

COURT FILE NO. 1703 12327

Clerk's Stamp

COURT COURT OF QUEEN'S BENCH
OF ALBERTA

JUDICIAL EDMONTON
CENTRE

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 BENCH BRIEF OF CANADIAN WESTERN BANK

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

McLennan Ross LLP
#600 McLennan Ross
Building
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Lawyer: Charles P. Russell, Q.C.
Telephone: (780) 482-9115
Fax: (780) 733-9757
Email: crussell@mross.com
File No.: 165813

TABLE OF CONTENTS

PART 1	INTRODUCTION	1
PART 2	LAW	1
PART 3	RELIEF SOUGHT.....	4

PART 1 INTRODUCTION

1. This Bench Brief is submitted on behalf of Canadian Western Bank (“CWB”) in opposition to Canada North Group Inc.’s (“CNC”) application for a further \$1 million in interim financing within these *Companies’ Creditors Arrangement Act*, R.S.C. c, C-36 (the “CCAA”) proceedings.
2. The purpose of the Bench Brief is to outline for the Court the legislation and jurisprudence relevant for the relief sought on application by CNC on December 12, 2017, and which is opposed in part by CWB.

PART 2 LAW

3. The policy consideration behind debtor-in-possession (“DIP”) financing is that insolvent companies require working capital to continue to carry on business for the benefit of all stakeholders while an attempt is made to develop and present an acceptable plan to its creditors.

Canwest Global Communications Corp., Re
 (“Canwest”), 2009 Carswellont 6184, at
 para 31. **Tab 1**

4. The statutory basis for the Court’s approval DIP financing is found in section 11.2 of the CCAA: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.

¹ The September 18, 2009 amendments to the CCAA expressly provided jurisdiction to approve DIP financing whereas prior to the 2009 amendments, Courts relied on inherent jurisdiction to approve DIP financing charges.

CCAA s. 11.2(1). **Tab 2**

5. Pursuant to s. 11.2(4), the factors to be considered by the Court in deciding whether to make an Order include:
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

CCAA s. 11.2(4). **Tab 2**

6. In addition, the Court is also to consider i) whether the debtor has provided secured creditors with sufficient notice; ii) whether the amount of the DIP financing is appropriate and required, having regard to the debtor's cash flow statement; iii) whether the DIP charge secures an obligation that existed before the order was made; and iv) the reasonableness of the DIP financing terms and associated fees.

Canwest at paras 32-34. **Tab 1**

Canwest Publishing Inc./Publications
Canwest Inc., Re, 2010 ONSC 222 at para
45. **Tab 3**

7. The British Columbia Superior Court held in *United Used Auto & Truck Parts Ltd., Re*, that there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to lenders whose security is being subordinated.

United Used Auto & Truck Parts Ltd., Re
("United Used Auto") (1999), 12 C.B.R.
(4th) 144, at para 28. **Tab 4**

8. Where the debtor fails to provide the Court with cogent evidence that the increase in DIP financing benefits all stakeholders more than it prejudices secured creditors, a Court will deny the debtor's application for an increase in the available DIP financing.

Tuan Development Inc., Re, 2007 BCSC
1827 at paras 51-52. **Tab 5**

9. Equally, in the decision of *Hunter Trailer & Marine Ltd., Re*, the Honourable Justice Wachowich was not satisfied that an increase in the maximum DIP financing provided in the Initial Order benefited all stakeholders more than the potential prejudice to secured creditors. The facts before Justice Wacowich demonstrated that the cash flow projections demonstrated a continuing net deficit, which suggested that the benefit of DIP financing was merely to prolong the inevitable. Changes in the RV sales business, including increased gas prices, a weak Canadian dollar and increased competition were systemic problems that were not likely to be resolved in the foreseeable future. Given the lack of cogent evidence that the DIP financing would benefit the debtor and its creditors in the long run, the Court refused to increase the maximum DIP financing.

Hunter Trailer & Marine Ltd., Re, 2000
ABQB 952, at paras 13-14. **Tab 6**

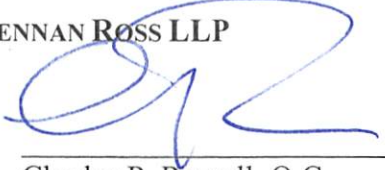
PART 3 RELIEF SOUGHT

10. CWB asserts that the DIP should be limited to the 1st tranche, which is an increase that does not exceed the requirements that need to be met before the stay of proceedings expires in January 2018. Any additional funding through the second tranche should only be made when the creditors see the results of the ISSP and the need for further funding at that time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 8 day of December, 2017.

MCLENNAN ROSS LLP

Per:



Charles P. Russell, Q.C.
Solicitor for Canadian Western Bank

TABLE OF AUTHORITIES

1. *Canwest Global Communications Corp., Re*, 2009 Carswellont 6184.
2. CCAA s. 11.2(1) s. 11.2(4)
3. *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222.
4. *United Used Auto & Truck Parts Ltd., Re*, (1999), 12 C.B.R. (4th) 144.
5. *Tuan Development Inc., Re*, 2007 BCSC 1827.
6. *Hunter Trailer & Marine Ltd., Re*, 2000 ABQB 952.

TAB 1

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST
GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009

Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

Table of Authorities

Cases considered by Pepall J.:

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

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to
Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to
Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed
Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to
Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed
Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to
Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to
Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 23 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act*.

Pepall J.:

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*.¹ The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./ Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Background Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*.² It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be

beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US\$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US\$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to \$75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of \$4.855 billion and total consolidated liabilities of \$5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling \$2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately \$954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by \$272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by \$253 million or 47%. It reported a consolidated net loss of \$1.578 billion compared to \$22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by \$8 million or 4% in the third quarter of 2009 and operating profit was \$21 million compared to \$39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US\$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US\$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US\$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US\$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's

subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of \$75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to \$23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of \$100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately \$634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of \$10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US\$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of \$187.3 million and an unsecured promissory note in the principal amount of \$430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than \$2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of \$13.3 million as at the last valuation date and a wind up deficiency of

\$32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding \$5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US\$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*³ definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*⁴. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and

Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*⁵; *Smurfit-Stone Container Canada Inc., Re*⁶; and *Calpine Canada Energy Ltd., Re*⁷. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*⁸ and *Global Light Telecommunications Inc., Re*⁹

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

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

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to \$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately \$10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is \$10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

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

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to \$15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

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

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of \$20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank *pari passu* with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first \$85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company

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

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

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

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

47 The proposed Monitor reports that the amount of \$20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for \$30 million in coverage and \$10 million in excess coverage for a total of \$40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*¹⁰ Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of \$5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them.

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of

Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re*¹¹ have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*¹² provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from \$1000 to \$5000 so as to reduce the burden and cost of such a process. The proceedings will

be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended

2 R.S.C. 1985, c.C.44.

3 R.S.C. 1985, c. B-3, as amended.

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522 (S.C.C.).

TAB 2

Canada Federal Statutes Companies' Creditors Arrangement Act Part II — Jurisdiction of Courts (ss. 9-18.6)
--

R.S.C. 1985, c. C-36, s. 11.2

S 11.2

Currency

11.2

11.2(1) Interim financing

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

11.2(2) Priority — secured creditors

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

11.2(3) Priority — other orders

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.

11.2(4) Factors to be considered

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

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

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65

Currency

Federal English Statutes reflect amendments current to November 15, 2017

Federal English Regulations are current to Gazette Vol. 151:23 (November 15, 2017)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 3

2010 ONSC 222

Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT
ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER
OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT
OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.**

Pepall J.

Judgment: January 18, 2010

Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities

Mario Forte for Special Committee of the Board of Directors

Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate

Peter Griffin for Management Directors

Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders

David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

Headnote

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

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business.

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

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by Pepall J.:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to
Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed
Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered
Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to
Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed
Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered
Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

Pepall J.:

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act*¹ ("CCAA") proceeding on October 6, 2009.² Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately \$10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be

in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of \$68.9 million. These unpaid amounts rank *pari passu* with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately \$953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately \$644.9 million. This included consolidated current assets of \$182.7 million and consolidated non-current assets of approximately \$462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately \$1.719 billion (increased from \$1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of \$1.612 billion and consolidated non-current liabilities of \$107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by \$181.7 million or 15% to \$1.021 billion as compared to \$1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of \$66 million compared to consolidated net earnings of \$143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.³ As at August 31, 2009, the amounts owing by the LP Entities totaled \$953.4 million exclusive of interest.⁴

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling \$68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to \$75

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US \$400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately \$1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of \$250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less \$25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of \$25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase I process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better

result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to \$250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re*⁵. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately \$1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed \$5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*⁶ and *Lehndorff General Partner Ltd., Re*⁷.

