

COURT FILE NUMBER 1703 12327
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON



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
CANADA NORTH GROUP INC., CANADA NORTH CAMPS
INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD.,
816956 ALBERTA LTD. and 1371047 ALBERTA LTD.

DOCUMENT **APPLICANTS' SUPPLEMENTAL BENCH BRIEF FOR FIRST
EXTENSION APPLICATION**

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A. INTRODUCTION

1. This Brief is in response to the application of Canadian Western Bank ("**CWB**") filed on Friday, July 21, 2017 to:
 - (a) lift the stay of proceedings granted under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") in favour of Canada North Group Inc. ("**Canada Group**"), Canada North Camps Inc. ("**CNC**"), Campcorp Structures Ltd. ("**Campcorp**"), D.J. Catering Ltd. ("**DJ**"), 816956 Alberta Ltd. ("**816956**"), 1371047 Alberta Ltd. ("**1371047**"), (Canada Group, CNC, Campcorp, 816956 and 1371047, collectively, the "**CCAA Parties**"); and
 - (b) appoint a Receiver over CNC, DJ and Campcorp.

DIP Financing

2. The CCAA Parties are also seeking an increase to the interim Debtor-In-Possession ("**DIP**") financing. The criteria for factors for a Court to consider in reviewing an application for DIP financing are reviewed in *U.S. Steel Canada Inc., Re*: 2014 ONSC 6145 at paras 12 - 18 [**Tab 1**]
3. The increase in the DIP financing is consistent with the principles enumerated in *US Steel*.
4. The DIP financing is sought to provide working capital to allow the CCAA Parties to carry out fire camp work in B.C. This work will generate more revenue than costs and, as such, is for the benefit of all stakeholder.
5. The DIP financing is being sought on notice and is supported by cash flow projections. There is no material prejudice to creditors.
6. As a result, the CCAA Parties, respectfully request that the DIP financing be increased to \$2,500,000.
7. CWB has revived its application to appoint a Receiver on the basis that it takes issue with the CCAA Parties' margining of the Grand Rapids Receivables (as defined in the Second Affidavit sworn by Shayne McCracken on July 20, 2017).

Receivership Application

8. Ms. McCracken has, in her Second and Third Affidavits provided a full factual answer to CWB's concerns and confirmed that, at all times, the margining of the Grand Rapids Receivables was done in good faith.
9. Further, the good faith obligations in a CCAA proceeding relates to conduct within the proceedings, not that relating to past activities:

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J.) [Commercial List] at para. 4 [**Tab 2**]

Pacific Shores Resort & Spa Ltd., Re, [2011 CarswellBC 3500] at paras. 31 and 32 [Tab 3]

4519922 Canada Inc., Re: 2015 ONSC 124 ("**4151992**") at paras 44 - 46 [Tab 4]

10. Further CWB's application is to appoint Deloitte Restructuring Inc. ("**Deloitte**") as the Receiver.
11. Deloitte cannot be appointed as the Receiver as it is in a conflict of interest.
12. As set out in the Second Affidavit of Shayne McCracken, the CCAA Parties retained Deloitte directly to act in their interest. The ability of Deloitte to provide information to third parties was expressly limited by the written terms of the Engagement Letter attached as Exhibit E to the Second Affidavit of Shayne McCracken.
13. Based on the information in Jessie Taha's First Affidavit, it appears that Deloitte directly reported to CWB with the intent of assisting CWB in its application for a Receiver.
14. This is directly at odds with Deloitte's engagement. The CCAA Parties accordingly have the basis of a claim for breach of contract and breach of fiduciary duty against Deloitte.
15. Deloitte as Receiver would be in the position of evaluating claims of the CCAA Parties and would be in a direct conflict.
16. This is not a conflict that can be managed as the CCAA Parties would, justifiably, have no confidence in an insolvency process if Deloitte were appointed as a Receiver.
17. The decision in *Winalta Inc., Re*: 2011 ABQB 399 ("**Winalta**") [Tab 5], deals with similar circumstances but for the fact that the imputed actions here have taken place prior to Deloitte receiving a court appointed role.
18. In *Winalta* at para. 113, Justice Topolniski found that Deloitte had "lost sight bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC" with certain analysis, creating "a perception of bias".
19. Justice Topolniski further stated at para 82:

Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a CCAA monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.
20. CWB's application to appoint Deloitte as a Receiver must, again, be dismissed.
21. It is undeniable that the relationship between CWB and the CCAA Parties is strained. The desire of CWB to liquidate the company so that CWB is paid out in short order cannot outweigh the overall benefit to creditors of the CCAA process.

22. As stated in *4519922 Canada Inc.* supra. at para. 59, the "purposes of a CCAA should not be frustrated by the self-interest of a single creditor."
23. The CCAA Parties respectfully seek to have the application to lift the stay and appoint a receiver dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF JULY, 2017.

DLA PIPER (CANADA) LLP



Stephanie A. Wanke

Spencer Norris

Counsel for Canada North Group Inc., Canada
North Camps Inc., Campcorp Structures Ltd.,
D.J. Catering Ltd., 816956 Alberta Ltd., 1371047
Alberta Ltd. and 1919209 Alberta Ltd.

Table of Authorities

1. *U.S. Steel Canada Inc., Re:* 2014 ONSC 6145.
2. *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J.).
3. *Pacific Shores Resort & Spa Ltd., Re*, [2011 CarswellBC 3500].
4. *4519922 Canada Inc., Re:* 2015 ONSC 124 .
5. *Winalta Inc., Re:*, 2011 ABQB 399.

2014 ONSC 6145
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2014 CarswellOnt 16465, 2014 ONSC 6145, 20 C.B.R. (6th) 116, 247 A.C.W.S. (3d) 266

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to U.S. Steel Canada Inc.

H. Wilton-Siegel J.

Heard: October 8, 2014

Judgment: October 8, 2014

Docket: CV-14-10695-00CL

Counsel: R. Paul Steep, Jamey Gage, Heather Meredith for Applicant

Kevin Zych for Monitor

Michael Barrack, Robert Thornton, Grant Moffat for United States Steel Corporation and the proposed DIP Lender
Gale Rubenstein, Robert J. Chadwick, Logan Willis for Her Majesty the Queen in Right of Ontario and the
Superintendent of Financial Services (Ontario)

Ken Rosenberg, Lily Harmer for United Steelworkers International Union and the United Steelworkers Union, Local
8782

Sharon L.C. White for United Steelworkers Union, Local 1005

Shayne Kukulowicz, Larry Ellis for City of Hamilton

Steve Weisz, Arjo Shalviri for Caterpillar Financial Services Limited

S. Michael Citak for Various Trade Creditors

Kathryn Esaw, Patrick Corney for Independent Electricity System Operator

Andrew Hatnay for Certain retirees and, for the proposed representative counsel

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Employment

Headnote

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

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — At comeback motion, applicant sought approval of debtor-in-possession (DIP) loan facility; order as to priority of administration charge and director's charge; approval of key employee retention payments; appointment of six representatives and representative counsel to represent interests of group of active and retiree beneficiaries not represented by union U — DIP financing approved — Financing facility was critically important to ensure stable continuing operations — Condition precedent to DIP loan was order granting charge giving DIP lender priority over all security interests and encumbrances, other than administration charge, director's charge and certain priority liens — DIP lender's priority charge granted, as it would not prejudice any other parties with security interests in applicant's property — Doctrine of paramountcy invoked so provisions of CCAA would override provisions of Pension Benefits Act in respect of priority of DIP lender's charge, administration charge and director's charge — Super-priority for administration and director's charges was necessary to further objectives of CCAA proceedings — Beneficiaries of such charges would not provide services to applicant without security for fees and disbursements — Key employee retention program approved in sum of \$2,570,378 — Representatives

were appointed — Unrepresented group of beneficiaries were important stakeholders and deserved meaningful representation, especially as there was solvency deficiency in applicant's pension plans.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Constitutional issues

