NO. S-206189
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1057863 B.C. LTD., NORTHERN RESOURCES NOVA SCOTIA CORPORATION, NORTHERN PULP NOVA SCOTIA CORPORATION, NORTHERN TIMBER NOVA SCOTIA CORPORATION, 3253527 NOVA SCOTIA LIMITED, 3243722 NOVA SCOTIA LIMITED and NORTHERN PULP NS GP ULC

PETITIONERS

APPLICATION RESPONSE

Application response of: The Province of Nova Scotia (the "**Application Respondent**" and the "**Province**")

THIS IS A RESPONSE TO the Notice of Application of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC (the "**Applicants**") dated April 26, 2022.

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of the orders set out in Notice of Application, Schedule "B": None.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in the Notice of Application at Schedule "B".

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in Notice of Application, Schedule "B": None.

Part 4: FACTUAL BASIS

Concise Overview of the Position of the Province

1. The Province opposes the Petitioners' application for: an extension of the stay of proceedings to October 31, 2022; approval of an increase of $8 million in the interim financing facility; approval of amendments to the milestone dates in the Amended and Restated Commitment Letter; and approval of the Amended and Restated Subordinated Interim Financing term sheet.

2. The Petitioners' decision to appeal and challenge by judicial review the terms of reference ("**TOR**") for the replacement effluent treatment facility ("**Replacement ETF**") is based on their objectives to address:

   (a) a lack of clarity to the benchmark limits against which effluent and other discharges and emissions would be measured;

   (b) delayed approval or consideration of future industrial permitting until following the conclusion of the environmental assessment process (the "**EA Process**"), characterized in the submission of the Petitioners as a lack of a "One Window Approach";

   (c) the open-ended nature of the draft TOR with a broad scope of review could lead to unnecessary frustrations and disputes, delays and expenditures later in the EA Process; and

   (d) the need for the EA Process to be led by one or more independent administrators with expertise in both kraft pulp production and environmental management to be appointed at the outset to manage the EA Process, review the draft environmental assessment report ("**EA Report**"), and make an informed and unbiased decision on the acceptability of the EA Report.[1]

3. The appeal and judicial review challenge are not aimed at complying with the legal requirements of the *Environment Act,* SNS 1994-95, c 1 (the "***Environment Act***") and its environmental assessment provisions. Rather, through these blunt and limited instruments, the Petitioners seek to dismantle the structure of the EA Process established

[1] Tenth Report of the Monitor dated April 27, 2022

under the *Environment Act* to suit their requirements. They have presented no evidence that the process, as it has unfolded to date, is unfair or unusual. The evidence before this Court is to the contrary.[2]

4. The appeal and application for judicial review are vain and costly exercises, which will lead to inevitable delays and are actions that would only be taken by a proponent who has the luxury of financing its actions using funds that are secure, and whose objectives are focused upon wrenching a settlement out of the Province rather than restoring the pulp mill (the "**Mill**") to operation.

5. In this Court's Reasons for Judgment dated September 14, 2020 in relation to the granting of the Amended and Restated Initial Order on August 7, 2020 (the "**ARIO**"), the Court stated:

> *[55] … The materials before the Court clearly show a "kernel of a plan" – namely the restart of the Pulp Mill and the Petitioners' operations, all intended to alleviate the dire financial circumstances here and allow the Petitioners to fashion a way forward with the support of their creditors. …*[3]

6. In the same Reasons for Judgment, the Court made the following findings with respect to litigation funding:

> *[53] In my view, in the overall context, the limited amount of litigation funding proposed to be spent between now and December 2020 is justified in these circumstances. If the proceedings are extended beyond that date, and further funding for that purpose is requested, the Court may revisit the matter.*[4]

7. The Province no longer believes the Petitioners are committed to completing the Nova Scotia EA Process in good faith and with due diligence. The Petitioners are now just using the process of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") to attack the integrity of the EA Process; to fund litigation against the Province, which depletes its security; and to advance claims for damages, which it has known cannot succeed since 2015.[5] The Province has determined, in response to this application, that

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[2] Affidavit No. 1 of Peter Oram sworn October 26, 2021

[3] Reasons for Judgment, *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359 (**Tab 1**), para 55

[4] *Ibid,* para 53

[5] Affidavit of Christine Sisneros sworn April 28, 2022, Exhibit "A"

it is no longer in the public interest to support the Petitioners' request for a further stay of proceedings.