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) *Filing of the Secured Creditors' Plan*

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re*⁸: "There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."⁹ Similarly, in *Anvil Range Mining Corp., Re*¹⁰, the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."¹¹

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation

should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of \$25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re*¹², I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the \$25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.

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

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities.

The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of \$3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.¹³ The LP Entities also request a \$10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

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

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

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

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

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of \$35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank *pari passu* with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re*¹⁴ as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of \$3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re*¹⁵, I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re*¹⁶ and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants

are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*¹⁷ to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access is an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)*¹⁸. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re*¹⁹ I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

- 1 R.S.C. 1985, c. C. 36, as amended.
- 2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.
- 3 Subject to certain assumptions and qualifications.
- 4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently \$382,889,000 in principal in Canadian dollars is outstanding along with \$458,042,000 in principal in American dollars.
- 5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).
- 6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.
- 7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).
- 8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).
- 9 Ibid at para. 16.
- 10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6, 2003) [2003 CarswellOnt 730 (S.C.C.)].
- 11 Ibid at para. 34.
- 12 Supra, note 7 at paras. 31-35.
- 13 This exception also applies to the other charges granted.
- 14 Supra note 7 at paras. 44-48.
- 15 Supra note 7.
- 16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).
- 17 R.S.O. 1990, c. C.43, as amended.
- 18 [2002] 2 S.C.R. 522 (S.C.C.).
- 19 Supra, note 7 at para. 52.

TAB 4

1999 CarswellBC 2673
British Columbia Supreme Court [In Chambers]

United Used Auto & Truck Parts Ltd., Re

1999 CarswellBC 2673, [1999] B.C.J. No. 2754, [2000] B.C.W.L.D.
114, 12 C.B.R. (4th) 144, 22 B.C.T.C. 268, 93 A.C.W.S. (3d) 411

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

In the Matter of the Company Act R.S.C. 1996, c. 62

In the Matter of United Used Auto & Truck Parts Ltd., VECW Industries Ltd.,
Seiler Holdings Ltd., United Used Auto Parts (Storage Div.) Ltd., Petitioners

Tysoe J.

Judgment: November 19, 1999
Docket: Vancouver A992950

Counsel: *William E.J. Skelly*, for Petitioners, United Group of Companies.

Douglas I. Knowles, for Ernst & Young LLP.

Martin L. Palleson, for Canadian Western Bank.

Shelley C. Fitzpatrick, for Century Services Inc.

E. Jane Milton, for Royal Bank of Canada.

John I. McLean, for Aziz Group.

Bonita Lewis-Hand, for Clarica Life Insurance Company.

R.G. Hildebrand, for City of Surrey.

Donnaree G. Nygard, for Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada (Revenue Canada).

Michael W. Watt, for International Union of Operating Engineers, Local 115.

Subject: Corporate and Commercial; Insolvency

Headnote

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

Petitioners owned large amounts of land and operated auto-wrecking business — Petitioners were granted ex parte stay order under Companies' Creditors Arrangement Act — Stay order allowed conduct of sale by bank and C to continue and granted charge, up to \$500,000, for professional fees of monitor and its legal counsel and petitioners' legal counsel — Petitioners brought application for authorization of debtor-in-possession financing and priority charge against lands — Secured creditors brought application to set aside stay order — Petitioners' application dismissed and secured creditors' application granted in part — It was not demonstrated that financing was critical for business to continue to operate or for petitioners to successfully restructure affairs — It was not clear that benefit of financing clearly outweighed potential prejudice to secured lenders — Stay order was not to be set aside in its entirety — Petitioners met realistic standard of disclosure and stay order was not to be set aside on basis of non-disclosure — Petitioners acted in good faith — Stay order was to be amended to stay conduct of sale by bank and C and to direct monitor to list lands and to receive and negotiate all offers for lands while considering input and interests of petitioners and security holders — It was appropriate for monitor to be given priority charge for its fees and disbursements, including legal fees — It was also appropriate to create priority charge in respect of petitioners' legal fees, to extent that expenses were reasonably incurred in connection with restructuring — Amount of administrative charge to be reduced to \$200,000.

The petitioners owned or had agreements for sale of 32 contiguous parcels of land totalling 150 acres. The petitioners operated an auto-wrecking business on part of the lands and employed 75 people. The petitioners experienced financial difficulties, and the petitioners entered into a series of forbearance agreements with the principal secured creditors. The agreements expired and a number of foreclosure actions were commenced. The bank and C obtained an order for conduct of sale with the consent of the petitioners. The parcels were listed for sale at a price in excess of the amount of the debt secured against the land. The petitioners made arrangements for debtor-in-possession financing and proposed that the financing be charged against the lands in priority ahead of all secured creditors except the Federal Crown and the holders of agreements for sale. The financing was alleged to be necessary to allow the petitioners to acquire new inventory for the auto-wrecking business and to retain professionals required for restructuring and bringing the operating business back to life. The court granted an ex parte stay order in favour of the petitioners under the *Companies' Creditors Arrangement Act*. The court allowed the conduct of sale to continue but directed the listing agents to deal with the petitioners or the monitor appointed under the stay order. The stay order also granted a charge, up to \$500,000, for the professional fees and disbursements of the monitor and its legal counsel and the petitioners' legal counsel. The court declined to deal on an ex parte basis with the petitioners' application for authorization of the debtor-in-possession financing and the charge on the financing. Notice was given to the affected creditors and the petitioners requested that the court proceed with the application. A group of secured creditors brought an application to set aside the ex parte order.

Held: The petitioners' application was dismissed and the secured creditors' application was granted in part.

The inherent jurisdiction of the court to subordinate existing security should be exercised only in extraordinary circumstances. It must be shown that the benefit of the debtor-in-possession financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated. While the financing in the circumstances at the time would have a beneficial effect on the operating business, it was not demonstrated that it was critical for the business to continue to operate or for the petitioners to successfully restructure their affairs. It was not clear that the benefit of the financing clearly outweighed the potential prejudice to the secured lenders.

The provisions in the forbearance agreements by which the petitioners purportedly contracted out of the provisions of the Act were ineffective in view of s. 8 of the Act. The petitioners' failure to disclose the true status of refinancing efforts or restructuring advice that they had received, was not a material omission. The petitioners met a realistic standard of disclosure and the stay order was not to be set aside on the basis of non-disclosure. The petitioners acted in good faith. The petitioners' failure to abide by the terms of the forbearance agreements and the fact that they obtained restructuring advice did not demonstrate a lack of good faith in bringing the proceedings. The petitioners had substantial land holdings and an operating business. The petitioners had a legitimate concern that an en bloc sale of the lands in the foreclosure proceedings could bring an end to the operating business. It was not an act of bad faith for the petitioners to seek the protection of the Act in order to attempt to save the operating business. The stay order was not to be set aside in its entirety.

The secured creditors did raise legitimate concerns that the petitioners might thwart any sale of the lands unless the price met with their approval and that the petitioners might not act reasonably in that regard. The evidence suggested that the petitioners had not acted reasonably in the attempts to sell the lands over the preceding two years. The stay order was to be amended so that the conduct of sale was also stayed and the listing agreement could not be acted upon by the bank and C. The amendment was to direct the monitor to list the lands on the same basis as the existing listing agreements, and the monitor was to receive and negotiate all offers for the lands or any part of the lands. The monitor was to consider the input of the petitioners and the security holders and to take into account the interests of the parties, but the petitioners and holders were not to interfere with any negotiations undertaken by the monitor. The offers were to be subject to court approval. The monitor was an officer of the court and had an obligation to act independently and to consider the interests of all parties. The potential continuation of the operating business was one of the considerations to be taken into account by the monitor in assessing offers on the land.

It was appropriate for the monitor to be given a priority charge for its fees and disbursements, including legal fees. The monitor acted on behalf of the court to provide information and monitoring for the benefit of all parties. It was also appropriate for the court to create a priority charge in respect of the petitioners' legal fees. The cash-flow projections of the petitioners did not provide for the payment of any legal expenses if there was no injection of working capital by way of the debtor-in-possession financing. The petitioners required legal advice in order to successfully restructure their affairs.

A priority charge was to be given in respect of the petitioners' legal expenses, but only to the extent that the expenses were reasonably incurred in connection with the restructuring. The \$500,000 maximum amount of the administrative charge in the stay order was too high and was to be reduced to \$200,000.