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — Condition precedent to debtor-in-possession (DIP) loan was order granting charge in favour of DIP lender giving priority over all encumbrances, other than administration charge, director's charge and certain priority liens — At comeback motion hearing, applicant sought, inter alia, approval of DIP loan facility and charge, and order as to priority of administration charge and director's charge — Doctrine of paramountcy invoked so that CCAA provisions would override provisions of Pension Benefits Act in respect of priority of DIP lender's charge, administration charge and director's charge — Super-priority for administration charge and director's charge was necessary to further objectives of CCAA proceedings — Beneficiaries of such charges would not provide services to applicant without proposed security for fees and disbursements — Financing was of critical importance to applicant to ensure stable continuing operations — DIP lender's charge did not secure any unsecured pre-filing obligations owed to DIP lender, and would not prejudice any other parties with security interests in applicant's property.

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

Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — At comeback motion, applicant sought extension of initial order, including stay provisions — Extension granted as it would further purposes of CCAA — Stay was necessary to provide stability required to allow applicant opportunity to work towards plan of arrangement — Without stay, applicant would have cash flow deficiency that would render successful restructuring unattainable — Applicant was acting in good faith and with due diligence to facilitate restructuring.

RULING on comeback motion regarding terms of initial order.

H. Wilton-Siegel J.:

1 U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

2 The Comeback Motion was adjourned from October 6, 2014 to October 7, 2014, and further adjourned on that date to October 8, 2014. On October 8, 2014, the Court heard various motions of the Applicant and addressed certain other additional scheduling matters, indicating that written reasons would follow with respect to the substantive matters addressed at the hearing. This endorsement constitutes the Court's reasons with respect to the five substantive matters addressed in two orders issued at the hearing.

3 In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Initial Order.

DIP Loan

4 The Applicant seeks approval of a debtor-in-possession loan facility (the "DIP Loan"), the terms of which are set out in an amended and restated DIP facility term sheet dated as of September 16, 2014 (the "Term Sheet") between the Applicant and a subsidiary of USS (the "DIP Lender").

5 The Term Sheet contemplates a DIP Loan in the maximum amount of \$185 million, to be guaranteed by each of the present and future, direct or indirect, wholly-owned subsidiaries of the Applicant. The Term Sheet provides for a maximum availability under the DIP Loan that varies on a monthly basis to reflect the Applicant's cash flow requirements as contemplated in the cash flow projections attached thereto. Advances bear interest at 5% per annum, 7% upon an event of default, and are prepayable at any time upon payment of an exit fee of \$5.5 million together with the lender's fees and costs described below. The Term Sheet provides for a commitment fee in the amount of \$3.7 million payable out of the first advance. The Applicant is also obligated to pay the lender's legal fees and any costs of realization or disbursement pertaining to the DIP Loan and these CCAA proceedings.

6 The Term Sheet contains a number of affirmative covenants, including compliance with a timetable for the CCAA proceedings. The DIP Loan terminates on the earliest to occur of certain events, including: (1) the implementation of a compromise or plan of arrangement; (2) the sale of all or substantially all of the Applicant's assets; (3) the conversion of the CCAA proceedings into a proceeding under the *Bankruptcy and Insolvency Act*; (4) December 31, 2015, being the end of the proposed restructuring period according to the timetable; and (5) the occurrence of an event of default, at the discretion of the DIP lender.

7 A condition precedent to funding under the DIP Loan is an order of this Court granting a charge in favour of the DIP lender (the "DIP Lender's Charge") having priority over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (herein, collectively "Encumbrances") other than the Administration Charge (Part I), the Director's Charge and certain permitted liens set out in the Term Sheet, which include existing and future purchase money security interests and certain equipment financing security registrations listed in a schedule to the Term Sheet (the "Permitted Priority Liens").

8 The terms and conditions of the DIP Loan, as set out in the Term Sheet, have been the subject of extensive negotiation in the period prior to the hearing of this motion. The DIP Loan is supported by the monitor and USS, and is not opposed by any of the other major stakeholders of the Applicant, including the Province of Ontario and the United Steelworkers International Union and the United Steelworkers Union, Locals 1005 and 8782 (collectively, the "USW").

9 The existence of a financing facility is of critical importance to the Applicant at this time in order to ensure stable continuing operations during the CCAA proceedings and thereby to provide reassurance to the Applicant's various stakeholders that the Applicant will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course. As such, debtor-in-possession financing is a pre-condition to a successful restructuring of the Applicant. In particular, the Applicant requires additional financing to build up its raw materials inventories prior to the Seaway freeze to avoid the risk of operating disruptions and/or sizeable cost increases during the winter months.

10 The Monitor, who was present during the negotiations regarding the terms of the DIP Loan, the Chief Restructuring Officer (the "CRO") and the Financial Advisor to the Applicant have each advised the Court that in their opinion the terms of the DIP Loan are reasonable, are consistent with the terms of other debtor-in-possession financing facilities in respect of comparable borrowers, and meet the financial requirements of the Applicant. The Monitor has advised in its First Report that it does not believe it likely that a superior DIP proposal would have been forthcoming.

11 The Court has the authority to approve the DIP Loan under s. 11 of the CCAA. I am satisfied that, for the foregoing reasons, it is appropriate to do so in the present circumstances.

12 The Court also has the authority under s. 11.2 of the CCAA to grant the requested priority of the DIP Lender's Charge to secure the DIP Loan. In this regard, s. 11.2(4) of the CCAA sets out a non-exhaustive list of factors to be considered by a court in addressing such a motion. In addition, Pepall J. (as she then was) stressed the importance of three particular criteria in *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial

List]) at paras. 32-34, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*]. In my view, the DIP Lender's Charge sought by the Applicant is appropriate based on those factors for the reasons that follow.

13 First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

14 Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

15 Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

16 Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

17 Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

18 Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd., Re*, 2012 ONSC 948 (Ont. S.C.J. [Commercial List]) at paras. 46-47, (Ont. C.A.) [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.) [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

Administration Charge and Director's Charge

19 The Initial Order provides for an Administration Charge (Part I) to the maximum amount of \$6.5 million, a Director's Charge to a maximum amount of \$39 million, and an Administration Charge (Part II) to a maximum amount of \$5.5 million plus \$1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

20 The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s.

11.51 of the CCAA provides the authority to grant a similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

21 As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

22 It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

23 In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

24 In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

The KERP

25 The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

26 The maximum amount payable under the KERP is \$2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

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

28 First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. 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.

29 Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration

between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

30 Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved

31 Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para.73, (Ont. S.C.J. [Commercial List]). In addition, USS, the only secured creditor of the Applicant, supports the KERP.

