAC as provided for herein. In the event that there is disagreement as to the interpretation or application of these Sale Procedures, the Court will have jurisdiction to hear and resolve such dispute.
62. The Sale Solicitation Process will proceed as follows:
- (a) As soon as reasonably practicable after the granting of the Initial Order:

- (i) the Monitor shall cause a notice of the Sale Solicitation Process contemplated by these Sale Procedures and such other relevant information which the Monitor, in consultation with OGAC and the Applicants, considers appropriate to be published in the *Daily Oil Bulletin* and the *Houston Chronicle*; and
 - (ii) in any event no later than February [19], 2016, the Trust shall issue a press release setting out the notice and such other relevant information as it may consider appropriate in form and substance satisfactory to the Monitor, following consultation with OGAC, with Canada Newswire designating dissemination in Canada and major financial centres in the United States;
- (b) OGAC shall prepare and distribute a teaser with respect to Argent US's business and assets (the "**Property**") for distribution to potential bidders by no later than February [17];
- (c) A Confidential virtual data room ("**VDR**") describing the opportunity to acquire all or a portion of the Property will be made available by OGAC to prospective purchasers that have executed a non-disclosure agreement with the Applicants. The VDR will be available by February [17];
- (d) In order to participate in the Sale Solicitation Process, each person (a "**Potential Bidder**") must deliver to OGAC at the address specified in **Appendix "A"** hereto (including by email), and prior to the distribution of any confidential information by OGAC to a Potential Bidder (including access to the VDR), an executed non-disclosure agreement in form and substance satisfactory to the Monitor, OGAC and the Applicants, which shall inure to the benefit of any purchaser of the Property;
- (e) A Potential Bidder that has executed a non-disclosure agreement, as described above, will be deemed a "**Qualified Bidder**" and will be promptly notified of such classification by OGAC;
- (f) OGAC shall provide any person deemed to be a Qualified Bidder with access to the VDR. The Monitor, OGAC and the Applicants make no representation or warranty as to the information contained in the VDR. The VDR shall contain a proposed Letter of Intent ("**LOI**") and Purchase and Sale Agreement ("**PSA**");
- (g) A Qualified Bidder, if it wishes to submit a bid, will deliver written copies of a binding proposal (a "**Qualified Bid**") in the form of an agreement for the acquisition of Argent US or its assets, business or undertaking, or any portion or combination thereof, which agreement must be in a form such that acceptance thereof by the Applicants will result in a sale proposal (a "**Sale Proposal**") to OGAC, with a copy to the Monitor, at the addresses specified in **Appendix "A"** hereto (including by email) so as to be received by them not later than 5:00 p.m. (Central Standard Time) on March [17], 2016, or such other date or time as may be agreed by OGAC, in consultation with the Monitor, the Applicants and the

Secured Creditor (the "**Bid Deadline**"). The Sale Proposal shall include a binding LOI and a form of PSA which the Qualified Bidder is willing to execute if it is the Successful Bidder and shall also include a marked version showing edits to the original form of PSA provided in the VDR. The LOI, but not the PSA, shall provide for due diligence for title and environmental defects and potential purchase price adjustments therefor subject to the terms of the LOI.

- (h) A Qualified Bid will be considered as such only if the Qualified Bid complies at a minimum with the following:
 - (i) it contains a duly executed Sale Proposal;
 - (ii) it provides written evidence of financial commitment or other evidence of the ability to consummate the sale satisfactory to OGAC, in consultation with the Monitor and the Applicants;
 - (iii) it is not conditional upon:
 - (A) the outcome of any unperformed due diligence, except the Qualified Bid may be conditional upon the Qualified Bidder completing confirmatory title and environmental due diligence provided that such condition is waived prior to the execution of a definitive agreement contemplated in Section 3(n);
 - (B) obtaining financing; and/or
 - (C) any other material conditions other than the receipt of the Approval Order and the Recognition Order (each as defined below).
 - (iv) it is received by the Bid Deadline; and
 - (v) it remains irrevocably open for acceptance until April [14], 2016.
- (i) OGAC, in consultation with the Applicants, the Monitor and the Secured Creditor, may waive compliance with any one or more of the requirements specified herein and deem such non-compliant bids to be Qualified Bids;
- (j) The Applicants, in consultation with the Monitor and OGAC, may, following the receipt of any Qualified Bid, seek clarification with respect to any of the terms or conditions of such Qualified Bid and/or request and negotiate one or more amendments to such Qualified Bid prior to determining the most favourable Qualified Bid as contemplated in Section 3(k).
- (k) The Applicants, in consultation with the Monitor, OGAC and the Secured Creditor, shall determine the most favourable Qualified Bid or Qualified Bids, as such bids may have been modified pursuant to Section 3(j) (collectively, the "**Successful Bid(s)**").