Table of Authorities

Cases considered by Tysoe J.:

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — applied
Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (B.C. C.A.) — referred to
Mooney v. Orr (1994), 33 C.P.C. (3d) 31, [1995] 3 W.W.R. 116, 100 B.C.L.R. (2d) 335 (B.C. S.C.) — considered
Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352, 57 O.A.C. 241 (Ont. C.A.) — referred to
Royal Oak Mines Inc., Re (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — applied
Royal Oak Mines Inc., Re (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — considered
Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) — applied
Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) — considered

Statutes considered:

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

Generally — referred to

s. 8 — referred to

APPLICATION by petitioners for authorization for debtor-in-possession financing and priority charge against lands; APPLICATION by secured creditors to set aside stay order.

Tysoe J.:

1 **THE COURT:** On November 8, I granted an ex parte stay Order under the *Companies' Creditors Arrangement Act* (the "CCAA") in favour of the Petitioners. In granting the Order, I indicated that I was not creating any burden on creditors who wished to apply to set aside the Order. I declined to deal on an ex parte basis with the request of the Petitioners that I authorize debtor-in-possession ("DIP") financing in the amount of \$1.1 million and create a charge for such financing in priority to all existing security except the charge in favour of the Federal Crown and the holders of agreements for sale.

2 After giving notice to the affected creditors, the Petitioners are now asking me to deal with the request for the DIP financing. One of the groups of the secured creditors has concurrently applied to set aside the November 8 Order, in whole or in part, and all of the other secured creditors support the application.

3 The Petitioner, VECW Industries Ltd., commenced business in 1958 in Victoria as the seller of English car parts. The business grew and VECW established an auto wrecking business in Surrey in 1963. The Victoria operation was closed in 1990. Over the years the Petitioners acquired additional land in Surrey and they now own or have agreements for sale on 32 contiguous parcels aggregating approximately 150 acres. At the present time, the auto wrecking business operates on approximately 40 acres of land and employs approximately 75 people.

4 The Petitioners first ran into financial difficulty in 1989 when they suffered significant losses. The Petitioners have only been profitable in two or three years since that time, the most recent profitable year being 1996. The accumulated losses have essentially been financed by mortgaging of the real estate. The gross revenues of the auto wrecking business have decreased from \$14 million in 1996 to \$6.5 million in 1998, and the projected revenue figure for 1999 is \$3 million.

5 The Petitioners entered into a series of forbearance agreements with the principal secured creditors, but when they expired a number of foreclosure actions were commenced in late 1998 or early 1999. Orders Nisi were granted and

redemption periods ran their course. On July 28, 1999, an order for Conduct of Sale was granted to Royal Bank of Canada and Century Services Inc. The Order was granted with the consent of the Petitioners. The 32 parcels were listed for sale with Colliers Macaulay Nicholls Inc. and J.J. Barnicke Vancouver Ltd. by a listing agreement dated October 12, 1999. The parcels are individually listed at an aggregate price of \$49.6 million and an en bloc price of \$32 million.

6 The aggregate amount of the debt secured against the real estate is approximately \$24 million.

7 There is disagreement as to the appraised value of the real estate. There have been two recent appraisals conducted by Burgess Austin, which was commissioned by the Royal Bank and Century Services, and by Grover Elliot, which was commissioned by the Petitioners. The range of the two appraisals for the sale of the land on a lot-by-lot basis, before making any allowance for carrying costs, selling expenses and developer profit, is \$44.4 million to \$48.5 million. The selling period for the land on a lot-by-lot basis has been estimated from 3 to 4 years to 7 to 8 years. Grover Elliot did not provide an en bloc valuation for the land. The final en bloc valuation of Austin Burgess was \$23 to \$25 million but an earlier draft of its appraisal valued the land on an en bloc basis at \$30 million.

8 The Petitioners have made arrangements for DIP financing in the amount of \$1.1 million, with \$200,000 being withheld for fees and an interest reserve. It is proposed that the financing be charged against the real estate in priority ahead of all of the secured creditors except the Federal Crown which is owed monies for unremitted source deductions and GST and except for the holders of agreements for sale. The President of the Petitioners had deposed that the DIP financing is essential for the purpose of allowing the Petitioners to acquire new inventory for the auto wrecking business, retain the professionals required for the restructuring and to generally bring the operating business back to life. The Petitioners have provided cash flow statements showing the effect of this injection of working capital.

9 In granting the stay Order, I allowed the conduct of sale to continue but I directed that the listing agents were to deal with the Petitioners or the Monitor appointed under the stay Order, rather than dealing with the Royal Bank and Century Services. The stay Order also granted a charge, up to \$500,000, for the professional fees and disbursements of the Monitor and its legal counsel and the Petitioners' legal counsel.

10 The secured creditors attack the stay Order on two main grounds. First, they say that the Petitioners did not make full and frank disclosure when obtaining the ex parte order. Second, they say that the Petitioners are not acting in good faith and are abusing the CCAA by using this proceeding to delay a sale of the real estate.

11 Numerous non-disclosures were alleged but I need only address the three main complaints. First, it was asserted that the Petitioners did not disclose the existence of provisions in the forbearance agreements by which the Petitioners purportedly contracted out of the provisions of the CCAA. As I advised during the course of submissions, these provisions were disclosed to me on November 8 and I was of the view that they were ineffective in view of s. 8 of the CCAA.

12 Second, it is said that the Petitioners failed to disclose the true status of the refinancing efforts of Remington Financial Group, Inc. If there was any non-disclosure in this regard, I do not consider it to be material. In granting the stay Order, I did not rely on any imminent prospect of refinancing.

13 Third, the secured creditors point to the non-disclosure of the fact that the Petitioners sought advice from Deloitte & Touche Inc. in February 1998 and were provided with a report advising them to consider a restructuring. I do not consider this omission to be material. Knowledge of this report would not have affected my decision to grant the stay Order.

14 As was pointed out in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C. S.C.), the standard of disclosure must be realistic. In my view, the Petitioners met a realistic standard of disclosure and I decline to set aside the stay Order on the basis of non-disclosure.

15 I am also not persuaded by the submissions of the secured lenders that the Petitioners are not acting in good faith. The facts that the Petitioners failed to abide by the terms of the forbearance agreements and that they obtained restructuring advice from Deloitte & Touche Inc. in February 1998 does not, in my view, demonstrate a lack of good faith in bringing these proceedings.

16 The Courts have consistently recognized the broad public policy objectives of the CCAA. The purpose of the legislation was described in the following passage from *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.):

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

17 In the present case, the Petitioners have substantial land holdings and an operating business. It is their intention to reorganize their affairs in order to save the auto wrecking business. They have a legitimate concern that an en bloc sale of the lands in the foreclosure proceedings could bring an end to the operating business. In my view, it is not an act of bad faith to seek the protection of the CCAA in order to attempt to save the operating business. The arguments of the secured lenders in this regard would have been more persuasive if the only business of the Petitioners was land holdings, but the Petitioners do have an active business which must be considered.

18 Accordingly, I decline to set aside the stay Order in its entirety.

19 As I indicated during the course of submissions, I appreciate the concerns of the secured creditors that the Petitioners may thwart any sale of the lands unless the price meets with their approval and that the Petitioners may not act reasonably in this regard. There is evidence to suggest that the Petitioners have not acted reasonably in the attempts to sell the lands over the past two years. I also agree with Mr. McLean's comment that the Court probably does not have the jurisdiction to amend the current listing agreement. Therefore, I set aside paragraph 33 of the stay Order and I order the following in its place:

(a) the stay of proceedings contained in paragraph 2 of the stay Order applies to the foreclosure proceedings, with the result that the Order for Conduct of Sale dated July 28, 1999 is also stayed and the listing agreement cannot be acted upon by the Royal Bank and CCAA Services;

(b) the Monitor is directed to list the lands with Colliers Macaully Nicholls Inc. and J.J. Barnicke Vancouver Ltd. on the same basis as the current listing agreement, provided that the Monitor may apply for further directions if it believes that there should be any changes in the listing arrangements;

(c) the Monitor is to receive and negotiate all offers for the lands or any part thereof;

(d) the Monitor is to provide copies of all offers to the Petitioners and the holders of the mortgages and agreements for sale and is to consider their input with respect to any offers, provided that the Monitor may accept an offer or make a counter-offer one full business day after providing a copy of the offer to these stakeholders;

(e) the Petitioners and the secured creditors are not to interfere with any negotiations undertaken by the Monitor and while they may answer any unsolicited inquiries from prospective purchasers, they are not to initiate contact with them;

(f) all offers are subject to court approval in this proceeding;

(g) in dealing with offers, the Monitor is directed to take into account the interests of the Petitioners and the interests of the secured creditors, as well as the unsecured creditors, and the Monitor is to give consideration to en bloc offers while weighing the viability of the continued operation of the auto wrecking business;

(h) in the event that any of the secured creditors believe that the Monitor is acting unreasonably in dealing with offers, there is liberty to apply to replace the Monitor with another party with respect to the sale of the lands or to seek directions with respect to any offer not accepted by the Monitor.