32 Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

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

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

34 The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

35 The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. I am satisfied that such an order should be granted in the circumstances.

36 In reaching this conclusion, I have considered the factors addressed in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328, [2010] O.J. No. 943 (Ont. S.C.J. [Commercial List]). In this regard, the following considerations are relevant.

37 The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will

be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

39 Third, the contemplated representation will avoid a multiplicity of retainers to the extent separate representation is not required. In this regard, I note that at the present time, there is a commonality of interest among all the non-USW Active and Retiree Beneficiaries in accordance with the principles referred to in *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) at para. 62, (Ont. S.C.J. [Commercial List]) [*Nortel*]. In particular, at the present time, none of the CRO, the proposed representative counsel and the proposed representatives see any material conflict of interest between the current and former employees. In these circumstances, as in *Nortel*, I am satisfied that representation of the employees' interests can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims. If the interests of such parties do in fact diverge in the future, the Court will be able to address the need for separate counsel at such time. In this regard, the proposed representative counsel has advised the Court that it and the proposed representatives are alert to the possibility of such conflicts potentially arising and will bring any issues of this nature to the Court's attention.

40 Fourth, the balance of convenience favours the proposed order insofar as it provides for notice and an opt-out process. The proposed representation order thereby provides the flexibility to members of this stakeholder group who do not wish to be represented by the proposed representatives or the proposed representative counsel to opt-out in favour of their own choice of representative and of counsel.

41 Fifth, the proposed representative counsel, Koskie Minsky LLP, have considerable experience representing employee groups in other restructurings under the CCAA. Similarly, the proposed representatives have considerable experience in respect of the matters likely to be addressed in the proceedings, either in connection with the earlier restructuring of the Applicant or in former roles as employees of the Applicant.

42 Sixth, the proposed order is supported by the Monitor and a number of the principal stakeholders of the Applicant and is not opposed by any of the other stakeholders appearing on this motion.

Extension of the Stay

43 Lastly, the Applicant seeks an order extending the provisions of the Initial Order, including the stay provisions thereof, until January 23, 2015. Section 11.02(2) of the CCAA gives the Court the discretionary authority to extend a stay of proceedings subject to satisfaction of the conditions set out in s. 11.02(3). I am satisfied that these requirements have been met in the present case, and that the requested relief should be granted, for the following reasons.

44 First, the stay is necessary to provide the stability required to allow the Applicant an opportunity to work towards a plan of arrangement. Since the Initial Order, the Applicant has continued its operations without major disruption. In the absence of a stay, however, the evidence indicates the Applicant will have a cash flow deficiency that will render the objective of a successful restructuring unattainable. As mentioned, the Monitor has advised that, based on its review, the Applicant should have adequate financial resources to continue to operate in the ordinary course and in accordance with the terms of the Initial Order during the stay period.

45 Second, I am satisfied that the Applicant is acting in good faith and with due diligence to facilitate the restructuring process. In this regard, the Applicant has had extensive discussions with its principal stakeholders to address significant objections to the initial draft of the Term Sheet that were raised by such stakeholders.

46 Third, the Monitor and the CRO support the extension.

47 Lastly, while it is not anticipated that the restructuring will have proceeded to the point of identification of a plan of arrangement by the end of the proposed stay period, the Applicant should be able to make significant steps toward that goal during this period. In particular, the Applicant intends to commence a process of discussions with its stakeholders as well as to explore restructuring options through a sales or restructuring recapitalization process (the

"SARP") contemplated by the Term Sheet. An extension of the stay will ensure stability and continuity of the applicant's operations while these discussions are conducted, without which the Applicant's restructuring options will be seriously limited if not excluded altogether. In addition, the Applicant should be able to take steps to provide continuing assurance to its stakeholders that it will be able to continue to operate in the ordinary course during the anticipated restructuring period, without interruption, notwithstanding the current proceedings under the CCAA.

48 Accordingly, I am satisfied that an extension of the Initial Order will further the purposes of the Act and the requested extension should be granted.

Order accordingly.

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2006 CarswellOnt 720
Ontario Superior Court of Justice [Commercial List]

Muscletech Research & Development Inc., Re

2006 CarswellOnt 720, [2006] O.J. No. 462, 19 C.B.R. (5th) 57

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT
ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER
OF MUSCLETECH RESEARCH AND DEVELOPMENT INC.
AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO**

Farley J.

Heard: February 6, 2006
Judgment: February 6, 2006
Docket: 06-CL-6241

Counsel: J.A. Carfagnini, Caterina Costa, Tom Ringe for Applicants
Derrick Tay for Iovate Companies, DIP Lender, Gardiner personally
Jay Swartz, Natasha MacParland for Monitor
Steven Golick for Zurich Insurance Company
Jeffrey Carhart, A. Sambasivan, Bill Baldiga, Stephen Smith for Ad Hoc Committee of the Muscletech Tort Claimants
David Rothwell, Jere Smith for Plaintiffs, Jaramillo

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Creditors of company proceeding under Companies' Creditors Arrangement Act obtained initial protective order on January 18, 2006 — U.S. creditor had trial against company scheduled for April 3, 2006 in New Mexico — Canadian creditors brought motion to extend protective stay for three months — U.S. creditor raised concern that filing under Act was stall designed to defeat its looming trial date — Motion granted — Exercise of discretion to grant stay was warranted under circumstance — Abundant evidence supported view that creditors were proceeding in good faith and due diligence towards resolution under Act — Significant progress was made since initial order with respect to mechanics concerning global resolution — Any party, including U.S. creditor, could employ comeback clause provision of initial order and request termination of stay prior to end of proposed three-month extension — Award of pre-judgment interest was sufficient compensation to creditor not included as person affected by plan presented by creditors under Act for any delay caused by imposition of stay, should its action against company ultimately proceed and be successful.

MOTION by creditors to extend stay of proceedings.

Farley J.:

- 1 This endorsement should be read in conjunction with my endorsement of January 18, 2006.
- 2 The essential aspects of the motion before me today were for an extension of the stay of proceedings to March 15, 2006, the sealing of the unredacted version of the Monitor's Second Report and recognition the U.S. Protective Orders. Allow me to deal with the two non-contentious aspects. Firstly, I note that there has been minimal redaction of the

Monitor's Second Report as to sensitive commercial financial information, all in accordance with the principles *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193 (S.C.C.). The draft order contemplates a sealing of the unredacted version pending further order of the court; thus any interested person could apply to the court for an unsealing on proper grounds. The unredacted version may be made available to any party which executes a suitable confidentiality/non-disclosure agreement. Similarly, with respect to the recognition of the U.S. Protective Orders, this makes common sense and is in general accord with the principles of *Sierra Club of Canada*.