- (l) Once the Successful Bid(s) has been determined pursuant to Section 3(k), the person(s) who made the Successful Bid(s) shall be referred to hereunder as the "**Successful Bidder(s)**", and OGAC shall provide notice of the determination of the Successful Bid(s) to the Successful Bidder(s).
- (m) Upon the Successful Bidder(s) receiving notice from OGAC of the determination of the Successful Bid(s) pursuant to Section 3(l), the Successful Bidder(s) shall pay a deposit (the "**Deposit**") in the form of certified cheque or wire transfer (to a bank account specified by the Monitor), payable to the order of the Monitor, in trust, in an amount equal to 10% of the total consideration in the applicable Successful Bid, which deposit is to be held and dealt with in accordance with these Sale Procedures;
- (n) The PSA in respect to the Successful Bid(s) pursuant to Section 3(l) must be executed no later than April [14], 2016, and which shall be conditional only upon the receipt of the Approval Order and the Recognition Order and shall provide for a closing on or before May [13], 2016, or such longer period as shall be agreed to by the Monitor, in consultation with OGAC, the Secured Creditor and the Applicants. The PSA in respect to the Successful Bid(s) shall not be conditional on any unperformed due diligence.
- (o) The Applicants shall apply to the Court (the "**Approval Motion**") for an order approving the Successful Bid(s) and vesting title to the purchased property in the name of the Successful Bidder(s) (the "**Approval Order**"). The Approval Motion will be held on a date to be scheduled by the Applicants and confirmed by the Court upon application by the Applicants, who shall use their best efforts to schedule the Approval Motion on or before April [30], 2016. The Approval Motion may be adjourned or rescheduled by the Applicants without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the Service List prior to the Approval Motion. As soon as practicable after the Approval Order is granted, the Monitor, as foreign representative pursuant to the Initial Order, shall apply for an order recognizing the Approval Order or such further and other orders as may be necessary to give effect to the Approval Order in the United States (the "**Recognition Order**");
- (p) Upon such definitive agreement(s) being negotiated and settled and the Approval Order and the Recognition Order being granted, the Deposit paid in respect of the Successful Bid(s) shall become non-refundable in the event the approved transaction is not completed;
- (q) All Qualified Bids (other than the Successful Bid(s)) shall be deemed rejected on and as of the date the Recognition Order is granted.

DEPOSIT

63. The Deposit:

- (a) shall be retained by the Monitor and invested in an interest bearing trust account;

- (b) paid by the Successful Bidder(s) whose bid(s) are subject of the Approval and Order and Recognition Order, plus accrued interest, shall be applied to the purchase price to be paid by the applicable Successful Bidder(s) upon closing of the approved transaction;
- (c) shall be non-refundable, subject only to the following exceptions:
 - (i) the Successful Bidder(s) provides notice to OGAC and the Monitor, on or before April 8, 2016, of material defects in the title and environmental due diligence in accordance with the LOI;
 - (ii) either or both of the Approval Order and the Recognition Order are not granted on or before May 17, 2016 or such later date as agreed to by the Monitor, in consultation with OGAC, the Secured Creditor and the Applicants.

APPROVALS

64. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA, Ch. 15 or any other statute or as otherwise required at law in order to implement a Successful Bid.

"AS IS, WHERE IS"

65. The sale of the Property will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, OGAC or the Applicants or any of their agents or estates, except to the extent set forth in the relevant sale agreement entered into between one or more Applicants and a Successful Bidder.

FREE OF ANY AND ALL CLAIMS AND INTERESTS

66. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Applicants in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA and section 363 of the United States *Bankruptcy Code*, such Claims and Interests to attach to the net proceeds of the sale of such Property (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant sale agreement with a Successful Bidder.

THE SECURED CREDITOR

67. The Secured Creditor and each member of the Syndicate have advised that they do not intend to participate as a Bidder in the Sale Solicitation Process, and therefore they will be entitled to have full access to the contents of all Qualified Bids, including copies thereof. No Qualified Bid that is less than an amount sufficient to fully discharge the Secured Creditor's indebtedness, together with any priority claims and security interests ranking ahead of the Secured Creditor, will be capable of becoming a Successful Bid without the prior written consent of the Secured Creditor. Giving or withholding such

consent will be in the sole, exclusive and absolute discretion of the Secured Creditor. Should, however, any Qualified Bid exceed an amount sufficient to fully discharge the Secured Creditor's indebtedness, together with any priority claims and security interests ranking ahead of the Secured Creditor, the consent of the Secured Creditor shall not be required in order for the Applicants to be able to negotiate and settle the terms of a definitive agreement in respect of the Successful Bid.

NO OBLIGATION TO CONCLUDE A SALE

68. The Applicants have no obligation to conclude a sale arising out of this Sale Solicitation Process, and they reserve the right and unfettered discretion to reject any offer or proposal, but shall not do so without first consulting with the Secured Creditor.