20 When I suggested during submissions that the Monitor be given conduct of the sale of the lands, counsel for the secured creditors argued that another chartered accounting firm be appointed as the party designated to have conduct of the sale. They submitted that the Monitor is seen to be in the camp of the Petitioners and that the party having conduct of the sale should give no consideration to the continuation of the operating business. I do not accept these submissions. The Monitor is an officer of the Court and has an obligation to act independently and to consider the interests of the Petitioners and its creditors. If the secured lenders can satisfy the Court that the Monitor is not performing its functions independently, there is liberty to apply for a replacement. With respect to the second point, it is my view that the potential continuation of the operating business is one of the considerations to be taken into account when assessing offers on the lands.

21 I now turn to the Petitioners' request for a priority charge in respect of the proposed DIP financing.

22 The first case in which a court in Canada created a charge against the assets of a company in CCAA proceedings was *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), where the Court created a charge to secure credit extended by suppliers of Westar Mining Ltd. during the period of the stay. The Court created the charge against unencumbered assets and it was not necessary to postpone any existing security.

23 In the *Westar Mining Ltd.* case, Macdonald J. distinguished the CCAA situation from the situation where a receiver-manager requests the Court to exercise its inherent jurisdiction to create a charge, such as occurred in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 52 C.B.R. (N.S.) 271 (B.C. C.A.)

24 While I agree with Macdonald J. that there are considerations in a CCAA situation which do not exist in relation to a receivership, it is my view that the inherent jurisdiction of the Court to subordinate existing security should only be exercised in extraordinary circumstances.

25 A somewhat similar situation arises when a request is made for a charge against trust assets. The jurisprudence suggests that the Court's jurisdiction to create such a charge should be sparingly exercised: for example, see *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 14 C.B.R. (3d) 6 (Ont. C.A.).

26 The extraordinary nature of superpriority for DIP financing in the context of CCAA proceedings was acknowledged by Blair J. in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at paragraph 24:

It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity

to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances - as opposed, for instance, to a receivership or bankruptcy - and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

Those comments continue to have force on an application for priority financing after the initial Order.

27 Farley J. expressed his views in the subsequent application in the same proceedings at item 22 of paragraph 6 of *Re Royal Oak Mines Inc.* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]):

Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the \$8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in *Re Skydome Corporation* released Nov. 27, 1998 where Blair J. stated at p. 7:

This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the parties which is inherent in these situations - have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff Gen Partner* (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Olympia & York Developments Limited v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. It would seem to me that Holden J.A. in his endorsement in *Re Dylex Limited* released January 23, 1995 implicitly engaged in this balancing of prejudices act where he observed:

I do not believe that the Bank of Montreal will be adversely affected by the making of this order. As a result of the bridge financing, new receivables will be generated which will assist in re-paying or securing the bridge financing.

Better and more timely information will be of assistance in minimizing the momentum effect in the future. My conclusion as to the appropriateness of the superpriority granted the DIP financing is of course limited to the Initial Order \$8.4 million amount and is based upon the conditions now determined to be prevailing as of the authorization date. Each subsequent DIP financing authorization and the priority to be attributed to it will have to be determined on the merits and circumstances then existing.

28 While I do not disagree that it is an exercise of balancing interests, it is my view that there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated. For example, in *Westar Mining Ltd.*, the charge was necessary to keep the business in operation and there was no prejudice to any secured lenders.

29 In the present situation, while the DIP financing would obviously have a beneficial effect on the operating business, I am not satisfied that it is critical for the business to continue to operate or for the Petitioners to successfully restructure their affairs. Nor do I have sufficient confidence in the cash flow projections and the appraised values of the realty that I can conclude that the benefit of the DIP financing clearly outweighs the potential prejudice to the secured lenders.

30 In the result, I dismiss the Petitioners' application for a priority charge to secure DIP financing.

31 The secured lenders also object to the priority charge for the professional fees and disbursements of the Monitor, its legal counsel and the legal counsel for the Petitioners. The jurisdiction of the Court in this regard was considered in the case of *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]), where Saunders J. said the following at paragraphs 48 and 49:

This court, in previous cases which postdate *Fairview Industries Ltd., Re*, has acted to give priority for payment of accounts. For example, in *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.) Mr. Justice Macdonald exercised his discretion to create a "first charge" to secure monies advanced to permit operations to continue. Considering this authority, and the genesis of the office of monitor, I conclude that this court does have jurisdiction to create a priority for fees charged by the monitor.

Further, in my view the order sought is appropriate. The monitor acts on behalf of the court to provide information and monitoring for the benefit of all parties. An order protecting the fees, as first granted in the *ex parte* order, shall continue.

32 I agree with these comments and I believe that it is appropriate for the Monitor to be given a priority charge for its fees and disbursements, including disbursements incurred for legal counsel. I will return shortly to the appropriate amount of the charge.

33 In *Starcom International Optics Corp.*, Saunders J. concluded that the Court had the jurisdiction to create a priority charge in respect of other professional fees but she declined to do so because the evidence was that they could be paid from cash flow. In this case, the cash flow projections prepared by the Petitioners do not provide for the payment of any legal expenses if there is no injection of working capital by way of the DIP financing.

34 I am satisfied that some priority should be given at this stage for the Petitioners' legal expenses because they will require legal advice in order to successfully restructure their affairs. However, in the event that the restructuring is not successful and there is a shortfall in the recovery for the secured lenders, it would not be fair to require those lenders to bear all of the burden of the expense of the lawyers for the Petitioners in acting against them. The secured lenders should not be expected to underwrite the expenses of lawyers who act unreasonably or who act on unreasonable instructions to frustrate them in the recovery of the monies owed to them.

35 Hence, I am only prepared to give a priority charge in respect of the Petitioners' legal expenses to the extent that they are reasonably incurred in connection with the restructuring. As an example, if the Court were to conclude that the position of the Petitioners' on an application was unreasonable, the Petitioners' counsel would not have the benefit of the priority charge and would have to look to other sources for payment.

36 After hearing full submissions on this matter, I have also concluded that the \$500,000 maximum amount of the administrative charge in paragraph 30 of the November 8 stay Order is too high without a requirement for further justification. I reduce the amount to \$200,000, subject to further order of the Court.

37 Two creditors asked to be excluded from these proceedings because of their unique situation. Both R.I.C. Lands Ltd. and Western Canadian Bank submitted that their security relates to isolated parcels and there is no reason why they should be part of the CCAA proceeding. I do not agree because the parcels of land against which they hold security form part of the collective land holdings of the Petitioners. There is no principled reason to exempt them from the stay Order.

38 Subject to the variations which I have ordered, the stay Order is to continue in force pending further Court application. When these applications initially came before me on November 15, I directed that the Monitor was not to take any steps under the stay Order except answering inquiries from creditors until further order. I now direct the Monitor to act under the stay Order.

Order accordingly.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 5

2007 BCSC 1827
British Columbia Supreme Court [In Chambers]

Tuan Development Inc., Re

2007 CarswellBC 3016, 2007 BCSC 1827, [2008] 7 W.W.R. 349, [2008]
B.C.W.L.D. 1447, 163 A.C.W.S. (3d) 571, 38 C.B.R. (5th) 71, 76 B.C.L.R. (4th) 367

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

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

And In the Matter of Tuan Development Inc.

J.S. Sigurdson J.

Heard: November 13-14, 2007
Oral reasons: November 20, 2007
Docket: Vancouver S073456

Counsel: D.P. Church, A.J. Pearson for Gibraltar Mortgage Ltd.

D. Fitzpatrick for Tuan Development Inc.

M. Peerson for Monitor, MacKay & Company

C. Schuld, B. Lewis-Hand for Creditor, Best Buy Canada

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Company was owner of unfinished resort development — Company was granted protection under Companies' Creditors Arrangement Act — Main secured creditor of development project made demand for its first and second mortgages against property, totalling about \$30,959,000 — Company arranged to have debtor in possession financing to fund continued building of project — Creditor agreed to first debtor in possession financing agreement — Fire destroyed significant portion of resort — Company proposed second debtor in possession financing to be used to discharge first debtor in possession facility made and to finance completion of cottages for sale and rental and for other general corporate purposes — Company brought application for approval of debtor in possession financing — Application dismissed — Benefit to all involved stakeholders did not clearly exceed potential prejudice to secured creditor — Company was seeking order that appeared to go beyond scope of appropriate debtor in possession financing in circumstances — Validity of company's projections of costs for continued construction of resort were not firm — Availability of insurance proceeds for fire remained in doubt — Company's projections regarding potential revenue of resort were open to significant question — Creditor's initial support of first debtor in possession financing did not preclude opposition of current remedy.