3 That leaves the question of the extension of the protective stay to March 15, 2006. Let me observe that all the parties represented before me today, except for counsel for the Jaramillos, were supportive of this request. Those supportive indicated that very significant progress had been made since the January 18, 2006 Initial Order with respect to the mechanics concerning a global resolution and as to initial discussions concerning substance; in contrast, the Jaramillos were concerned that this CCAA filing was designed to derail their trial scheduled for April 3, 2006 in New Mexico. In defence of the attitude of the Jaramillos in this regard, I would observe that I can understand their frustration and suspicion that, vis-à-vis them, the CCAA filing was a ploy and/or a stall designed to defeat a looming trial date. If that were shown to be the case, then this (Canadian) court would not tolerate such tactical game playing. However, I am satisfied on the evidence before me (and as supported by the other parties represented here today, including the Monitor, being an officer of the court — appointed by the court, with special responsibilities to the court, including neutrality as to all stakeholders (including the Jaramillos)) that the CCAA applicants have been proceeding in good faith with due diligence towards a CCAA resolution (and with the timetable addressed in the material having to be met demonstrating that they are presently proceeding in good faith and with due diligence) that it would be appropriate in these circumstances to extend the stay to March 15, 2006. I pause to note that at any time and from time to time any interested person may employ the comeback clause provision of the Initial Order and in this regard the Jaramillos (or others) are perfectly at liberty to request that the stay be terminated even before the March 15, 2006 date. One would ordinarily assume that that use of the comeback clause would be triggered by some adverse happening or negative result; however, the comeback clause is not so restricted.

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

5 It was suggested by U.S. counsel for the Jaramillos (I would observe that US counsel were variously present in the courtroom as shown in the list of counsel) that the CCAA applicants were attempting to pit this (Canadian) court off against the U.S. court (this would include Judge Rakoff's court and the court in New Mexico). I would observe that this court has a long tradition of comity and cooperation with the courts of the U.S. and it will not engage in such an activity. As discussed in Judge Rakoff's hearing transcript of January 25, 2006, he would be calling me and I would confirm that he and I had a very pleasant and productive discussion as to coordination and cooperation — and we will continue with that liaison and endeavour. I know that he is waiting to see how this hearing in Canada goes, before dealing with the matter in New York on February 9.

6 In that regard, and as I pointed out, I have absolutely no difficulty with the element of Judge Rakoff having to be satisfied as to the appropriateness of how to deal with the Jaramillo litigation in New Mexico. It will be up to him to assess whether that litigation should be carved out, as to which see his previous consideration in this regard. I advised counsel (and Mr. Ringe specifically acknowledged) that they would have to be up to speed re the New Mexico case if Judge Rakoff did not find favour with the process as presently contemplated.

7 In that regard, I would also advise that I impressed upon all parties/counsel that they would have to continue with the lightning (choice of that word being that of one supportive counsel) progress that had been made to date. I found it very helpful to have the Monitor's interim report as to transactions affecting the CCAA applicants with related parties. That report will have to be finalized forthwith, including all aspects of "reviewable transactions". I was advised by the Monitor that the CCAA applicants and the other Gardiner entities plus Mr. Gardiner personally recognized the importance of this and that the Monitor was receiving full cooperation and candour in this respect. I am certain that the

Supplemental Objection to Motion For Temporary Restraining Order and Preliminary Injunction (headed up with the style of proceedings in the CCAA matter, but clearly addressed to the U.S. court) of the Jaramillos will be of assistance in allowing the Monitor to give special attention to the concerns addressed there. Originally, it was thought that the final report could be completed by February 15, 2006, but with the additional workload forthcoming, it was suggested that February 22, 2006 would be a more manageable date. I would therefore expect a draft interim report by February 15, 2006 to demonstrate that real progress is being made in this regard. Given the future dates in question, it would be better to consider February 22, 2006 as an outside date and better to provide same earlier.

8 I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]

9 I would reiterate my observations in *Grace Canada Inc., Re*, [2005] O.J. No. 4868 (Ont. S.C.J. [Commercial List]) at paragraph 5 and 11:

5. It would seem to me that the various class proceedings would benefit from cooperation and coordination — using the 3 Cs of the Commercial List (communication, cooperation and common sense). Otherwise, they will be faced with the practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and therefore susceptible to being conquered.

11. It would seem to me that the insolvency adjudicative proceedings would, at least under presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.

10 As well, it is helpful to recall what Blair J. (as he then was) said concerning CCAA stays of proceedings against third parties in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraphs 13, 17, 20, 24 and 25:

13. The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

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

20. I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very

far or very effectively unless and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

25. In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim*, supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

11 I am satisfied on a balancing of interests, weighing the benefits and the detriments, that it is appropriate to exercise my discretion to extend the stay. Order is to issue as per my fiat.

12 This endorsement was written over the lunch hour. I directed counsel to have their lunch together usefully discussing how this matter may productively proceed. I then returned to court to give them this endorsement and read it to them. I was advised that counsel (including those for the Jaramillos) had had an open and frank discussion.

Motion granted.

2011 BCSC 1775
British Columbia Supreme Court [In Chambers]

Pacific Shores Resort & Spa Ltd., Re

2011 CarswellBC 3500, 2011 BCSC 1775, [2011] B.C.J. No. 2482,
[2012] B.C.W.L.D. 2484, 213 A.C.W.S. (3d) 91, 75 C.B.R. (5th) 248

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

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

In the Matter of Pacific Shores Resort & Spa Ltd., Westerlea Sales Consulting Ltd., Aviawest Resorts
Inc., Ocean Place Holdings Ltd., Fairfield Ventures Inc. and Parkside Project Inc. (Petitioners)

S.C. Fitzpatrick J.

Heard: November 2-4, 2011
Judgment: November 7, 2011
Docket: Vancouver S117098

Counsel: D.K. Fitzpatrick for Petitioners
S. Dvorak for Monitor
A.A. Frydenlund, S. Stephens for Fisgard Capital Corporation
D. Toigo for Unsecured Loan Holders
K.S. Campbell for Water's Edge Rental Pool Creditors
C.D. Brousson for bcIMC Construction Fund Corp

Subject: Insolvency; Civil Practice and Procedure

Headnote

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

Petitioners obtained order for interim stay of proceedings under Companies' Creditors Arrangement Act (CCAA) — At comeback hearing two secured creditors opposed stay, but petitioners sought to extend it, increase administration charge, and obtain order authorizing debtor in possession (DIP) financing — One secured creditor brought cross-application to appoint receiver over its security — Although petitioners were insolvent, there were substantial assets that would be potential source of refinancing or sale, and there was no justification for secured creditors' lack of faith in management — Petitioners had bona fide intention to continue their operations within CCAA and to present plan, and it was likely plan would evolve through negotiation which might result in refinancing of debt and restructuring — DIP financing was necessary to allow petitioners' operations to continue and enhance prospects of viable arrangement, benefits of DIP financing outweighed any potential prejudice to secured creditors, and monitor supported approving it — Petitioners established that they acted in good faith with due diligence; stay was extended; administration charge was increased; DIP financing was ordered — Cross-application to appoint receiver was dismissed since receivership would obliterate every financial interest save for first and possibly second secured lenders.

COMEBACK HEARING for petitioners seeking to extend stay of proceedings, increase administration charge, and obtain order authorizing debtor in possession financing; CROSS-APPLICATION by secured creditor opposing stay and seeking to appoint receiver over its security.

S.C. Fitzpatrick J.:

1 This proceeding was commenced on October 21, 2011. On October 24, 2011, I granted an initial order pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*") which included an interim stay of proceedings and a nominal administration charge. At that time, two of the secured creditors, bcIMC Construction Fund Corporation and bcIMC Specialty Fund Corporation (collectively "bcIMC") and Fisgard Capital Corporation opposed the granting of the order. There was, however, insufficient time to fully hear the arguments against the granting of the order, notwithstanding that the statutory requirements of the *CCAA* had been met by the petitioners.