FURTHER ORDERS

69. At any time during the Sale Solicitation Process, the Monitor may, following consultation with OGAC and the Applicants, apply to the Court for advice and directions with respect to the discharge of its powers and duties hereunder.

Appendix "A"**TO OGAC:**

The Oil & Gas Asset Clearinghouse
500 N Sam Houston Pkwy W, Suite 1500
Houston TX 77067

Attention: Patrick DaPra

Phone: 832-601-7655

E-Mail: pdapra@ogclearinghouse.com

TO THE MONITOR:

FTI Consulting Canada Inc.
720, 440 – 2nd Ave. S.W.
Calgary AB T2P 5E9

Attention: Deryck Helkaa

Phone: 403-454-6031

E-Mail: Deryck.Helkaa@fticonsulting.com

WITH A COPY TO:

McCarthy Tétrault LLP
Suite 4000
421 – 7th Ave. S.W.
Calgary Alberta T2P 4K9

Attention: Sean Collins

Phone: 403-260-3531

E-Mail: scollins@mccarthy.ca

TAB 11

2009 CarswellOnt 1330
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 1330, [2009] O.J. No. 1044, 175 A.C.W.S. (3d) 965

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

And In the Matter of a plan of compromise or arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (the "Applicants")

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Morawetz J.

Heard: March 6, 2009
Judgment: March 12, 2009
Docket: 09-CL-7950, 09-CL-7951

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
J. Pasquariello for Monitor, Ernst & Young Inc.
Jonathan Bell for Informal Group of Nortel Networks Noteholders
R. Moncur, M. Barrack for Flextronics
M. Starnino for Pension Benefits Guarantee Fund
Harvey Chaiton for IBM
D. Ullman for Verizon Communications Inc.
Harvey Garman for U.K. Protection Fund, Nortel Networks UK Pension Trust Limited
Demtrios iokaris for Certain Former Salaried Employees of Nortel Networks
Alex MacFarlane for U.S. Unsecured Creditors' Committee

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.b Approval by court](#)

[XIX.3.b.iv Miscellaneous](#)

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court

— “Fair and reasonable”

Table of Authorities

Cases considered by Morawetz J.:

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Morawetz J.:

- 1 This motion was heard on March 6, 2009 and the requested relief was granted, with brief reasons to follow.
- 2 At the outset of the Nortel proceedings on January 14, 2009, Mr. Tay, on behalf of Nortel Networks Corporation (the “Applicants or Nortel”), indicated that the Applicants would be seeking approval of a Key Employee Incentive Plan (“KEIP”) and a Key Employee Retention Plan (“KERP”). Such approval was sought on this motion, together with a request to approve the Calgary Retention Plan (the “Calgary Retention Plan”) providing for retention bonus payments promised to employees in connection with the closing of the Westwinds facility.
- 3 This motion was not opposed.
- 4 The record establishes that the commitment and retention of key employees will be essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement.
- 5 The KEIP applies to certain executives of the Senior Leadership Team (“SLTs”) and the Executive Leadership Team (“ELTs”) and the KERP applies to certain other key employees.
- 6 The Monitor reports that these plans have been developed to incent those employees who are:
 - (i) absolutely key to the success of the restructuring; and
 - (ii) to remain with the Applicants and U.S. Debtors through to the completion of the Canadian and U.S. proceedings

7 In designing the plans, Nortel obtained independent advice from Mercer (U.S.) Inc. ("Mercer") which included benchmarking total direct compensation levels against industry standards in comparing other key employee incentive plans approved by the courts in recent comparable North American restructurings. In addition, the Monitor reports that Nortel's financial advisor, Lezard Frères & Co., as well as the Monitor were consulted by Nortel throughout the development process with respect to the plans and have provided Nortel with appropriate input.

8 A total of 972 employees are eligible for the plans. This represents approximately 5% of Nortel's global workforce (excluding employees of the EMEA Filed Entities and the joint venturers). The KEIP covers 92 participants, of which, 29 are employed by the Applicants. The potential dollar value to be paid out under the KEIP is approximately \$23 million, of which \$6.8 million is allocated to the Canadian Applicants. With respect to the KERP, this plan covers 880 participants, of which 294 are employed by the Canadian Applicants. The total potential dollar value to be paid out under the KERP is approximately \$22 million, of which \$6.2 million is allocated to the Canadian Applicants.

9 The awards under both the KEIP and the KERP will vest based on the achievement of three milestones, namely, achievement of North American objectives; achievement of certain parameters that will result in a leaner and more focussed organization; and court-approved confirmation of a plan of restructuring.

10 The Unsecured Creditors' Committee ("UCC") in the Chapter 11 proceedings has indicated that it supports the plans, although such support with respect to the KEIP for the SLTs is conditional upon the delivery to the UCC of Nortel's 2009 financial projections.

11 Counsel to the Applicants advised that the U.S. Bankruptcy Court has approved the KEIP (except as it relates to the SLTs) and the KERP.