The Lack of Progress in the EA Process

8. In the almost two years since the commencement of these proceedings, the Petitioners have not advanced the EA Process for the approval of either the initially proposed replacement effluent treatment facility or the new Replacement ETF in any material respect, despite having both the time and financing for them to do so.

9. At the outset of the CCAA proceedings, Northern Pulp Nova Scotia Corporation ("**Northern Pulp**") brought a judicial review application concerning the decision of the Nova Scotia Minister of Environment to require an EA Report for the Replacement ETF.[6]

10. At the same time, Northern Pulp was complaining that the final TOR for the EA Report issued on April 28, 2020 did not give a clear understanding of what was required of it from the regulators, what it would be measured against, and did not ensure a clear risk-based EA Report process with agreed to outcomes and valued-ecosystem components.[7]

11. At the August 6, 2020 hearing, the Petitioners had announced that they were temporarily pausing the EA Process in respect of the Replacement ETF, in order to permit them time to negotiate with the Province in the interest of obtaining clarity regarding the EA Process, the TOR and the EA Report.[8]

12. Nearly two years later, the Replacement ETF has changed and the EA Process has not advanced any further. The Petitioners are in receipt of the TOR for preparation of an EA Report, but rather than meeting the task of completing the studies and the EA Report for which they have approved financing, the Petitioners are challenging the process to the Minister, pursuant to section 137 of the *Environment Act,* and looking to seek judicial review of the TOR for the EA Report.

13. The Province has consistently urged the Petitioners to advance the proposed Replacement ETF, to the point where the Minister may make a decision respect to the EA Report. Approval of the Replacement ETF is both essential and on the critical path to

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[6] Affidavit No. 1 of Bruce Chapman, para. 32

[7] Affidavit No. 1 of Bruce Chapman, para. 32

[8] Affidavit No. 4 of Bruce Chapman, paras. 42-43

restoring the Mill to operating status. In light of both the lack of progress and the Petitioners' preference to launch a legal attack on the EA Process, rather than to perform the environmental assessment, the Province opposes an extension of the stay.

14. The Province is well aware of the implications that a refusal of an extension of the stay will have. It has taken its position in this application advisedly, with full knowledge and consideration of all aspects of the public interest.

A Summary of the Province's Position in the CCAA Proceedings

15. The Province has been consistent throughout these proceedings. As set out in Affidavit No. 1 of Duff Montgomerie:

> *4. The Province has to take into consideration all aspects of the public interest in relation to any form of support it offers to any industry. Such public interest considerations include the obligations of the Province as a representative of the Crown to uphold the honour of the Crown by consulting with First Nations whose asserted rights and claims may be affected by any government action or decision. This factor has particular importance in connection with the Mill and its effect upon the Pictou Landing First Nation ("PLFN").*
>
> *5. Public interest considerations also include the need to ensure that the Mill and any modifications to it obtain any required environmental approvals and permits and operate in accordance with these approvals and permits. The integrity of the environmental assessment and approval processes is important to the Province and people of Nova Scotia and these processes are administered independently under the direction of the Minister of Environment. The Province itself is subject to these same processes and approvals when it is the proponent of a new or modified undertaking, such as a new highway or highway twinning project.*
>
> *6. The expenditure of public funds to support or promote particular sectors requires the Province to consider the public interest in determining the justification, utility, and benefit of doing so in priority to other responsibilities of the Province and in light of the limited resources of the Province.*
>
> *…*
>
> *63. The Province's position is that it has no liability to Northern Pulp as a result of the passage of the Boat Harbour Act and that if Northern Pulp had acted reasonably it would have been able to obtain a decision on the environmental assessment of a replacement effluent treatment facility in time to have continued operations after January 31, 2020. Despite these positions, the*