2 This hearing was intended to stand as a comeback hearing under s. 11.02(2) of the *CCAA*, when the arguments of those secured creditors could be fully heard. At this time, the petitioners seek to extend the stay to December 11, 2011, and to increase the administration charge from \$100,000 to \$300,000.

3 Further, the petitioners seek an order authorizing debtor in possession, or DIP, financing in the amount of \$600,000 and the imposition of a director's charge in the amount of \$700,000.

4 bcIMC and Fisgard oppose the granting of the order sought, contending that it is not appropriate in the circumstances and that the petitioners are not acting in good faith and with due diligence; in other words, that the petitioners have not satisfied the test in respect of the granting of this further order as that test is formulated under s. 11.02(3) of the *CCAA*. Fisgard also applies to appoint a receiver over the security held by it relating to one of the developments.

5 As at the time of the application for the initial order, the onus remains on the petitioners at this hearing to satisfy the requirements under s. 11.02(3) of the *CCAA*.

Background Facts

6 The corporate group, or, as it is known, the Aviawest Group, began its operations in 1990 with the development of the Pacific Shores Resort near Parksville, British Columbia. Over the last 21 years, the business has grown substantially and includes other resort properties around B.C. Generally speaking, the business of the Group includes sales of vacation ownership products, sales of deeded ownership products and management of those interests.

7 At the peak of its business, the Group employed over 400 people on Vancouver Island. I am advised that over 8,000 families are vacation owners or fractional owners in its property portfolio.

8 The corporate structure is fairly complex, but for the purposes of this application I will summarize it as follows:

a) the Pacific Shores resort is owned by the petitioner Ocean Place Holdings Ltd.;

b) the units of Pacific Shores Resort, along with the resort amenities, are managed by the petitioner Pacific Shores Resort & Spa Ltd. ("PSRS"). PSRS also operates a rental pool for the owners. There are other interested parties relating to this resort, including various owner associations and strata corporations, known as PSOE, PSFRA and PS Strata, who were represented at this hearing;

c) the Parkside Resort in Victoria was developed in 2009. It is owned by the petitioner Parkside Project Inc. in trust for a limited partnership, the general partner of which is the petitioner Fairfield Ventures Inc. There are other interested parties relating to this resort, including various owner associations and strata corporations, known as PV1, PV2 and PV Strata, who were also represented at this hearing;

d) the petitioner Aviawest Resorts Inc. ("Aviawest") operates a business that manages the Parkside Resort and also other resorts in Victoria, Sun Peaks, Ucluelet (known as the Water's Edge Resort) and Vancouver. It also sells vacation interests in the Parkside Resort and the other resorts listed. In addition, Aviawest operates rentals of certain vacation units in Parkside Resort and Water's Edge Resort. Aviawest sells memberships and points packages to purchasers in the Aviawest Resort Club, which is an independent company which is not part of this proceeding but who was represented at the application. Aviawest also provides management services to the Club. The points program is integrated with the various vacation properties which it manages.

9 The Aviawest Group employs approximately 250 people at this time in respect of its various operations, with 115 employed at the Pacific Shores Resort and 80 at Parkside Resort.

10 The causes of the Group's insolvency can be laid principally at the feet of the development of the Parkside Resort. There were significant delays and cost overruns relating to that project. In addition, the global economic downturn in 2008 has led to decreased sales, which has exacerbated the lack of working capital due to a loss of credit facilities with one of their lenders.

11 There is a substantial amount of evidence detailing the assets of the Group and the outstanding debt against those assets. In respect of Parkside Resort, bcIMC has a first mortgage of \$28.1 million, BCC Mortgage Investment Corporation has a second mortgage of \$8.5 million, and bcIMC has a third mortgage of \$20 million. There is also a fourth mortgage of \$1.7 million. Finally, there are various priority claims, such as property taxes, and a substantial amount of unsecured debt totalling \$6.6 million. The total of the priority claims and secured debt alone is \$58 million.

12 In respect of Pacific Shores Resort, Fisgard has a first mortgage of \$8.7 million, and the bcIMC and BCC debt on the Parkside Resort is collaterally secured against this property as well. There are also priority claims and unsecured debt relating to this property. The total secured debt against this property is \$82 million, although that includes the debt collaterally secured relating to the Parkside Resort.

13 Aviawest also has assets, such as its points portfolio and receivables, and also has substantial debt totalling \$13.3 million. That debt includes \$7.6 million owed to unsecured noteholders who were represented at the hearing.

Arguments of the Secured Creditors

14 bcIMC and Fisgard contend that the *CCAA* order should not be granted for a number of reasons, as follows:

1. there is no equity in the assets;
2. they have no faith in current management;
3. there is no plan, in that no lender will provide sufficient financing to pay off the secured creditors since there is no equity; and
4. they will not vote for any plan that requires them to accept less than what they are owed.

I will deal with each of these arguments in turn.

No equity in the assets

15 The total value of the assets, accepting the appraisals of the petitioners, is \$88.2 million, which does not include the going-concern value of the Group. The total debt is estimated by the petitioners at \$90.2 million, although I note that the monitor puts that figure at \$99.4 million.

16 Much of the argument regarding the equity situation concerned the valuations relating to the Parkside Resort, which has secured debt of \$58 million. The petitioners value the Parkside Resort at \$63.7 million based on appraisals

obtained by them in November 2010, which would indicate some value beyond the secured debt on that asset. There are also potential tax losses in Parkside Resort of \$19 million.

17 bcIMC says that the appraisals are suspect because the appraiser in fact had an interest in the Parkside Resort at the time. In response, Mr. Sweett, the appraiser, has filed a certificate attesting that he did not value his unit in the Resort and that he did the remainder of the appraisal given his familiarity with and expertise relating to the project before his purchase of that unit.

18 bcIMC has introduced an appraisal of the Parkside Resort well below this first appraisal. In accordance with my order dated November 2, 2011, this appraisal was sealed given bcIMC's submission that it was highly confidential and that there could be potential detrimental effects if it was disclosed publicly.

19 There are difficulties relating to this appraisal also. It is clear that it does not purport to provide a market value of the property, but rather an investment value to a specific investor, namely Delta Hotels, a subsidiary of bcIMC. In addition, the value indicated in this appraisal is contradicted in any event by bcIMC's own evidence in that they indicate that they have received an offer to assume their first mortgage on the Parkside Resort for the sum of \$20 million.

20 The petitioners point to other evidence of value which confirms to some extent the values in their appraisals, including assessment values and their relationship to sale prices, historical prices of the ownership interests and negotiated listing prices determined with lender input.

21 The Monitor has also conducted a limited review of the sales of Parkside Resort units and has concluded that the values in the appraisal of the petitioners are generally supported, with the proviso that the time within which those units could be sold and the cost that would be incurred during that time would erode the overall values as at this time.

22 For the purposes of this application and with that proviso, I accept that the value of the Parkside Resort interests as advanced by the petitioners is as set out in their appraisals.

23 With respect to Figgard, it is apparent that they are well secured given the value of the Pacific Shores Resort, which is estimated by the petitioners to be \$16.5 million. The \$5.5 million liquidation value that was referred to by Aviawest was a liquidation value and not a going-concern value, which is particularly relevant given Figgard's own stated intention to continue the operations of the Resort even within a receivership.