Table of Authorities

Cases considered by J.S. Sigurdson J.:

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — followed

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — considered

Statutes considered:

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

Generally — referred to

APPLICATION by company for approval of debtor in possession financing.

J.S. Sigurdson J.:

1 This is an application by the company, Tuan Development Inc., for approval of debtor in possession (DIP) financing (a second DIP facility), and that it be used to discharge the first DIP facility made under the order of Mr. Justice Myers of June 8, 2007, and that it be further used to finance the completion of the cottages for sale and rental, the working capital requirements for the reconstruction of the lodge and pool that was destroyed by fire, and for other general corporate purposes and for other capital expenditures described in a cash flow attached to the proposed order.

2 The amount of DIP financing sought is a credit facility not to exceed \$12 million with a first tranche of not more than \$2 million to pay out what the company contends are the actual advances under the first DIP facility in favour of Gibraltar, and then in two subsequent tranches of \$5 million each.

3 According to the monitor's review of the cash flow attached to the proposed order, referred to as H1, the money would be advanced by the proposed DIP lender, Century, in month one and month two (November and December 2007 respectively) with repayment made in month eight (or by June 2008).

4 The basic facts of this matter are as follows.

5 As I noted in my oral reasons of October 19, 2007 when I extended the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") order made June 8, 2007, which was to expire October 15, 2007, to December 15, 2007, the subject development is on Salt Spring Island and is called the "Salt Spring Island Village Resort". It involves, in phase one, the construction of 50 strata units for sale and lease back. Phase two involves the development of 73 additional strata lots.

6 Gibraltar Mortgage is the main secured creditor. It made a demand in May of 2007 for its first and second mortgages against the property, totaling about \$30,959,000. The current balance owing to Gibraltar on those two mortgages, as well as the DIP financing that it extended is, as of November 1, 2007, \$36,499,209 plus interest accruing at about \$605,000 per month.

7 In the initial CCAA order, DIP financing from Gibraltar was made by consent of Gibraltar, under which Gibraltar agreed to advance \$13.5 million. That advance included funds to complete the units in phase one of the project, as well as some work on the lodge, although the lodge was essentially complete, and as well to pay interest to itself with respect to its outstanding loans.

8 Apparently, the original DIP financing was structured in that way, from Gibraltar's perspective, because the loans from Gibraltar Mortgage are syndicated loans and the past interest portion of the DIP financing that was ordered in June, by consent, would be advanced by Gibraltar and presumably repay the indebtedness owed to other syndicated lenders of Gibraltar.

9 Subsequent to the original CCAA order, a fire on July 9, 2007 destroyed the lodge and the pool. It was obvious to me that the sale of units in phase one and the second phase would be difficult unless the lodge is rebuilt because of the amenities that the lodge, pool and spa were to provide to purchasers and renters of the units.

10 At the time of the application before me for the extension in October, the position of the insurer was unclear as to whether the fire loss would be covered, to what extent, and to whom the loss would be paid, if it was paid. Those uncertainties have not been resolved. I am told by Mr. Church that there will be a meeting of the underwriters on November 23rd after which the insurer will provide Tuan with its position on coverage.

11 The expectation of Tuan, or at least the hope at the time of the extension order, was that the insurance proceeds of up to \$7 million would be available to rebuild the lodge. I note as well that during the extension period the company intended to apply for a restructuring committee. The appointment of a restructuring committee was, in fact, part of the company's application for approval of the second DIP loan, but it has not been fully argued on this application.

12 I note that when I granted the extension of the *CCAA* order for 60 days from October 15, I did so on the condition that in the event that there was evidence that the insurance coverage was declined, Gibraltar would have liberty to apply, on two days notice, to terminate the stay. I also granted the extension on the specific condition that the company pay the monitor funds that are required to protect the site during the extension period.

Parties' Positions

13 The company's position is as follows.

14 The second DIP financing is necessary in order to complete the units in phase one, and if insurance is delayed or denied, some part of that DIP financing is necessary to rebuild the lodge. The company says that there is really no alternative, but that the units have to be rebuilt and the lodge must be completed, and that if insurance proceeds become available, they will be paid to Gibraltar on account of its loans. The company says that the circumstances support the exercise of the court's discretion to authorize DIP financing in priority to the secured creditors, even against Gibraltar's opposition. The company says that it has always been understood (Gibraltar earlier agreed to support the first DIP financing) that the value of the development will be maximized by the completion of the units and the lodge, and that by granting the DIP lender priority over the secured creditor in order to complete the phase one units and rebuild the lodge, the position of the secured creditor will not be impaired. It points out that the monitor supports the DIP financing and argues that the company's cash flow projections are conservative.

15 The company relies heavily on Gibraltar's prior agreement, at the time of the initial consent order, to DIP financing. It argues that means that Gibraltar acknowledges that DIP financing is appropriate in these circumstances. The company argues that the Court should take into consideration that, but for the fire, Gibraltar was prepared to advance the original DIP financing, that even after the fire Gibraltar had made advances, which indicates that it has waived the fire as a material adverse change that might have justified not funding, and that the unique circumstances of the relationship between the company and Gibraltar as a shareholder (one agreeing to subordinate its loans) are additional factors that support the court's exercise of its discretion to grant DIP financing in the circumstances.

16 This proposed DIP financing is strenuously opposed by Gibraltar. In the alternative, if the application is not dismissed, Gibraltar says it should be adjourned until the week of December 17. Moreover, Gibraltar says it is obtaining an appraisal that it will have in hand at some time in December 2007.

17 The basic opposition to the proposed Dip financing is that the application is for an extraordinary remedy, one to be used sparingly, and that the circumstances here, Gibraltar says, are far beyond the circumstances when DIP financing should be ordered. Gibraltar says that it is really the only stakeholder with any risk in these circumstances and all of the risk of an application of this sort is being borne by it.

18 Gibraltar says that the appraisal evidence of the company either is faulty or, if sound, suggests that this application is a misuse of DIP financing for if there is equity, as the company suggests, then the company can and should simply refinance.

19 Finally, Gibraltar says that what is proposed is not really DIP financing, but is in effect a forced restructuring, a point that Mr. Fitzpatrick said might have some merit at first blush if it was made at the time of the initial application; however he points out that Gibraltar consented to the original DIP financing and therefore cannot say that DIP financing is not appropriate to complete phase one and the lodge.

The Law Concerning DIP Financing

20 The law is set out in a number of leading cases.

21 In *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144, 93 A.C.W.S. (3d) 411 (B.C. S.C. [In Chambers]), a judgment of Mr. Justice Tysoe, as he then was (aff'd 2000 BCCA 146, 73 B.C.L.R. (3d) 236 (B.C. C.A.)), he said as follows:

[21] I now turn to the Petitioners' request for a priority charge in respect of the proposed DIP financing.

[22] The first case in which a court in Canada created a charge against the assets of a company in *CCAA* proceedings was *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.), where the Court created a charge to secure credit extended by suppliers of Westar Mining Ltd. during the period of the stay. The Court created the charge against unencumbered assets and it was not necessary to postpone any existing security.

[23] In the *Westar Mining Ltd.* case, Macdonald J. distinguished the *CCAA* situation from the situation where a receiver-manager requests the Court to exercise its inherent jurisdiction to create a charge, such as occurred in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 52 C.B.R. (NS) 271 (B.C.C.A.)

[24] While I agree with Macdonald J. that there are considerations in a *CCAA* situation which do not exist in relation to a receivership, it is my view that the inherent jurisdiction of the Court to subordinate existing security should only be exercised in extraordinary circumstances.

[25] A somewhat similar situation arises when a request is made for a charge against trust assets. The jurisprudence suggests that the Court's jurisdiction to create such a charge should be sparingly exercised: for example, see *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 14 C.B.R. (3d) 6 (Ont. C.A.).

[26] The extraordinary nature of superpriority for DIP financing in the context of *CCAA* proceedings was acknowledged by Blair J. in *Re Royal Oak Mines Inc.*, [1999] O.J. No. 709 (Ont. Gen. Div.) at paragraph 24:

It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the *CCAA* approach to the insolvency is the appropriate one in the circumstances — as opposed, for instance, to a receivership or bankruptcy — and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

Those comments continue to have force on an application for priority financing after the initial Order.

.....