> *Province has always indicated a willingness to negotiate assistance for Northern Pulp as it may be in the public interest and so long as the integrity of the environmental assessment and approval processes can be preserved and the Province is able to discharge its duty to consult with the PLFN.* [9]

16. The Province objected in July 2020 to the attempt of the Petitioners to litigate their way to an environmental assessment approval, in stating:

> *83. The entire cost of the loan contemplated by the Term Sheet is to be borne by the Province and the end result of the financing is a negotiation with the Petitioners or a lawsuit with the Petitioners. This is not a restructuring plan but rather a proposed course of action to advance a lawsuit or claim against the Province.* [10]

December 11, 2020 Application for extension of the stay under ARIO to April 30, 2021

17. The Province objected to the extension of the stay for this period. In doing so, the Province expressed concerns regarding the lack of progress by the Petitioners in advancing the EA Process for the Replacement ETF. In the Province's submissions for that application, it was stated:

> *The Province has, however, recently expressed concerns to the Petitioners and the Monitor as to the pace of the Petitioners' efforts in relation to the environmental remediation of the Mill and the progress towards advancing a plan for a replacement effluent treatment facility, which will require approval following an environmental assessment. As is apparent from the materials which have been filed, the Petitioners are significantly behind schedule in terms of their work programme. The Petitioners' materials note that they expect the pace to pick up significantly in early 2021. The Province hopes this will be the case.*
>
> *The main area of concern for the Province is the effect of the lag in the work schedule in relation to the milestone dates set out in the July 16, 2020 draft Commitment Letter (Exhibit B to the Fourth Affidavit of Bruce Chapman), which provides as follows:*
>
> > *The Borrowers shall cause or procure the achievement of each of the following (the "Milestones" and each a "Milestone"):*
> >
> > *1. By not later than June 30, 2021, the Borrowers shall have provided evidence satisfactory to the Lenders (acting*

[9] Affidavit No. 1 of Duff MacKay Montgomerie, paras. 4-6 and 63

[10] Affidavit No. 1 of Duff MacKay Montgomerie, para. 83

reasonably) that there is no existing or anticipated matter, event or circumstance that would reasonably be expected to have a material adverse effect on the ability of the Borrowers to satisfy the conditions set out in:

(a) paragraph 2 below by June 30, 2022; or

(b) paragraphs 3(a) or 3(b) below by December 31, 2022;

2. *By no later than June 30, 2022, the Borrowers shall have: (i) obtained all material regulatory approvals required to commence construction of a Replacement ETF; (ii) entered into an agreement with the Province to compensate the Petitioners for losses associated with the shutdown of the or the Boat Harbour Effluent Treatment Facility, hibernation of the Mill and cessation of operations and share the costs associated with obtaining approvals for and construction of the Replacement ETF, in settlement of claims of the Petitioners against the Province pursuant to agreements between the Province and the Petitioners (the "Agreements"); and (iii) obtained financing for the Replacement ETF, each in form and substance satisfactory to the Lenders (acting reasonably);*

3. *By no later than December 31, 2022, the Borrowers shall have:*

   (a) entered into an agreement with the Province in settlement of claims of the Petitioners against the Province pursuant to the Agreements, compensating the Petitioners for losses associated with the hibernation of the Mill and cessation of operations, in form and substance satisfactory to the Lenders (acting reasonably); or

   (b) obtained a final non-appealable decision from a court of competent jurisdiction satisfactory to the Lenders (acting reasonably) awarding the Petitioners damages payable by the Province for losses

> *associated with the hibernation of the Mill and cessation of operations.*
>
> *Continuation in delays in the schedule have heightened the prospect for an inadvertent default under the interim financing facility before a plan of arrangement can be presented.*
>
> *The Province has raised this issue with the Petitioners without any resolution to date. The Province will continue to monitor the performance of the Petitioners and to bring its concerns before this Court should these issues persist.*