12 In order to maintain consistency between Canada and the U.S., the Applicants' motion to approve the KEIP excludes the SLTs. The Monitor reports that the Applicants have advised that they intend to request approval of the KEIP for the SLTs at a future date.

13 With respect to the Calgary Retention Plan, a decision was made in July 2008 to close the Westwinds facility and transfer R & D and global operations to other facilities over a period of 12 months. In July 2008, Nortel developed the Calgary Retention Plan that provided for retention payments to be made to those Westwinds facility employees who Nortel determined were critical to the successful shutdown of the facility. The Applicants have indicated that the maximum cost of the Calgary Retention Plan is estimated to be approximately \$727,000 to be paid to 45 employees at the time the employees have completed their portion of the project.

14 I am satisfied that the record establishes that the employees who are covered by the KEIP, the KERP and the Calgary Retention Plan are key to the operations of Nortel and are sought after by competitors, even given current market conditions.

15 The Monitor has reviewed the details of the Applicants proposed plans and Mercer's analysis and believes that the proposed plans provide reasonable compensation in the current situation.

16 Full details with respect to the plans are contained in the Confidential Report. I have reviewed this Report and agree with the submissions of both the Applicants and the Monitor that the Report contains sensitive commercial information that would be harmful to the Applicants if it were disclosed in the marketplace. In addition, the Confidential Report contains sensitive personal information relating to Nortel's employees, the disclosure of which, in my view, would be harmful.

17 The Applicants and the Monitor request that the Confidential Report be sealed, pending further order of the court. I am satisfied that the test for sealing the Confidential Report, as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) has been satisfied and it is appropriate to grant the sealing order.

18 I have been satisfied that it is appropriate to approve the plans in question.

19 An order shall therefore issue approving:

(i) the KEIP except as it relates to the Applicants' employees whose are designated members of the SLT;

(ii) the KERP; and

(iii) the Calgary Retention Plan

20 An order shall issue sealing the Confidential Report pending further order of this court.

TAB 12



Bordereau de transmission par télécopieur

L'honorable Louis J.Guin
Cour supérieure du Québec

Palais de justice de Montréal

1, rue Notre-Dame Est

Montréal (Québec) H2Y 1B6

Date d'envoi : **2012-08-24**

Heure soumis : **11:56:40**

Nombre de page(s) incluant
le présent bordereau : **6**

Destinataire(s) : **Dossier #500-11-041305-117 - HOMBURG - Order Granting Fifth Extension
and Authorizing Extended KERP**

Télécopieur : **514 904-8101**

Expéditeur : **Elise Azoulay**

Télécopieur : **514 904-4205**

Téléphone : **514 393-2136**

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Message :

Désolée, voici la copie du jugement signée.

Attention:
Me Martin Desrosiers et
Me Sandra Abitan
OSLER, HOSKIN & HARCOURT
et
Me Jocelyn Perreault
McCARTHY TÉTRAULT

Bonjour Maîtres,

Nous vous transmettons une copie de courtoisie du jugement rendu le 24 août 2012 par l'honorable Louis J. Guin, j.c.s., dans la cause mentionnée en objet.

Veuillez en prendre connaissance.

Salutations,

Elise Azoulay, adjointe
Honorable Louis J. Guin, j.c.s.

courriel: elise.azoulay@judex.qc.ca
tél: 514 393-2136 IP 52513
fax: 514 904-4205

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SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: 500-11-041305-117

DATE: August 24, 2012

PRESIDING : THE HONOURABLE LOUIS J. GOUIN, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

HOMBURG INVEST INC.

HOMBURG SHARECO INC.

CHURCHILL ESTATES DEVELOPMENT LTD.

INVERNESS ESTATES DEVELOPMENT LTD.

CP DEVELOPMENT LTD.

NORTH CALGARY LAND LTD.

Debtors / Petitioners

- and -

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP

HOMCO REALTY FUND (88) LIMITED PARTNERSHIP

HOMCO REALTY FUND (89) LIMITED PARTNERSHIP

HOMCO REALTY FUND (92) LIMITED PARTNERSHIP

HOMCO REALTY FUND (94) LIMITED PARTNERSHIP

HOMCO REALTY FUND (96) LIMITED PARTNERSHIP

HOMCO REALTY FUND (105) LIMITED PARTNERSHIP

HOMCO REALTY FUND (121) LIMITED PARTNERSHIP

HOMCO REALTY FUND (122) LIMITED PARTNERSHIP

HOMCO REALTY FUND (142) LIMITED PARTNERSHIP

HOMCO REALTY FUND (199) LIMITED PARTNERSHIP

Mises-en-cause

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Monitor

JG2270

ORDER GRANTING FIFTH EXTENSION AND AUTHORIZING EXTENDED KERP

- 2 -

[1] The Petitioners present an *Amended motion to extend the stay period and for the approval of the extension of the key employee retention plan* dated August 23, 2012 (the "**Motion**") pursuant to sections 11 and 11.02 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**");