24 There is no doubt that the petitioners are insolvent and that they face substantial challenges ahead in terms of any restructuring. However, for the purpose of this application, it is evident to me that there are substantial assets that will be a potential source of refinancing or sale with respect to both Parkside Resort and Pacific Shores Resort.

No faith in management

25 In this respect, bcIMC says that management has shown no record of success and that there has been financial mismanagement and cash flow and financial recordkeeping irregularities. Figgard adopts these same contentions.

26 bcIMC says that it has not received any interest payments since 2009, although it appears that they have been receiving 100% of payments from sales and applying those proceeds to principal, which has resulted in their debt being reduced by \$35 million over the last two years. I have been advised that just prior to the filing, bcIMC received approximately \$1 million toward its loan, although I understand that Figgard disputes that payment, saying that the payment was improperly diverted to bcIMC.

27 It is clear to me that there have been substantial dealings between bcIMC and the petitioners since the loans were initially advanced and also throughout the ensuing period when financial difficulties became apparent to all concerned. I have been advised that there were a substantial number of meetings to discuss matters and also the appraisals now presented by the petitioners were provided to bcIMC some time ago.

28 Both parties seem to have been working together to resolve the problems, and I have not been advised that bcIMC raised any issues relating to management's abilities until now. To that extent, the lack of success on the part of the petitioners has come as no surprise to bcIMC at this time.

29 In fact, even as early as some months ago when the appraisal evidence was known, bcIMC took no action. bcIMC's opposition and the demands for payment in relation to this proceeding only arose after the petitioners indicated their intention to seek protection under the *CCAA* in mid-October. This opposition relates to bcIMC's position that they do not object to the petitioners seeking protection provided that it is done on their terms, all in accordance with a "with prejudice" offer that they sent some days ago which gives them full control over how long these proceedings would extend and on what terms (including that no DIP financing would be sought or obtained).

30 There are some issues concerning rental monies from Water's Edge Resort. It appears that rental monies were previously used by Aviawest contrary to an agreement, which required that those monies be held in a segregated trust account. I am advised that this has been rectified and that the segregated accounts are now in place. There may be consequences arising from this situation, although that will be sorted out in the fullness of time. In any event, counsel for Water's Edge Resort did not submit that the order should be refused for this reason.

31 I also would note that in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) at para. 4, Justice Farley stated that the good faith requirement relates to conduct within the proceedings, not that relating to past activities.

32 The Monitor has been working diligently with the petitioners during the short time of its engagement since October 24. Accordingly, its review of the matters has been limited. Nevertheless, the Monitor has concluded that the petitioners are acting in good faith and with due diligence. I also accept that the current management team has a great deal of expertise in this business that would be fundamental to any restructuring that may occur.

33 In conclusion, I do not accept the submissions of bcIMC and Fisgard that there is any justification for their lack of faith in management.

There is no plan

34 bcIMC says that there is no plan or any credible outline of a plan that makes any sense. To a large extent, this argument is that any plan is "doomed to failure" and accordingly, these proceedings should be terminated.

35 This contention is addressed in the affidavit of James Pearson, who is the chief executive officer of the petitioners. Key elements of the plan at this time include:

- a) the sale of some redundant assets, which would reduce cash flow requirements;
- b) the sale and lease back of certain assets to increase working capital;
- c) restructuring the income stream from the PSOE and the Club;
- d) the refinance of the debt with bcIMC regarding Parkside Resort, which would in part allow some proceeds of sale to provide working capital;
- e) restructuring the secured debt with Fisgard;
- f) continuing sales of fractional interests and commercial units;
- g) renegotiating arrangements with existing interest groups regarding the management and operation of the vacation interests;

h) resuming the points business; and

i) making a proposal to unsecured creditors regarding a share in the future income stream.

36 In addition, I am advised by counsel for the petitioners that they have now talked to six potential investors who are either hotel entrepreneurs or financiers.

37 Both the petitioners and bcIMC have referred me to *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.). In that case, the Court disapproved of the granting of an initial order where there was no stated intention by the debtor to propose an arrangement or compromise to its creditors. I note, however, that this situation is markedly different than the situation addressed in that case. As Tysoe J.A. stated at para. 31, it is not a prerequisite that a draft plan be filed at the time of the stay. What is required, however, is that the creditor have a *bona fide* intention to do so while having the protections of the stay under the *CCAA*.

38 Given the evidence of the petitioners, I am satisfied that the Group has a *bona fide* intention to present a plan. I am not convinced that, as bcIMC states, it is simply a "hope and a prayer".

39 I am of the view that, similar to the facts under consideration in *Forest & Marine Financial Corp., Re*, 2009 BCCA 319 (B.C. C.A.) at para. 26, (2009), 273 B.C.A.C. 271 (B.C. C.A.), this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The *CCAA* proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

Secured creditors will not vote in favour of any plan

40 This argument is also part of the "doomed to failure" argument of bcIMC and Fisgard. I have been referred by bcIMC and Fisgard to *Hunters Trailer & Marine Ltd., Re*, 2000 ABQB 952, 5 C.B.R. (5th) 64 (Alta. Q.B.), as authority for the proposition that unless there is equity in the assets beyond that owed to secured creditors, a *CCAA* order is only appropriate if the secured creditors are supportive of it.

41 To the contrary, at para. 19 of that case, the Court states quite clearly that a recalcitrant creditor should not necessarily prevent the granting of an order under the *CCAA*. This approach is consistent with the comments of Madam Justice Newbury in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

[27] ... I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner.

42 Further, bcIMC's insistence that it will not cooperate in terms of a refinancing simply does not make sense in light of what has already occurred in relation to bcIMC's debt and the positions and actions they have taken in relation to their debt. Firstly, they have already made the "with prejudice" offer to accept an amount under their first mortgage position only, which would give rise to a loss of approximately \$20 million. Secondly, they have investigated the potential sale of their debt, which gave rise to an offer of \$20 million.

43 Both of these circumstances indicate to me that they are open to negotiations with the petitioners and that those negotiations may possibly result in a refinance of their debt that would allow the Group to go forward on some restructured basis.

44 bcIMC and Fisgard are well known and sophisticated lenders doing business in this jurisdiction. As was stated by the court in *Rio Nevada Energy Inc., Re* (2000), 283 A.R. 146 (Alta. Q.B.) at para. 25, this is some evidence that

bcIMC and Fisgard will not act against their commercial interests and that they will reasonably consider proposals. This distinguishes the case of *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para. 12, (1999), 244 A.R. 93 (Alta. C.A.), where there was evidence that the lender had valid commercial reasons to vote against the proposal.

DIP Financing

45 The petitioners seek DIP financing in the amount of \$600,000, which is just shy of the \$620,000 which the cash flow indicates will be required to see them through to December 11.

46 The petitioners have in hand a term sheet from Fisgard which allows for funding to a maximum of \$2.5 million. If the DIP financing is ordered, the parties are generally agreed that it will be restructured so as to separate the funding to Parkside Resort and Pacific Shores Resort given the different debt structures on those properties. There would also have to be some general funding for head office expenses.

47 There also appears to be the possibility that PSOE and the Club will recommence paying the amounts that would normally have been billed to them by the petitioners but for the prepayments that were made in anticipation of services continuing. If so, that will provide an additional \$323,000 by December 11.