April 22, 2021 Application for an extension of the stay until October 31, 2021

18. In response to be application heard on April 22, 2021 to extend the stay of proceedings to October 31, 2021, the Province did not oppose the extension of the stay, but expressed concerns as to the progress being made by the Petitioners and objected to the failure of the milestones in the DIP term sheets to reflect the erosion of the schedule for achieving environmental assessment approval for the Replacement ETF. The Province's written submissions in connection with that application stated:[11]

> *3. … As has been raised previously by the Province in these CCAA proceedings, the environmental assessment and approval processes are administered independently under the direction of the Nova Scotia Minister of the Environment and Climate Change ("NSECC"). Despite efforts by the Petitioners to link the two, the environmental assessment and approval processes necessary for a new ETF are separate from these CCAA proceedings and should remain so.*
>
> *4. Since the start of the CCAA proceedings almost one year ago, there has been little progress by the Petitioners in meeting the scheduled activities that they have previously presented to this Court and to the other interested parties. This fact is of significant concern to the Province. The Ninth Chapman Affidavit suggests a positive picture of the progress being made by the Petitioners. The Province takes issue with much of Mr. Chapman's characterization of what has occurred, some of which will be set out in these submissions.*
>
> *5. The Petitioners have sought more public input into their project and have responded to public concerns by proposing a new solution to the ETF. The Petitioners have also determined that litigation with the Province and the Minister of Environment is not the most reasonable approach to expeditiously advancing the environmental process, a point that the Province made in its*

[11] Submissions of the Province dated April 20, 2021, paras. 4-18

materials and brief filed in July 2020. The Province views these steps positively.

6. The stay application heard in July 2020 was not supported by materials from the Petitioners in the form of a schedule against which progress could be readily tracked, other than to determine whether expenditures were proceeding as planned. In the key area of the environmental assessment, the expenditures have lagged significantly as the Petitioners reassessed their position and delays occurred in the setting up and advancing the work of the Environmental Liaison Committee ("ELC").

7. While the Province views the path forward for Northern Pulp to be more positive than it was last July, this view must be tempered by recognition in the period of time that has elapsed the Petitioners have determined they will not pursue the previously filed application for an environmental approval. Instead they will be initiating a new application for environmental assessment for a different project. The very first step in this process has not occurred as the registration document has not yet been filed with NSECC or shared with the Province. The Petitioners have not yet hired the lead environmental consultant for the environmental assessment and the public, apart from the ELC, have not yet been engaged in what is a process that operates with the requirement of providing significant opportunities for public engagement.

8. A recurring refrain in the Petitioners' material with respect to the EA Process ("EA Process") is its desire for "clarity". The EA Process is well defined in the Environment Act, S.N.S. 1994-5, c.1 and the Environmental Assessment Regulations N.S. Reg.26/95. It begins with the registration of an undertaking by the filing of a project description . It entails seeking public comment regarding the terms of reference prepared by the Minister for the environmental assessment after the Minister has reviewed the registration document. The proponents are responsible for completing the EA at which point there is further opportunity for public comment. The retainer of experienced and capable environmental consultants familiar with the EA Process, which is part of the Petitioners' plan but which has not yet occurred, would assist them. To seek clarity on the specifics of the EA for the replacement ETF before registering the undertaking misapprehends the nature of the regulatory scheme and the importance of public input.

9. Without seeing the project description for the new ETF and significant advancement of public engagement and consultation with affected First Nations (most notably, Pictou Landing First Nation ("PLFN")), the Province's evaluation of the project and potential consideration of negotiation with the Petitioners is necessarily delayed.

10. In spite of the fact that the Petitioners' plan now involves starting the critical EA Process anew, it does not make any real

concession to the fact that its work schedule has been significantly compressed.

11. The Interim Financing Term Sheet (attached as Exhibit B to the affidavit of Bruce Chapman dated July 17, 2020) contains three important milestones (sec. 25 reproduced at Schedule "A" herein). The first milestone is a check-in of sorts that is intended to provide the Interim Financing Lender with assurances that the next two milestones, which are significant objectives for the Petitioners although in the Province's view not necessarily appropriate for these proceedings, will be met.