[2] **CONSIDERING** the Motion and affidavit in support thereof, and the representations of counsel;

[3] **CONSIDERING** the Monitor's Fourteenth Report dated August 22, 2012;

[4] **CONSIDERING** the provisions of the CCAA;

FOR THESE REASONS, THE COURT:

[5] **GRANTS** the present *Amended Motion to extend the stay period and for the approval of the extension of the Key Employee Retention Plan* (the "**Motion**");

[6] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion;

[7] **EXTENDS** the Stay Period (as defined in the initial order granted by this Court in this matter on September 9, 2011 (the "**Initial Order**") and as extended from time to time) to September 14, 2012, the whole subject to the terms of the Initial Order, as amended;

[8] **ORDERS** that the terms of the Extended KERP, **Exhibit P-1** are hereby approved, and HII is hereby authorized to implement the Extended KERP and **AUTHORIZES** HII to remit to the Monitor the aggregate amount of \$482,000 to be held in escrow by the Monitor together with the funds already in escrow with the Monitor in respect of the KERP for the benefit of the Eligible Employees;

[9] **DECLARES** that the Extended KERP contains sensitive and confidential information and shall be sealed in the court file in these proceedings and segregated from, and not form part of, the public record;

[10] **PRAYS ACT** of the Monitor's 14th Report dated August 22, 2012;

- 3 -

[11] **ORDERS** provisional execution of the present order, notwithstanding appeal;

[12] **THE WHOLE WITHOUT COSTS.**


LOUIS J. GOUIN, J.S.C.

Hearing date : August 24, 2012

Me Martin Desrosiers
Me Sandra Abitan
Osler, Hoskin & Harcourt LLP
Counsel to Petitioners

TAB 13

2012 ONSC 506
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 1263, 2012 ONSC 506, [2012] O.J. No. 472, 217 A.C.W.S. (3d) 12, 85 C.B.R. (5th) 169, 95
C.C.P.B. 48

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

In the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc.
(Applicants)

Morawetz J.

Heard: January 12, 2012
Judgment: February 2, 2012
Docket: CV-12-9539-00CL

Counsel: A.J. Taylor, M. Konyukhova, K. Esaw, for Applicants
D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada
C. Sinclair, for United Steelworkers' Union
K. Peters, for AMG Advance Metallurgical Group NV
M. Bailey, for Superintendent of Financial Services (Ontario)
S. Weisz, for FTI Consulting Canada Inc.
A. Kauffman, for Investissement Quebec

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Labour; Employment; Public

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

I Bankruptcy and insolvency jurisdiction

I.1 Constitutional jurisdiction of Federal government and provinces

I.1.c Paramourcy of Federal legislation

Bankruptcy and insolvency

X Priorities of claims

X.2 Preferred claims

X.2.c Costs and expenses of administrators

X.2.c.ii Priority over other claims

Bankruptcy and insolvency

X Priorities of claims

X.2 Preferred claims

- [X.2.d](#) Wages and salaries of employees
- [X.2.d.i](#) Entitlement to preferred status

Bankruptcy and insolvency

- [X](#) Priorities of claims
 - [X.6](#) Restricted and postponed claims
 - [X.6.b](#) Officers, directors, and stockholders

Bankruptcy and insolvency

- [XIX](#) Companies' Creditors Arrangement Act
 - [XIX.1](#) General principles
 - [XIX.1.c](#) Application of Act
 - [XIX.1.c.iv](#) Miscellaneous

Business associations

- [V](#) Legal proceedings involving business associations
 - [V.3](#) Practice and procedure in proceedings involving corporations
 - [V.3.n](#) Confidentiality or sealing orders

Labour and employment law

- [I](#) Labour law
 - [I.6](#) Collective agreement
 - [I.6.l](#) Employee benefits
 - [I.6.l.iii](#) Pensions

Pensions

- [I](#) Private pension plans
 - [I.1](#) Administration of pension plans
 - [I.1.g](#) Valuation and funding of plans
 - [I.1.g.ii](#) Funding arrangements

Pensions

- [I](#) Private pension plans
 - [I.2](#) Payment of pension
 - [I.2.l](#) Bankruptcy or insolvency of employer
 - [I.2.l.ii](#) Registered plans

Pensions

- [I](#) Private pension plans
 - [I.2](#) Payment of pension
 - [I.2.m](#) Special payments

Headnote

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Costs and expenses of administrators — Priority over other claims

Super priority of administration charge — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — Absence of court-ordered super priority charge would frustrate objectives of CCAA — Without assistance of advisors, and in void caused by lack of governance structure, companies would be unable to proceed with restructuring and likely result would be bankruptcy — It was unlikely that advisors would participate in proceedings, and it was neither reasonable nor realistic to expect advisors to participate, unless administration charge was granted to secure their fees and disbursements — Role of advisors was critical to efforts to restructure insolvent companies — Employees were not prejudiced by requested relief since alternative was bankruptcy, which would not be better result for stakeholders.