[28] While I do not disagree that it is an exercise of balancing interests, it is my view that there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated. For example, in *Westar Mining Ltd.*, the charge was necessary to keep the business in operation and there was no prejudice to any secured lenders.

[29] In the present situation, while the DIP financing would obviously have a beneficial effect on the operating business, I am not satisfied that it is critical for the business to continue to operate or for the Petitioners to successfully restructure their affairs. Nor do I have sufficient confidence in the cash flow projections and the appraised values of the realty that I can conclude that the benefit of the DIP financing clearly outweighs the potential prejudice to the secured lenders.

[30] In the result, I dismiss the Petitioners' application for a priority charge to secure DIP financing.

[Emphasis added]

22 In Professor Janis Sarra's book, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2007) at p. 94 she said:

Mr. Justice Clement Gascon of the Quebec Superior Court has held that there are five principles currently operating in the court's consideration of applications for DIP financing and priority charges or priming liens: adequate notice of DIP financing and priming requests, so that creditors can fully assess the impact of DIP financing decisions; sufficient disclosure; timeliness of the request; balancing the prejudice to creditors and other stakeholders; and the principle of granting priority financing as an extraordinary remedy.

I have also had reference to a number of other authorities referred to me by both counsel as well as a useful article on Dip financing by Michael Roztan and in particular paragraphs 1-8 on pages 2-3 of that article.

23 I think it is important to keep in mind the purpose of the *CCAA*.

24 In the Court of Appeal decision in *United Used Auto & Truck Parts Ltd., Re*, where the issue on appeal was whether the reasonable fees and disbursements of the monitor should be paid in priority to secured creditors, McKenzie J.A. referred to a decision of the Supreme Court of Canada at the time that the *CCAA* was first unveiled in the 1930s, which noted the legislation's intention (at ¶10-12):

[10] ...

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[11] Those observations were reinforced by Gibbs J.A. in *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315-16:

The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *C.C.A.A.*, the Court is called upon to play a kind of supervisory role to preserve the *status quo* and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

There is nothing in the *C.C.A.A.* which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the *Act* qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument.

Gibbs J.A. concluded (at 320):

In the exercise of their functions under the *C.C.A.A.* Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. ... The trend demonstrated by these cases is entirely consistent with the object and purpose of the *C.C.A.A.*

[12] These comments emphasize that the *CCAA*'s effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Discussion

25 The petitioner's contention is that this DIP financing is critical for the business to continue to operate and for the petitioner to be able to successfully restructure its affairs.

26 The monitor has reviewed the proposal on the basis that there would be no insurance proceeds from the fire, that the full amounts of the proposed DIP financing from Century would be used and from the cash flows prepared by the principal of Tuan, the lowest revenues projected would be used. The cash flow projections that are attached to the monitors report are premised on the DIP financing being extended in November and December (months one and two), that DIP financing would be repaid in month 8 or June 2008, that sales of the units would start to complete in February with revenue coming in March through August of 50 units sold on a one-quarter unit basis at \$170,000 per unit, for a revenue, net of commission, of \$31,450,000.

27 The monitor's recommendation was that the net Dip funding of \$8,446,500, which is the amount of the loan (other than the \$2 million said to be allocated to repay the first DIP loan) of \$10,000,000 (less interest and monitoring fees and commitment fees and application fee) is sufficient to build the lodge and the phase one units and sell them. The monitor opines that the cash flow is adequate if the cottage sales begin to be sold by March 2008, but if there is a two month delay, the DIP financing, assuming that it need only pay out no more than \$2,000,000 to the original DIP lender will be insufficient to fund the project by about \$1,432,450.

28 The monitor's recommendation based on the cash flow of the company was that the cash flow may be overly conservative in their expenses and the contingency may be too high, but said that overstating expenses might be prudent.

29 Time was seen to be of the essence by the monitor, who noted that the project was on hold for some time but interest and other costs are continuing to accrue with no real value being added to the project. The monitor said that in order to "move the project forward for the benefit of all stakeholders, the monitor is in support of the proposed borrowing from Century".

30 As the monitor noted in court, if the DIP financing is not permitted, and given that the answer with respect to the insurance proceeds will not be available until the end of November, that if the DIP financing is declined, then the possible restructuring will falter and the *CCAA* proceedings will effectively come to an end.

31 Although the company secured the protection of *CCAA* in June 2007, it has not yet filed a plan of arrangement. It has passed up to me a general draft. Mr. Fitzpatrick told me that the proposal or plan of arrangement that he will file will be much the same as what he told me at the time of the extension application. In general terms, after the completion of the phase one units, the reconstruction of the lodge, there will be the repayment of part of the existing DIP financing, payment of the new DIP financing, the payment of the Gibraltar mortgages in part, then a refinancing for the balance owing to Gibraltar and then some form of arrangement with its third mortgagee and the unsecured creditors which apparently total \$777,250.

32 I put the possible plan this way in my summary in my last set of oral reasons:

Mr. Fitzpatrick argues that the appraisal evidence indicates that the cabins in phase one had a value at December 8th, 2006 of \$34,960,000, and that the lodge, mostly complete, was worth \$9,880,000 on completion and the residual value of the work in place on the 73 lots is \$9,340,000, for a total of \$54,180,000. Mr. Fitzpatrick submits that this exceeds the debt to the secured and unsecured creditors.

The petitioner expects the insurance proceeds of up to \$7 million would be available to restore the lodge to its pre-fire status in order to reach the value just expressed. The business of the resort will proceed first by rental of the cottages and later the rental of the rooms in the lodge, and the cash flow, Mr. Fitzgerald says, shows a realization and a resulting recovery from the sale of the first 50 units of \$28 million and the balance against the second phase.

If I understood Mr. Fitzpatrick correctly, the plan that will be proposed will be that from the possible \$28 million, although he says it is possibly more, \$10 million will be paid to the new debtor in possession lender, \$18 million to Gibraltar, and the balance will be \$17 million. He also indicated figures between \$11 million and \$19 million would be the amount refinanced out.

33 On the other hand, Gibraltar contends that this proposed new DIP financing is really a forced restructuring, not simply a temporary measure to keep the company in operation pending the proposal and approval of a plan. Gibraltar says as well that the cogent evidence that is required before the court grants this extraordinary remedy is simply absent in the circumstances. The evidence it says does not demonstrate that the benefit to all stakeholders exceeds the possible prejudice to it as the secured creditor.

34 The secured creditor points to the fact that this is a request for a substantial charge in priority to its security, in circumstances where there may be no insurance proceeds, with a view to building the lodge and the units and then selling them and presumably refinancing the remaining property at that stage attempting to pay out Gibraltar. The plan, it says, indefinitely defers Tuan's obligations to Gibraltar, which it says is its only secured creditor of significance and as such, the requested financing, if not beyond the court's jurisdiction to grant DIP financing, is nevertheless a significant factor that should affect whether the court exercises its discretion to grant DIP financing.

35 I find that there is a reasonably strong argument by Gibraltar that what is proposed here is really beyond the scope of DIP financing and really amounts to a restructuring against the consent of the secured creditor. I am, however, mindful achieving the objectives of the CCAA often depends on a broad and flexible exercise of discretion to facilitate a restructuring. While I recognize that DIP financing is often granted by the Court without the consent of the primary secured creditor, and a secured creditor should not have a veto as that would clearly thwart the purpose of the CCAA, I also recognize that DIP financing is normally made so that the business can continue in order that a plan of arrangement can be proposed to the creditors. Here, the heart of the possible plan now appears to be the completion of the phase one units *and* the rebuilding of the lodge without the insurance proceeds, and then Gibraltar, to the extent that it is not paid out, will be paid upon a refinancing at the time that phase two is about to be constructed. As Mr. Church appears to argue, the proposed DIP financing is really the plan.

36 Gibraltar's argument now mirrors an argument that it made at the time of the extension application and that is that this is not really an ongoing business that ought to attract the protection of the CCAA. While there was some merit to that argument, I felt that it was countered by Gibraltar's consent to the initial order that CCAA protection was appropriate. Nevertheless, I think that the argument has some merit on this application, particularly given the nature, purpose and extent of the proposed DIP financing.

37 The petitioner argues that it is not appropriate for Gibraltar to resist the application for DIP financing because it was prepared earlier to grant DIP financing itself and that even though it might have refused to fund due to the fire, Mr. Fitzpatrick argued that it waived that right, and it is ignoring its responsibility as a shareholder in the resort operation.

38 I have taken these arguments into consideration.

39 I have considered as well that Gibraltar was prepared to fund, it said, essentially as a self-help remedy to complete the phase one units, but circumstances, it contends, changed with the fire and destruction of the lodge and the pool. I am unable to see on the evidence that there was a waiver of Gibraltar's rights under the original DIP financing that effectively means that it can not object to this proposed DIP financing.