12. In this motion, the Petitioners seek to extend the first milestone date (from June 30, 2021 to October 31, 2021) presumably in recognition of the fact that their progress to date has been slower than originally predicted. Regrettably, they say nothing about the two remaining milestones (June 30, 2022 – having secured the approvals and financing necessary in relation to a new ETF – and December 31, 2022 – having resolved all outstanding matters with the Province). These remaining milestones are inextricably linked to the first milestone and, perhaps more to the point, to the progress of the Petitioners in meeting such milestone. It is regrettable that the Petitioners have not chosen to pursue any meaningful discussions with the Province in relation to these milestones. The failure of the Petitioners to meet these milestones poses a significant threat to the successful conclusion of the CCAA process and, by extension, to the interests of the Province.

13. The Province's specific concern in relation to the Interim Financing Term Sheet milestones is that to date, significant existing scheduled activities in the work plan of the Petitioners have not been met and the Petitioners have not yet even completed the first step in the EA Process, being the registration of a project description. The Petitioners have pushed off the start of the EA Process, while seeking to maintain the same completion date of June 29, 2022, as initially proposed in July 2020. This is of significant concern to the Province, given that its position is subordinated to that of the Interim Financing lender. The Petitioners missing any of the milestones in the Interim Financing Term Sheet may result in the Interim Financing lender enforcing on its security, to the detriment of the Province.

Concerns with the Petitioners' Proposed Schedule

14. The Province highlights some of the concerns it has identified in the Petitioners' most recent materials, which set out its overarching concern on the Petitioners' latest proposed schedule in the next section.

15. Since the last court appearance in these CCAA proceedings, the Province has, under a reservation of rights agreement, taken over the Petitioners' obligations in relation to the

removal and remediation of sludge as part of the decommissioning process. In addition to allowing the Province to maintain control over the remediation process, this will allow the Petitioners to focus their efforts on the environmental assessment and approval processes that form the basis for any possible resumption of mill operations. It will also relieve the Petitioners of the need to meet the expenditures associated with this activity through the Interim Financing Facility.

16. In the most recent materials filed, the Petitioners have advanced a schedule that shows a decision on the EA Process by June 29, 2022 (the Ninth Chapman Affidavit, Exhibit B, line 71 of the Gant Chart). The schedule includes the commencement of consultations with the PLFN on April 8, 2021. The PLFN have previously indicated that there will be no engagement with the Petitioners until the Petitioners' judicial review application is dropped; however, the Petitioners have set a schedule where the decision on the judicial review application will not be made until May 19, 2021 (the Ninth Chapman Affidavit, Exhibit B, line 103 of the Gant Chart), which is after the proposed start of consultations with PLFN.

17. The schedule being advanced by the Petitioners is predicated on the ETF project being classified a Class I undertaking. Should this assumption of the Petitioners be incorrect, the entire schedule will need to be immediately revised. It is noted that the Ninth Chapman does not make reference to this possibility or address its potential implications on the Petitioners' schedule.[12]

18. Lastly, the schedule being advanced does not include reference to the industrial approvals needed to construct the ETF.[13] *This is part of the second milestone in the Interim Financing term sheet, but is not included as part of the Petitioners' new proposed schedule.*

[Emphasis added]

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[12] The failure to address contingencies to the schedule associated with assumptions made by Northern Pulp in April 2021 persists in its current schedule at April 2022, which assumes success in the appeal and judicial review challenges to the TOR.

[13] In April 2021, the Province pointed out the schedule failed to accommodate the time required for the issuance of an industrial approval, which follows the approval of the environmental assessment. In the present application, the Petitioners attempt to "finesse" this issue by seeking a "One Window" approval process, contrary to the scheme of the *Environment Act,* to obtain issuance of the industrial approval simultaneously with the approval of the environmental assessment.

Oral Submissions

19. In the course of the April 22, 2021 hearing, the Province stated that the Petitioners have come forward with a new kernel of a plan to advance the new Replacement ETF project for environmental assessment. The Province indicated it was encouraged by the new approach as expressed by the Petitioners but we expressed the concern that the plan was "*poised exquisitely at the point between the Petitioner's expressions of intent and the hard actions of putting it into effect and adhering to the schedule*".