Bankruptcy and insolvency --- Priorities of claims — Restricted and postponed claims — Officers, directors, and stockholders

Super priority of directors' and officers' charge — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — Absence of court-ordered super priority charge would frustrate objectives of CCAA — Without assistance of advisors, and in void caused by lack of governance structure, companies would be unable to proceed with restructuring and likely result would be bankruptcy — Directors and officers would be unlikely to continue their service without D&O charge — It was neither reasonable nor realistic to expect directors and officers to continue without requested protection — Employees were not prejudiced by requested relief since alternative was bankruptcy, which would not be better result for stakeholders.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

Suspension of special payments — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Companies had insufficient liquidity to make special payments to plans at this time — Employees were not prejudiced by requested relief since likely outcome should proceedings fail was bankruptcy — There was no priority for special payments in bankruptcy — Application of provincial pensions legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Requiring companies to make special payments would deprive them of sufficient funds to continue operating, which was what CCAA was intended to avoid.

Pensions --- Administration of pension plans — Valuation and funding of plans — Funding arrangements

Suspension of special payments — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent

companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Companies had insufficient liquidity to make special payments to plans at this time — Employees were not prejudiced by requested relief since likely outcome should proceedings fail was bankruptcy — There was no priority for special payments in bankruptcy — Application of provincial pensions legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Requiring companies to make special payments would deprive them of sufficient funds to continue operating, which was what CCAA was intended to avoid.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous

Relationship between Act and provincial pensions acts — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Application of provincial pension legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Order requiring company to make special payments in accordance with provincial legislation would frustrate rehabilitative purpose of CCAA if such order would have effect of forcing company into bankruptcy — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial pension legislation.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Application of provincial pension legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy, contrary to purpose of CCAA — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial pension legislation — Doctrine of paramountcy was properly invoked.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Entitlement to preferred status

Key Employee Retention Plans — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA) — Insolvent companies' board of directors approved key employee retention plans (KERPs) in order to keep employees who were considered critical to successful proceedings under CCAA because they were experienced employees who played central roles in restructuring initiatives — Insolvent companies brought motion for order approving KERPs, and sealing confidential supplement to monitor's report — Motion granted — KERPs were approved — It was necessary that KERPs' participants be incentivized to remain in current positions during restructuring process — Continued participation of these employees would assist company in its objectives — Replacement of these employees if they left would not provide any substantial economic benefits to company — Confidential supplement to monitor's report, which contained copies of unredacted KERPs, was sealed pursuant to R. 151 of Federal Courts Rules.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders

Companies' Creditors Arrangement Act (CCAA) — Supplement to monitor's report — Insolvent companies obtained relief under CCAA — Insolvent companies' board of directors approved key employee retention plans (KERPs) in order to keep certain employees who were considered critical to successful proceedings under CCAA — Supplement to monitor's report contained copies of unredacted KERPs, which had sensitive personal compensation information — Insolvent companies brought motion for order approving KERPs, and sealing confidential supplement to monitor's report — Motion granted — KERPs were approved — Confidential supplement to monitor's report was sealed pursuant to R. 151 of Federal Courts Rules for period of 45 days — Disclosure of personal information in supplement could compromise commercial interests of companies and cause harm to KERPs' participants — Confidentiality order was necessary to prevent serious risk to companies' and KERPs participants' interests.

Labour and employment law --- Labour law — Collective agreement — Employee benefits — Pensions
Insolvent employer.

Table of Authorities

Cases considered by *Morawetz J.*:

AbitibiBowater inc., Re (2009), 74 C.C.P.B. 254, D.T.E. 2009T-434, 57 C.B.R. (5th) 285, 2009 QCCS 2028, 2009 CarswellQue 4329, [2009] R.J.Q. 1415 (C.S. Que.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

Collins & Aikman Automotive Canada Inc., Re (2007), 37 C.B.R. (5th) 282, 2007 CarswellOnt 7014, 63 C.C.P.B. 125 (Ont. S.C.J.) — referred to

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 4469, 55 C.B.R. (5th) 217, 2009 C.E.B. & P.G.R. 8350, 76 C.C.P.B. 254 (Ont. S.C.J. [Commercial List]) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Indalex Ltd., Re (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.*) 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re*) 99 O.R. (3d) 708 (Ont. C.A.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — followed

Timminco Ltd., Re (2012), 2012 ONSC 106, 2012 CarswellOnt 1059 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Régimes complémentaires de retraite, Loi sur les, L.R.Q., c. R-15.1

en général — referred to

Rules considered:

Federal Courts Rules, SOR/98-106

R. 151 — considered

Words and phrases considered:

special payments

. . . [S]pecial (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation

The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36].

MOTION by insolvent companies for order suspending obligations to make special payments to pension plans, granting super priority to two charges, approving key employee retention plans, and sealing confidential supplement to monitor's report.