48 The granting of DIP financing is to be considered in accordance with s. 11.2 of the *CCAA*, which are relatively new provisions that came into force in September 2009:

Interim Financing

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

Priority - secured creditors

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

Priority - other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

- (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.

49 I will address each of the factors listed in s. 11.2(4):

a) at this time the petitioners are seeking to continue the stay for a further five weeks until December 11, 2011, which is not an inordinate amount of time given the ambitious task ahead of them. Nevertheless, in my view it is essential that they be given this breathing room to explore restructuring options. The parties and the Monitor can assess their progress by that time to determine whether a continuation from that time forward is appropriate.

b) regarding management, as I have stated above, in my view the current management of the business is acting in good faith and with due diligence. They appear to be in the best position to potentially come to a solution given their expertise and the complexities involved. They have taken immediate steps to address cash flow difficulties in terms of the operational costs. I would also add that no party has submitted that the present management team be replaced by, for example, a Chief Restructuring Officer or that the Monitor should be granted further powers to address any deficiencies in that respect.

c) it goes without saying that bcIMC does not support current management. However, a substantial number of other stakeholders do support the management team, including BCC, who has a significant financial stake in the matter given its second mortgage on Parkside Resort. Fisgard does not support management either. However, I am of the view that this position should be discounted substantially given that it is fully secured on Pacific Shores Resort.

d) the DIP financing is necessary in the circumstances to allow the Group's operations to continue. Without it, this proceeding cannot go forward. In that respect, it will enhance the prospects of a viable compromise or arrangement.

e) I have already discussed the nature and value of the Group's assets. Allowing the Group to continue can only serve to maintain the existing goodwill in the Group's business. It is well acknowledged that a receivership would have disastrous consequences in relation to the ability to market the units.

f) material prejudice is the most substantial argument of bcIMC and Fisgard in opposition to the DIP financing. I accept that the imposition of the charge may prejudice them in the event that the assets are not sufficient to pay their first mortgages, although that seems more unlikely in respect of Fisgard. Nevertheless, the materiality of the charge is questionable, particularly since the secured lenders have expressed an intention to continue the operations of Pacific Shores and Parkside Resorts respectively - which would in turn result in any receiver obtaining priority borrowings and which would erode the security in the same manner as DIP financing. The DIP financing will allow operations to continue, which will maintain the goodwill and enhance values in the meantime. In these circumstances, I am satisfied that the benefits of DIP financing outweigh any potential prejudice to the secured creditors, particularly bcIMC: see *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), Tysoe J. at para. 28.

I would note that material prejudice to secured creditors is only one factor and is to be considered in equal measure with the others listed in s. 11.2(4). It is not, as submitted by Fisgard, the case that as a matter of law the court cannot impose DIP financing over the objections of a secured creditor if there is prejudice to that secured creditor, particularly in light of the statutory test.

g) I would note that the Monitor in its first report, dated October 31, 2011, agrees that the current offer of Fisgard is the most favourable to the petitioners and the Monitor supports the granting of an Order approving DIP financing and the imposition of a DIP charge for that purpose.

Conclusions

50 I wish at this time to address the argument of Fisgard that a *CCAA* proceeding is not appropriate in respect of these Resorts since they are real estate developments.

51 There are numerous cases which have considered this issue including *Cliffs Over Maple Bay Investments Ltd.; Encore Developments Ltd., Re*, 2009 BCSC 13, 52 C.B.R. (5th) 30 (B.C. S.C.); and *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47 (B.C. S.C.), to name a few. Yet those cases are clearly distinguishable from the present circumstances. In those cases, there were undeveloped or partially completed real estate projects and the courts found that it was more appropriate for the secured creditors to realize on those assets in the usual manner.

52 In *Forest & Marine*, at para. 26, the Court of Appeal clearly drew the distinction between that situation and one where there is an active business being carried on within a complicated corporate group. The latter situation is exactly what we are dealing with here.

53 Despite the setbacks in their business, the petitioners wish to continue their operations within the *CCAA* for the purpose of developing and presenting a plan to their creditors. This is consistent with the fundamental purpose of the *CCAA* as has been expressed in many cases of this court and our Court of Appeal: see, for example, *Sharp-Rite Technologies Ltd., Re*, 2000 BCSC 122 (B.C. S.C.) at para. 23; and *Cliffs Over Maple Bay* at paras. 27-29.

54 The petitioners say they have a proven track record in terms of sales and that they remain in the best position to maintain operations while they seek a more permanent solution to their financial troubles. They say that this will be advantageous for a number of reasons: the business is complex; the businesses are linked together such that each depends on each other, such that the whole will be weakened by a receivership; the buying of fractional interests is driven by the relationship with Aviawest; a stay will protect other stakeholders beyond the first secured creditors; and management has the skills to continue the sales of fractional interests.

55 These points concerning the complexity and interconnectedness of the petitioner parties, which I accept, meet the suggestion by bcIMC and Fisgard that somehow the proceeding should be bifurcated - although this argument is, for the most part, made by each of them against the other in that each says that their main security should be released from the proceedings and that the other businesses and properties can remain within the *CCAA* proceedings. There was also a suggestion by bcIMC that Aviawest should be released from the *CCAA* proceedings, although it is not clear to me what benefit might be gained in that respect.

56 In my view, this is a highly integrated group and the protections under the *CCAA* must be for the entire group in order that they can seek a solution to their financial problems as a whole. It may be that individual solutions will be found for particular assets or debts, but that can be accommodated within the *CCAA* proceedings as currently sought by the petitioners for that integrated group.

57 I do not wish to end without noting the obvious. There are a substantial number of stakeholders involved: the petitioners themselves and the related corporate entities, the secured creditors, the unsecured creditors, the owner groups and strata corporations, the thousands of homeowners, and the hundreds of employees. Many of the hundreds of parties holding unsecured debt in Aviawest are retirees who have invested their life savings into the enterprise, although it is also apparent that many pensioners have also invested through bcIMC.

58 There can be no doubt that a receivership will result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. On this point there is no disagreement, save for Fisgard's somewhat inexplicable argument that a receivership of Pacific Shores Resort would prejudice no one. The prejudice to the other stakeholders in relation to that resort is palpable in the event of a receivership.

59 In conclusion, it is my opinion that the petitioners have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that the making of a further order extending the stay is appropriate. The order will go as sought, including that the administration charge is increased to \$300,000 and that a director's charge is imposed to a maximum of \$700,000 in respect of potential obligations that might be incurred post-filing.

60 In addition, I am satisfied that the requested DIP financing order is appropriate in the circumstances and that it can be structured as has already been discussed between the parties.

61 Fiskard's application to appoint a receiver is dismissed.

Stay granted, administration charge increased, debtor in possession financing ordered; cross-application dismissed.