October 29, 2021 Hearing to extend the stay to April 30, 2022

20. Unfortunately, the problems regarding adherence by the Petitioners to the completion of the EA Process for the Replacement ETF persisted up to the time of the October 29, 2021 hearing.

21. In response to the Petitioners' request to extend the stay from October 31, 2021 until April 30, 2022, the Province took no objection, but raised a number of concerns in its submissions with respect to the significant passage of time and funds spent since the start of the CCAA proceedings, with very little progress to show in the EA Process. The Province elaborated this position in its written submissions as follows:

> *20. Since the beginning of these proceedings, the Province has raised its concerns over the lack of focus of the Applicants on the EA Process . These concerns have been raised by the Province at every hearing in this CCAA proceeding, but have taken a back seat to the subjective reports being advanced by the Applicants on their progress. A review of the actions of Northern Pulp in these proceedings show that the Province's concerns have been borne out.*
>
> *21. The starting point for the environmental approval process is the filing of the environmental assessment registration document ("EARD"). It is the document that requires the Minister of Environment to make decisions, which ultimately lead to an approval or rejection of the environmental assessment of an undertaking. For the first year of the CCAA proceeding, the Applicants were looking to advance the environmental assessment ("EA") for a replacement effluent treatment facility through a judicial review application challenging a Ministerial Decision, which had required a full environmental assessment of the undertaking. The Province objected to the use of DIP financing for the purpose of pursuing this litigation, but also presented evidence that:*

> *…it does not consider the proposal of the Petitioners to challenge by way of an application for judicial review the decision of the Minister of the Environment to require an environmental assessment of the replacement effluent treatment facility and by way of appeal to the Supreme Court of Nova Scotia the issuance of a Ministerial Order to be reasonable steps in advancing the environmental assessment as expeditiously as possible*
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> *Affidavit of Duff Montgomerie sworn July 22, 2020 (the "Montgomerie Affidavit") at para 83*

22. This statement proved to be correct. Northern Pulp subsequently established the Environmental Liaison Committee and, after its engagement with the community, changed its approach to finding support for a new effluent treatment facility by simultaneously addressing concerns of the public about the operation of the Mill. In the application heard April 22, 2021, Northern Pulp advised that it was abandoning the lawsuits against the Minister of Environment, discontinuing its application of EA approval of the previous application for a replacement effluent treatment facility and would be seeking environmental assessment approval for new plans for the replacement of the effluent treatment facility as part of an overall mill transformation.

23. The Province supported the extension of the stay application in April 2021 in order to allow Northern Pulp to pursue the environmental assessment approval for this new undertaking. In communicating this to the Court on behalf of the Province, the following submission was made:

> *While the Province views the path forward for Northern Pulp to be more positive than it was last July, this view must be tempered by recognition in the period of time that has elapsed the Petitioners have determined they will not pursue the previously filed application for an environmental approval. Instead they will be initiating a new application for environmental assessment for a different project. The very first step in this process has not occurred as the registration document has not yet been filed with NSECC or shared with the Province. The Petitioners have not yet hired the lead environmental consultant for the environmental assessment and the public, apart from the ELC, have not yet been engaged in what is a process that operates with the requirement of providing significant opportunities for public engagement*
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> *April 20, 2021 Submissions of the Province, para 7*

24. In written submissions dated April 20, 2021 on behalf of the Province:

> *The Province's specific concern in relation to the Interim Financing Term Sheet milestones is that, to date, significant existing scheduled activities in the work plan of the Petitioners have not been met and the Petitioners have not yet even completed the first step in the EA Process, being the registration of a project description. The Petitioners have pushed off the start of the EA Process, while seeking to maintain the same completion date of June 29, 2022, as initially proposed in July 2020. This is of significant concern to the Province, given that its position is subordinated to that of the Interim Financing lender. The Petitioners missing any of the milestones in the Interim Financing Term Sheet may result in the Interim Financing lender enforcing on its security, to the detriment of the Province.*
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> *April 20, 2021 Submissions of the Province, para 13*

25. A Project Description for the new proposal was filed by the Applicants on May 14, 2021 to the Minister of the Environment to determine whether the project would be classified as a Class I EA (with less stringent requirements), or as a Class II EA (with more rigorous requirements). The decision that a Class II EA would be required was made by the Minister of the Environment on July 16, 2021.