Morawetz J.:

1 This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

2 These are those reasons.

Background

3 On January 3, 2012, Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") applied for and obtained relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

4 In my endorsement of January 3, 2012, (*Timminco Ltd., Re*, [2012 ONSC 106](#) (Ont. S.C.J. [Commercial List])), I stated at [11]: "I am satisfied that the record establishes that the Timminco Entities are insolvent and are 'debtor companies' to which the CCAA applies".

5 On the initial motion, the Applicants also requested an "Administration Charge" and a "Directors. and Officers. Charge" ("D&O Charge"), both of which were granted.

6 The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the "PBA") or the *Quebec Supplemental Pensions Plans Act* (the "QSPPA") (collectively, the "Encumbrances") in favour of any persons that have not been served with this application.

7 IQ had been served and did not object to the Administration Charge and the D&O Charge.

8 At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

9 The Timminco Entities now bring this motion for an order:

- (a) suspending the Timminco Entities. obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);
- (b) granting super priority to the Administration Charge and the D&O Charge;
- (c) approving key employee retention plans (the “KERPs”) offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities. obligations under the KERPs (the “KERP Charge”); and
- (d) sealing the confidential supplement (the “Confidential Supplement”) to the First Report of FTI Consulting Canada Inc. (the “Monitor”).

10 If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of \$1 million;
- second, the KERP Charge (in the maximum amount of \$269,000); and
- third, the D&O Charge (in the maximum amount of \$400,000).

11 The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers. Union of Canada (“CEP”). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers. Union (“USW”).

12 The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L.Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

13 Counsel to the Applicants identified the issues on the motion as follows:

- (a) Should this court grant increased priority to the Administration Charge and the D&O Charge?
- (b) Should this court grant an order suspending the Timminco Entities. obligations to make the pension contributions with respect to the pension plans?
- (c) Should this court approve the KERPs and grant the KERPs Charge?
- (d) Should this court seal the Confidential Supplement?

14 It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

15 The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

14. The Timminco Entities sponsor the following three pension plans (collectively, the “**Pension Plans**”):

- (a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the “**Haley Pension Plan**”);
- (b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the “**Bécancour Non-Union Pension Plan**”); and
- (c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the “**Bécancour Union Pension Plan**”).

Haley Pension Plan

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco’s magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the “**PBA**”), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario (“**FSCO**”) detailing the plan’s funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of \$5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of \$3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling \$4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be \$1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan’s actuaries, despite Timminco having made contributions of approximately \$4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is \$3,102,900.

Bécancour Non-Union Pension Plan

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit (“**DB**”) and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was \$3,239,600.

21. In 2011, normal cost contributions payable to this plan totaled approximately \$9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately \$41,710 per month. All contributions in respect of the plan were paid when due in accordance with the Québec *Supplemental Pension Plans Act* (the “**QSPPA**”) and regulations.

Bécancour Union Pension Plan

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010.

As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was \$7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately \$7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately \$95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Bector of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

Pension Plan Deficiencies and the Timminco Entities' CCAA Proceedings

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were \$1,598,500 for 2010, \$1,397,000 for 2011 and \$1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to \$1,728,700 for each of 2011 and 2012.

Suspension of Certain Pension Contributions

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the **"Normal Cost Contributions"**). Timminco currently owes approximately \$1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately \$140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the **"Pension Contributions"**), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

The Position of CEP and USW

16 Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

17 In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation "would frustrate the company's ability to restructure and avoid bankruptcy". (See *Indalex Ltd., Re*, 2011 ONCA 265 (Ont. C.A.) at para. 181.)

18 Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the

purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no reason to believe that their interests will be protected through the issuance of the orders being sought.

19 Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must “wear two hats” and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex Ltd., Re, supra*, at para. 129.)

20 Counsel to CEP goes on to submit that, where the “two hats” gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex Ltd., Re, supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex Ltd., Re, supra*, at paras. 140 and 207.)

21 In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities. fiduciary duties to the pension plans, the super priority charge ought not to be granted.

22 Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (See *Indalex Ltd., Re, supra*, at paras. 179 and 189.)

23 In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

24 CEP also takes the position that the Timminco Entities. obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

25 In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex Ltd., Re, supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

26 In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of \$95,300 per month to the Bécancour Union Pension Plan, and of \$47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities. request to suspend the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

27 Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

28 With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

29 Counsel to CEP’s final submission is that, in the event the KERPs are approved, they should not be sealed, but rather

should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

The Position of the Timminco Entities

30 At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

31 I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities. employees, pensioners, suppliers and customers.

32 As at December 31, 2011, the Timminco Entities. cash balance was approximately \$2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately \$5.5 million and total operating disbursements of approximately \$7.7 million for net cash outflow of approximately \$2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated \$157,000.