40 I also note that in the correspondence before the fire, the first mortgage advance, which included interest, was \$3,698,064.24, and that included a net advance of \$1,200,000 to the company, and that advances after August by Gibraltar were stated to be for items crucial to preserving Gibraltar's security. Whether the so-called eighth advance on October 10 of \$1,794,176.83, which is largely of accrued interest, is really an advance under the original DIP or not, I do not think it was shown that it amounts to a waiver or that if it does that it prevents Gibraltar from opposing this proposed DIP financing.

41 I think that the question is: should the court, applying the principles in the cases that I have set out that pertain to DIP financing, exercise its discretion and approve this DIP financing and give it priority to the security of Gibraltar and the other creditors?

42 Is there the cogent evidence that demonstrates that the court should make the extraordinary order that the petitioner seeks? Will the benefit of the funding clearly outweigh the prejudice to the secured creditor whose security is being subordinated? The petitioner relies on appraisal evidence of the value of the phase one units and the lodge when complete, the importance of the completion of the lodge to the sale of the units and the viability of the project, the budget for the construction of the lodge and the anticipated length of time to sell the units in phase one.

43 I note that the appraisal in support of the application has been updated and is attached as an exhibit to Mr. Hauff's affidavit.

44 It has been noted that an aspect of DIP financing is adequate notice to affected creditors to allow them to respond to whether their security should be subordinate. Gibraltar has requisitioned an appraisal, but that will not be available until December. It, however, relies on some comments from its appraiser of concerns with respect to the petitioner's appraisal.

45 In the appraisal letter from Messrs Osland and Bush, they raise concerns about the size of the lodge, the fact that the reconstruction will be non-conforming and that the comparisons used by the appraiser generally are overall superior or appeal to a different market. Gibraltar's appraiser noted that the market value of \$34,960,000 in the appraisal is not actually the market value, but the estimated value on completion and does not include a discounting to reflect that sales will take place over time nor does it reflect other things such as marketing costs and risk.

46 The appraiser also notes that absorption is a critical issue, the subject is not a small development and that sale of the units, although proposed earlier, most likely will not occur until the lodge is reconstructed, which is a minimum of eight months into the future.

47 Another comment by the appraiser for Gibraltar concerned the site. They said the fact of the sloping site conditions, stairs in every unit, and the lack of areas for recreation make the development of limited appeal to seniors and families.

48 The validity of the cash flow projections of the petitioner and whether they will prove true depends on whether the lodge can be rebuilt at the cost and within the time estimated, that sales will take place within the time frame of the cash flow projections, and that the market values will result from the sales.

49 I think that given each of those factors, there is significant risk to the secured creditor in the circumstances. Just one example will suffice: a brief delay of two months will result in the DIP financing being inadequate. Another significant risk is that the proposed cost to rebuild the lodge is simply a budget, not a firm price.

50 The situation is significantly different than it was at the time of the original DIP financing before the lodge burned down. The availability of the insurance proceeds is very much in doubt. I recognise that at some point the lodge and

the phase one units both have to be completed. However, it does not follow simply from this that DIP funding for that purpose should be granted.

51 The cash flow projections present a number of concerns and I find that the evidence falls short of the cogent evidence that is required on an application of this sort for the type of extraordinary order that the petitioner seeks. I recognize that it is difficult for the company to put together that evidence given the scope of the order sought. The type of order sought, if not itself a restructuring, is closer to that than an order that attempts to maintain the *status quo* while the insolvent company attempts to gain approval of its creditors for a proposed arrangement.

52 Simply put, the petitioner has not demonstrated that the benefit to all of the stakeholders clearly exceeds the potential prejudice to the secured creditor. I have concluded that in the circumstances that the petitioner is seeking to have an order in place that appears to go beyond the scope of appropriate DIP financing in the circumstances. It has not demonstrated by cogent evidence that this extraordinary remedy, in the unique circumstances of a fire and insurance proceeds possibly not being available, is appropriate.

53 In the circumstances, it is not necessary to decide whether it is appropriate to give the new lender priority if it pays out only part of what Gibraltar says is owing to the original DIP lender.

54 Accordingly, the application for DIP financing is dismissed.

Application dismissed.

TAB 6

2000 ABQB 952
Alberta Court of Queen's Bench

Hunters Trailer & Marine Ltd., Re

2000 CarswellAlta 1776, 2000 ABQB 952, [2000] A.J. No. 1550, 137 A.C.W.S. (3d) 743, 5 C.B.R. (5th) 64

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

In the Matter of Hunters Trailer & Marine Ltd.

Wachowich A.C.J.Q.B.

Heard: November 17, 2000
Judgment: December 1, 2000
Docket: Edmonton 0003-19315

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Insolvent company H Ltd. applied for and was granted stay of proceedings on October 11, 2000, pursuant to Companies Creditors' Arrangement Act ("CCAA") permitting H Ltd. to carry on business for 30 days — Order authorized debtor-in-possession ("DIP") financing up to \$1.5 million which would have "super-priority" status over any other claims — H was granted extension of stay in November 2000 — H Ltd. applied for extension of stay of proceedings to at least February 28, 2001, and increase in maximum amount of DIP financing — Application dismissed — Evidence provided by H Ltd. did not show that benefits of DIP financing will clearly outweigh potential prejudice to objecting creditors — Impossible to conclude that short-term benefit of DIP financing will culminate in H Ltd.'s financial recovery — Objecting creditors held purchase money security interests and therefore their claims ranked ahead of all other creditors', but their ability to realize on priority will be reduced further every time DIP finances were increased — CCAA should not be used where it will put financial well-being of majority of creditors at risk.

Table of Authorities

Cases considered by Wachowich A.C.J.Q.B.:

Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 10 C.B.R. (3d) 23, 4 B.L.R. (2d) 306, 7 O.R. (3d) 362, 1992 CarswellOnt 159 (Ont. Gen. Div.) — considered

Icor Oil Gas Co. v. Canadian Imperial Bank of Commerce (1989), 102 A.R. 161, 1989 CarswellAlta 693 (Alta. Q.B.) — considered

Meridian Development Inc. v. Toronto Dominion Bank (1984), [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576, 1984 CarswellAlta 259 (Alta. Q.B.) — followed

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — followed

Starcom International Optics Corp., Re (1998), 1998 CarswellBC 477, 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) — considered

Timber Lodge Ltd. v. Timber Lodge Ltd. (Creditors of) (1992), 15 C.B.R. (3d) 244, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 2)*) 321 A.P.R. 77, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 2)*) 101 Nfld. & P.E.I.R. 77, 1992 CarswellPEI 14 (P.E.I. T.D.) — considered

United Used Auto & Truck Parts Ltd., Re (1999), 1999 CarswellBC 2673, 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) — followed

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Statutes considered:

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

Generally — considered

s. 11(6) — considered

APPLICATION by insolvent company under *Companies Creditors' Arrangement Act* for extension of stay of proceedings and for order authorizing increase in debtor-in-possession financing.

Wachowich A.C.J.Q.B.:

Background

1 Hunters Trailer & Marine Ltd. ("Hunters") applied for and was granted a stay of proceedings, *ex parte*, on October 11, 2000, pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The order permitted Hunters to carry on business in a manner consistent with the preservation of Hunters' business and property for 30 days, under the supervision of a court-appointed Monitor, and within the terms of the order. The order authorized "debtor in possession" ("DIP") financing up to \$1.5 Million which would have "super-priority" status over any other claims. An Administration Charge of up to \$1 Million was also granted, and was given priority over every other security except for the DIP financing.

2 A short-term extension of the stay, to November 17, 2000, was granted by the Honourable Mr. Justice W.E. Wilson on November 8, 2000. His amendments to the original order included a reduction in the maximum amount available for DIP financing to \$800,000.00, and a reduction in the maximum Administration Charge to \$350,000.00.

Current Application

3 Hunters seeks to extend the stay of proceedings to at least February 28, 2001. They also seek an increase in the maximum amount of DIP financing and Administrative Charge available. Three of Hunters' major creditors (the "Objecting Creditors"), who are floor plan financiers, oppose the applications. The Objecting Creditors are Deutsche Financial Services, the Bank of America Specialty Group Ltd. and C.I.T. Financial Ltd. Hunters owes them in excess of \$2,000,000.00, \$3,085,728.80, and \$4,567,239.00 respectively. All three are first charge creditors, but it is not yet clear how they rank in terms of priority. Two other major creditors support Hunters' application for an extension. One is Canada Western Bank, whom Hunters owes \$1,061,000.00 on a line of credit, and who is currently providing DIP financing. The other is U.M.C. Financial Management Inc., whom Hunters owes \$3,400,000.00, principally secured by a real estate mortgage.