26. In connection with the plan of the Petitioners put forward at the April 22, 2021 hearing, the following submissions were made on behalf of the Province:

> *The schedule being advanced by the Petitioners is predicated on the ETF project being classified a Class I undertaking. Should this assumption of the Petitioners be incorrect, the entire schedule will need to be immediately revised. It is noted that the Ninth Chapman does not make reference to this possibility or address its potential implications on the Petitioners' schedule*
>
> *April 20, 2021 Submissions of the Province, para 17*

27. The Minister's decision that the Project was a Class II undertaking was foreseeable. Northern Pulp should have had a contingency plan. As outlined in the Affidavit of Peter Oram sworn October 26, 2021 (the "Oram Affidavit"), there were activities that it could have undertaken during the last stay period in order to advance the EA process, including the next step in the EA process, being the filing of an EARD. The EARD is a critical step in seeking environmental approval for any project and is necessary regardless of the Class designation determined by the Minister. After the decision was made that the Project was a Class II undertaking, the Applicants could and should have moved directly to working on the EARD, as an approved EA process is necessary for the resumption of mill operations, particularly in view of the position of the Applicants that they wish to obtain the terms of reference for the EA

in order to know whether they have a reasonable path forward with the new project. Also, there are EA studies, such as the Receiving Waters Study, which have long lead times and could have been started as contemplated in the Gantt chart presented by the Applicants at the last hearing. The Applicants, however, chose to wait and have now incurred an additional delay in the environmental approval process.

Oram Affidavit at paras 14-7, 20

28. The Petitioners have not advanced the EA process to any material extent in the period of the current stay. The lack of expenditure on EA activities (as noted in the Oram Affidavit at paras 19 and 20) illustrates this dramatically.[14] *The delay, however, comes at a cost as it extends the period of the administration as the Applicants attempt to pursue a plan of arrangement that will yield an operating mill as a going concern. By their own materials, the Applicants note they have spent nearly $4.4 million in recurring costs since the last application before this Court with little or no progress (as evidenced by the scant amount expended on the EA process during that period).*

29. The lack of haste by the Applicants in pursuing the EA process has come at a cost, but not to the Applicants. Such cost has been entirely borne by the Province, with the continued erosion of the value of its security.

30. After a year and a half of protection under the CCAA, the Applicants are now at the starting point of the EA process for an alternative effluent treatment facility. Significant time and funds have been spent (in excess of $15.0 million), with very little progress being made on the EA process. There continues to be some suggestion, despite the repeated assertions by the Province to the contrary, that the environmental process can form part of any settlement negotiations. This is simply not the case.

31. The Province again asserts that the environmental process is separate and administered independently from the direction of the Province (as a whole) in these proceedings. As set out in the Montgomerie Affidavit at paragraph 5:

> *5. Public interest considerations also include the need to ensure that the Mill and any modifications to it obtain any required environmental approvals and permits and operate in accordance with these approvals and permits. The integrity of the environmental assessment and approval processes is important to the Province and people of Nova Scotia and these processes are administered independently under the direction of the Minister of Environment. The*

[14] This under-expenditure of budget funds for the preparation of the environmental assessment persists today. See Tenth Report of the Monitor, Appendix “C”

> *Province itself is subject to these same processes and approvals when it is the proponent of a new or modified undertaking, such as a new highway or highway twinning project.*
>
> *32. The inadequate response of the Applicants to the environmental process and the conflation of the independent environmental process with settlement discussions raises significant concerns that the Applicants either: (i) do not understand the EA process; or (ii) are not treating it with any sense of urgency. The complexity of the environmental issues and the significant public interest component demand a greater level of attention that has not been provided by the Applicants to date.*

22. The Province concluded its written submissions with the following:

> *40. While the Province wishes to continue to try to work with the Applicants, the narrative being advanced by the Applicants is based on a public relations strategy and does not reflect the reality of the work required in the EA Process. The use of the CCAA proceedings for anything other the intended purpose cannot be entertained to allow the Applicants to continue to use these proceedings to advance their singular interests.*

23. For the benefit of the Court, on behalf of the Province, we filed an affidavit of Peter Oram, a professional geologist by training, with extensive experience in applying for environmental assessment approvals and industrial approvals for new and modified projects under the *Environment Act*.