33 The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two thirdparty lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility.¹

34 The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

35 There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

36 The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

37 Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

38 The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities. restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

39 Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

11.52(1) Court may order security or charge to cover certain costs — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

40 Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities' liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

41 Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

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

(3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Analysis

(i) Administration Charge and D&O Charge

42 It seems apparent that the position of the unions is in direct conflict with the Applicants' positions.

43 The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

44 Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

45 Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

46 It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timminco Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

47 The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

48 Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corp., Re*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

49 It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36:

In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

50 Further, as I indicated in *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

51 The Court of Appeal in *Indalex Ltd., Re* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...

...

What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be

situations in which paramourcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

52 The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

53 Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

54 Further, the Timminco Entities submit that the doctrine of paramourcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities. CCAA proceedings.

55 The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

56 The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater inc., Re* (2009), 57 C.B.R. (5th) 285 (C.S. Que.); *Collins & Aikman Automotive Canada Inc., Re* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc., Re* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Commercial List])).

57 I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

58 The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

59 Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex Ltd., Re, supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

60 Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

61 The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the

pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

62 On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

63 In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corp., Re*).

64 In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

65 There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

66 In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

67 If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

68 For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

69 I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities. obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

70 I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities. failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

71 Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

72 In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities. CCAA proceedings as they are experienced employees who have played central roles in the

restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is \$269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corp., Re*, [2009] O.J. No. 1044 (Ont. S.C.J. [Commercial List]), *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]), and *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]).

73 In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

74 The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

75 I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

76 The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

77 CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

78 In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

79 In the result, the motion is granted. An order shall issue:

- (a) suspending the Timminco Entities. obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);
- (b) granting super priority to the Administrative Charge and the D&O Charge;
- (c) approving the KERPs and the grant of the KERP Charge;
- (d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

Motion granted.

Footnotes

- ¹ In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

TAB 14

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Canada \(Procureur général\) c. Contrevenant No. 10](#) | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

**Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada,
Respondent and The Minister of Finance of Canada, the Minister of Foreign
Affairs of Canada, the Minister of International Trade of Canada and the Attorney
General of Canada, Respondents**

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), [2000 CarswellNat 970](#), (sub nom. [Atomic Energy of Canada Ltd. v. Sierra Club of Canada](#)) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), [1999 CarswellNat 2187](#), [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

[XII](#) Discovery

[XII.2](#) Discovery of documents

[XII.2.h](#) Privileged document

[XII.2.h.xiii](#) Miscellaneous

Civil practice and procedure

XII Discovery

XII.4 Examination for discovery

XII.4.h Range of examination

XII.4.h.ix Privilege

XII.4.h.ix.F Miscellaneous

Evidence

VII Documentary evidence

VII.5 Privilege as to documents

VII.5.d Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — [Loi canadienne sur l'évaluation environnementale](#), L.C. 1992, c. 37, art. 5(1)(b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — [Loi canadienne sur l'évaluation environnementale, L.C. 1992](#), c. 37, art. 5(1)b — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — [Loi canadienne sur l'évaluation environnementale, L.C. 1992](#), c. 37, art. 5(1)b — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a \$1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in [Dagenais v. Canadian Broadcasting Corp.](#), [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurier les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société

d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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s. 8 — referred to

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s. 54(2)(b) — referred to

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R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by Iacobucci J.:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the “Confidential Documents”). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL’s experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang’s evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the “EIRs”), a Preliminary Safety Analysis Report (the “PSAR”), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent’s position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with

the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) *Evans J.A. (Sharlow J.A. concurring)*

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) *Robertson J.A. (dissenting)*

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns “trade secrets,” this information will not be disclosed during a trial if to do so would destroy the owner’s proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is “necessary” to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

- (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the

discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick, supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

- (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
- (b) the judge must consider whether the order is limited as much as possible; and
- (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the

parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the “necessity” branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase “proper administration of justice” must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to “reflect . . . the substance of the *Oakes* test”, *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL’s confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer’s property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant’s commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant’s capacity to make full answer and defence or, expressed more generally, the appellant’s right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L’Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter: New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as “the very soul of justice,” guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick, supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under R. 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck, supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase “important commercial interest” is in need of some clarification. In order to qualify as an “important commercial interest,” the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no “important commercial interest” for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields “where the *public* interest in confidentiality outweighs the public interest in openness” (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an “important commercial interest.” It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase “reasonably alternative measures” requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a “confidential nature” in that it has been “accumulated with a reasonable expectation of it being kept confidential” (para. 14) as opposed to “facts which a litigant would like to keep confidential by having the courtroom doors closed” (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant’s commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL’s competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal’s assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant’s case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club’s position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would

not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), per Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra, supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra*, per Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the

nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of

protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values,” we must guard carefully against judging expression according to its popularity.”

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the

scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.
Pourvoi accueilli.