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2011 ABQB 399
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc.,
Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings
Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011
Judgment: June 24, 2011
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.
Darren Bieganeck for Winalta Group

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act --- Miscellaneous

Fees and conduct of monitor — Monitor acted for debtor in proceedings under Companies' Creditors Arrangement Act — Monitor was appointed at behest of principal creditor and shared certain reports with principal creditor, who provided interim financing — After receiving report, principal creditor ceased to provide interim financing, although this may have been coincidence — Monitor brought application to be paid fees — Monitor found to have acted improperly and given 60 days to make further submissions on fees — No presumption of regularity exists regarding fees — Insolvency monitor generally was appropriate comparator for judging fees, not chartered accounts generally or legal profession — Monitor charged separately for IT staff, administration and secretarial staff — Monitor required to provide more evidence regarding billing practices for IT staff, administration and secretarial staff — Use of subordinate staff did not constitute duplication of work, despite cursory descriptions of some items — CCAA proceedings moved quickly, restructuring involved multiple entities, including publicly traded parent, liabilities far outweighed asset values, intensive sales campaign was initiated to shed redundant asset, and there were numerous claims and disallowances — No evidence that subordinate staff were not thorough and diligent — No evidence, despite extensive questioning, that duplication of services existed among partners — Administrative charge of 6 per cent of total fees in lieu of disbursements was not reasonable, and monitor required to prepare documentation of disbursements — Parties agreed that fees for internal review were not proper — Provisions of s. 23 of Act did not allow monitor to provide principal creditor with report — Initial order gave authority for monitor to aid in required reports of debtor, but not to deliver them to principal creditor — Monitor was not transparent in actions regarding report, and ignored line between impartial court officer and consultant for principal creditor — No quantifiable loss or evidence of damage to estate was shown, but failure to scrupulously avoid conflict of interest negatively impacted integrity of insolvency system — Appropriate remedy was to reduce fees by amount associated with preparation of report.

APPLICATION by monitor for approval of fees.

J.E. Topolniski J.:

I. Introduction

Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc.'s application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about \$9.5 million, while its liabilities exceeded \$73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for \$1,155,206.05 (Fee) and is asking for a \$275,000.00 adjustment for alleged overcharging. It complains about the following:

(i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);

(ii) duplication;

(iii) a six percent administration fee charged in lieu of disbursements (\$50,000.00);

(iv) mathematical errors (\$47,979.39); and

(v) charges for internal quality reviews described as something "required to be independent from the engagement" (\$10,000.00).

5 The Winalta Group also seeks a \$75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeover financing.

6 Deloitte & Touche Inc. has agreed to deduct its \$10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of \$47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

(i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;

(ii) HSBC would be unaffected by the *CCAA* proceedings;

(iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and

(iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in CCAA Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing CCAA monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

(i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or

(ii) approval of "special" or "premium fees" for an administrator under a CCAA plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at 2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]), Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of CCAA monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...

...The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

26 In *Agristar Inc., Re*, 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.) , Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a CCAA monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate." citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

- (a) allowing the trustee a fair compensation for his services;
- (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
- (c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

30 In my view, the appropriate focus on an application to approve a CCAA monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial

and senior management positions, with (discounted) hourly billing rates ranging from \$65.89 per hour (clerical services) to \$460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of \$588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) Clerical, administrative, and IT staff

35 In *Peat, Marwick Ltd.* at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

36 Referee Funduk in *Northland Bank* refused to follow that aspect of the *Peat, Marwick Ltd.* decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

37 The Alberta Court of Appeal weighed in on the topic in *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.), Stevenson J.A. stating at para. 8:

... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

38 In the result, the court in *Columbia Trust Company* elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

39 In *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.), at 93, (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court, observed that *Columbia Trust* qualified but did not overrule *Northland Bank* as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

40 The law is no different as it concerns a CCAA monitor. While the court should avoid microscopic examination of the Monitor's work, the *Columbia Trust* requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in *Northland Bank* that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

41 In the present case, the Initial Order specified that: "[t]he 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." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

42 Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish

that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

43 The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

44 The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) Professional staff (non-partner)

45 The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

46 Like Hall J. in *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 20, (2002), 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.), I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

47 Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

48 Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Hickman Equipment (1985) Ltd.* at para. 26).

49 Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

50 There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

51 I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

52 The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

53 HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets

and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

54 It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriguez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main *raison d'être* was to liaise with and provide comfort to HSBC.

55 Both Messrs. Rodriguez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriguez and Keeble.

56 The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriguez (\$127,000.00) and for Mr. Keeble (\$209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

57 The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriguez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

58 The Winalta Group contends that the Monitor's \$50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

59 The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

60 Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

61 A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

62 The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

63 The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

64 The disbursement account will be prepared at the Monitor's own cost.

5. *Mathematical errors*

65 The parties have resolved the alleged mathematical errors.

6. *Internal quality reviews*

66 At the hearing of this matter, the Monitor quite properly conceded that the \$10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

67 A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

68 Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:

The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

69 The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

70 The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

(1) the bank appoints a receiver for all companies on September 7, 2010;

(2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriguez and Keeble the next day.

71 Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

72 The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it led to HSBC's refusal to fund its takeover financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

73 Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.
2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.
3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:
 - (a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and
 - (b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation

(a) The monitor's fiduciary and ethical duties

74 Section 25 of the *CCAA* provides that:

25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

75 Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment (Rule 44).

76 In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

77 A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at 8; *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) at para. 2; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 20; and *843504 Alberta Ltd., Re*, 2003 ABQB 1015 (Alta. Q.B.) at para. 19, *843504 Alberta Ltd., Re* (2003), 351 A.R. 222 (Alta. Q.B.)). The following observations made by Farley J. in *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bkcty.), at 247 about a bankruptcy trustee's duty of impartiality resonate:

The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

78 In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996) 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

79 Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

80 Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

81 Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

82 Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) The Monitor's legislated and court ordered duties

83 One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

84 Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

85 The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

86 HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

87 Clause 28(d) of the Initial Order reads, in part, as follows:

28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:

(d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender.

[Emphasis added.]

88 Clause 30 of the Initial Order states:

The Monitor shall provide HSBC and any other creditor of the Applicants' and any 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 the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

89 The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) Principles of interpretation

90 The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

91 In *Smoky River Coal Ltd., Re*, 2001 ABCA 209, 299 A.R. 125 (Alta. C.A.), the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

92 The issue in *Smoky River Coal Ltd.* was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

93 The provision at issue in *Afton Food Group Ltd., Re* (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the *Smoky River Coal Ltd.* considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

- (i) assume that the parties carefully drafted the terms of the order;
- (ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and
- (iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

94 The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

95 In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

96 I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

97 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26:

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

(b) Interpreting the relevant provisions of the Initial Order and the CCAA

98 The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

99 Section 23 of the *CCAA* sets out certain reporting requirements for a court-appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

100 Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

101 If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

102 I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

103 This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

104 Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBC, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

105 Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

106 The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

107 Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

108 However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

109 The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

110 The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

111 Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

112 The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

113 Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that the Monitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

114 In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

115 HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

116 No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Sally Creek Environs Corp., Re*, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) is informative, although distinguishable on its facts.

117 *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

118 On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from \$240,000.00 to \$1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

119 These directives apply equally to a court-appointed CCAA monitor.

120 In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

121 There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (*Nelson, Re* (2006), 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) at para. 31 (Ont. S.C.J.)).

122 Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (*Murphy* at para. 112; *Nelson, Re* at para. 31).

123 Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

124 Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

125 The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

126 The Monitor exceeded its statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed CCAA monitor and a private monitor.

127 In the result:

- (i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.
- (ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.
- (iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.
- (iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.
- +
- (v) The \$10,000.00 charged for internal quality reviews is to be deducted from the Fee.
- (vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.
- (viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Order accordingly.