4 The onus in a stay application under the CCAA is dictated by s. 11(6) of the CCAA:

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

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

5 In this case, it will be unnecessary to deal with subsection (b). In light of the evidence before me, I find that the applicant, Hunters, has not satisfied its onus of showing that a stay would be appropriate in the circumstances. In arriving at this conclusion, I considered two issues - first, whether DIP financing should continue, and second, whether the purpose of the CCAA would be achieved by granting an extension of the stay.

DIP Financing

6 In *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), Tysoe J. articulated the test for when DIP financing should be permitted: there must be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated: p. 153, para. 28. In that case, Tysoe J. found that DIP financing would benefit the business, but was not critical for the operation or restructuring of the business. As well, he did not have sufficient confidence in the cash flow projections and appraised value of the realty to conclude that the benefit clearly outweighed the potential prejudice to the secured lenders: p. 153, para. 29.

7 This reasoning was not objected to on appeal: *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.). The issue in the appeal was whether the court has jurisdiction to grant priority to a monitor's fees and expenses. Mackenzie J.A., speaking for the Court, held that the court's jurisdiction is found in equity, as is its jurisdiction to order super-priority for DIP financing: p. 152, paras. 30-31. On the issue of when this priority should be granted, Mackenzie J.A. stated, at para. 30:

It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and CCAA orders should only be made if there is a reasonable prospect of a successful restructuring.

8 Determining whether DIP financing is appropriate requires a careful balancing of interests.

9 In *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), Blair J. made the following comments at pp. 321-322, para. 24:

It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances - as opposed, for instance, to a receivership or bankruptcy - and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

10 In my view, the evidence provided by Hunters does not show that the benefits of DIP financing will clearly outweigh potential prejudice to the Objecting Creditors. While DIP financing is the only means for Hunters to continue operating, it is impossible to conclude that this short-term benefit will culminate in Hunters' financial recovery, due to a number of deficiencies in the evidence. First, there are no appraisals of the real estate or rolling stock in evidence to support Hunters' financial projections. Second, because Hunters' computer services provider shut down Hunters' computer based accounting system, Hunters and the Monitor have had extremely limited access to Hunters' books and records. As a result, final financial statements for the year ended February 29, 2000 are unavailable, and current, reliable balance sheets cannot be provided. The Monitor cannot verify Hunters' financial situation because reliable data cannot be accessed.

11 Third, the value of a major asset is uncertain. According to Hunters, the insurance policies on the life of Mr. Bondar's father are worth \$2,300,000.00, and security is held against them by the mortgagee of the lands to the extent of \$1,800,000.00. However, the policies are not in evidence, so the value and terms are uncertain. Also, apparently Mr. Bondar's wife is a beneficiary, but the percentage of her interest is not in evidence.

12 Fourth, Hunters' cashflow projections are not supported by evidence from the Monitor or any other independent third party, which would verify their reasonableness or accuracy. Already, it appears that the Monitor's fees will be \$100,000.00 greater than the cashflow projections anticipated. In light of all of the above deficiencies in Hunters' evidence, Hunters has not satisfied its onus of showing that DIP financing would be beneficial, or indeed, that a stay would be appropriate in the circumstances.

13 Another consideration in assessing the benefit of DIP financing is that even if Hunters' projected cashflows are accurate, they show a continuing net deficit, suggesting that the benefit of DIP financing is merely prolonging the inevitable. Even as of September 2001, following the months when the volume of Recreational Vehicle ("RV") sales is highest, Hunters expects a cash flow deficit. After September, the RV sales will slow down significantly as Hunters enters the low season, so cash flow is not likely to increase after September. Hunters can expect continuing difficulties in meeting operating expenses well into the foreseeable future. The sources of Hunters' cash flow problems, as identified by Blair Bondar, the company president, will likely continue to exist. Mr. Bondar states that RV sales have decreased as a result of, in part, increasing gas prices, a weak Canadian dollar, and increased competition. Hunters has no control over these systemic problems, and there is no evidence or reason to believe that they will be resolved in the foreseeable future. As a result, I am not convinced that the cash flow projections themselves are accurate. The Monitor does not verify the accuracy or reasonableness of the projections. Therefore, it is impossible to conclude that the DIP financing will benefit Hunters and its creditors in the long run.

14 The prejudice caused by DIP financing to the Objecting Creditors could be significant. The Objecting Creditors hold Purchase Money Security Interests and therefore their claims rank ahead of all other creditors', but their ability to realize on this statute-granted priority will be reduced further every time increases in DIP financing and Administrative Charges are approved to fund Hunters' operating costs. Extending the stay until February, 2001 would place the Objecting Creditors at risk during a period when RV sales are very slow and minimal cash flow will be generated. In order for Hunters to carry on its business, further increases in DIP financing are inevitable. This financing, which has now exceeded \$800,000.00 in order to cover payroll for November, and the Administrative Charges of \$350,000, are eroding the security of the Creditors while the financial position of Hunters is precarious and uncertain. Given these circumstances, and the principle from *Royal Oak Mines Inc., Re, supra.* that DIP financing and its super-priority should not be granted lightly, DIP financing is not appropriate. The potential prejudice of DIP financing to the Objecting Creditors is not outweighed by the benefit to Hunters, and there is insufficient evidence of a reasonable possibility of a successful restructuring.

Purpose of the CCAA

15 I described the purpose of the CCAA in *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.) as follows, at p. 114:

The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

16 In this case, an extension of the stay will not maintain the status quo for the Objecting Creditors. Their priority status and ability to recover their losses will be jeopardized. At least two of the Objecting Creditors have buy-back agreements with manufacturers that will be impaired or disappear with the passage of time. These Creditors could then only recover their costs if Hunters is able to sell all of this inventory at cost or higher, a prospect that appears to be unrealistic. The CCAA should not be used where, as in this case, it will put the financial well-being of the majority of the creditors at risk.

17 Another factor influencing my decision is the possibility that the inventory that is not subject to buy-back agreements will decline in value over the period of the stay. The other creditors will not face a decline in their interests in real estate and DIP financing, and it would be unfair to maintain the status quo for these creditors while the interest of the Objecting

Creditors deteriorates. Another circumstance that could result in prejudice to the Objecting Creditors is the requirement in the Order that 10% of the proceeds from the sale of the Creditors' collateral shall be paid to Hunters for operating costs. This reduces the security available to the Objecting Creditors, who are inventory suppliers, while Hunter endures the slow season in RV sales.

18 A stay of proceedings should not be granted under the *CCAA* where it would only prolong the inevitable, or where the position of the objecting respondents would be unduly jeopardized: *Timber Lodge Ltd. v. Timber Lodge Ltd. (Creditors of)* (1992), 15 C.B.R. (3d) 244 (P.E.I. T.D.) at p. 252, para. 21; p. 253, para. 24. The B.C. Court of Appeal said that *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring: *United Used Auto & Truck Parts Ltd., Re, supra.* at p. 152, para. 30. Given my conclusion that further DIP financing should not be permitted, it is clear that Hunters will be unable to finance its operating costs, and therefore the business is doomed to failure. But even if DIP financing continued, the problems with cashflow, discussed above, suggest that Hunters has no reasonable prospect of becoming viable again.

19 The jurisprudence makes it clear that the objection of a few recalcitrant creditors should not prevent the petitioner from proceeding to attempt to work out a plan under the *CCAA*: *Icor Oil Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 (Alta. Q.B.) at p. 164, para. 21. The court should consider the interests of all affected constituencies in deciding whether a stay is appropriate, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally: *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 7 O.R. (3d) 362 (Ont. Gen. Div.) at p. 369.

20 However, in *Bargain Harold's Discount, supra.*, Austin J. also stated that where no plan will be acceptable to the required percentage of creditors, the *CCAA* application should be refused: p. 369. Put another way, one factor to be considered in the context of s. 11(6) is whether the attempt to reach a compromise is doomed to failure, or is a realistic ambition: *Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) at p. 184, para. 22. I am satisfied that in this case, no compromise will be reached between the Objecting Creditors and the other major secured creditors, nor between the Objecting Creditors and Hunters.

21 For all of these reasons, Hunters' application for an extension of the stay of proceedings is denied. However, in order to allow creditors time to prepare, the effect of my dismissal of Hunters' application will be suspended for one week. Therefore, I order a short-term extension of the stay of proceedings to December 8, 2000.

Application dismissed.