24. In his affidavit in relation to the motion heard on October 29, 2021, Mr. Oram described the purpose of the TOR for an EA Report and his opinion with respect to whether or not TORs would provide clearly defined environmental limits that the project would be required to meet, as sought by Mr. Chapman. We refer to the following passages of Mr. Oram's affidavit sworn October 26, 2021:

> *27. The purpose of the TOR is to determine the work that needs to be undertaken and the information that needs to be provided in order to complete an EA for the proposed undertaking. Under section 2(s) of the Environment Act, "environmental assessment" is defined as a "a process by which the environmental effects of an undertaking are predicted and evaluated and a subsequent decision is made on the acceptability of the undertaking".*
>
> *28. "Environmental effect" is defined in section 2(v) of the Environment Act as follows:*

(v) "environmental effect" means, in respect of an undertaking,

(i) any change, whether negative or positive, that the

undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance, and

(ii) any change to the undertaking that may be caused by the environment, whether the change occurs inside or outside the Province.

29. The Environment Act contains a broad definition of "environment" in section 2(r) as including not only the components of the earth such as air, land, water and organic and inorganic matter and living organisms, but also for the purposes of EAs the socio-economic, environmental health, cultural and other items referred to in the definition of environmental effect.

30. The purpose of the TOR is to determine the work and information that need to be undertaken and provided in order to complete an EA for the proposed undertaking. The most commonly used and accepted means to do this is to identify the Valued Environmental Components ("VEC") of a proposed undertaking. Given the broad definitions of "environment" and "environmental effect" in the Environment Act this also must include socio-economic components of the environment that are valued. The TOR typically will address the VECs that need to be considered and addressed in the EA Report so it may be determined what if any effect the undertaking will have upon them and what types of specific mitigation may be available to contain those effects to acceptable levels.

31. The purpose of an EA Report is to enable the Minister to make a decision whether to reject or approve the undertaking. The rejection of an undertaking is because of the likelihood it will cause adverse effects or environmental effects that cannot be mitigated. The Minister is required to give reasons for the decision on whether to reject, approve or approve with conditions any undertaking, including Class II undertakings referred to a review panel. (section 39(3) of the Environment Act.)

32. A properly prepared EA Report will identify the likelihood of the project causing adverse effects or environmental effects that cannot be mitigated. The conducting of the studies and preparation of the EA Report may be an iterative process that involves studying the local environment and predicting the environmental or adverse effects of the undertaking as defined in the registration document. In the event the studies and work on the EA Report reveal some adverse effects, mitigative measures in the design or components

of the undertaking are considered in order to reduce the effects to acceptable levels. It is, however, the proponent who identifies the components of the undertaking including the environmental targets it can achieve through design and its proposed mitigation.

33. In paragraph 29 of Chapman Affidavit No. 10, Mr. Chapman states that Northern Pulp's anticipated date for the Minister's decision on the EA Approval for the Project is contingent upon the TOR providing "a reasonable path forward for completion of the EA process with clearly defined environmental limits that the Project will be required to meet".

34. In my experience, the TOR does not provide clarity on what levels of air emissions or effluent content would be deemed acceptable for the receiving environment. The work and study undertaken in the EA will examine the VECs for the surrounding environment and will consider the effects, if any, that the undertaking will have upon the environment. The EA Report will assist the Review Panel and the Minister who will also review public comment and input from the EA Branch at NSECC to identify the likelihood of the project causing adverse effects or environmental effects that cannot be mitigated. The EA Report is a research document that provides information for the review panel in the case of a Class II undertaking to make recommendations to the Minister and upon which the Minister may found a decision on whether the effects of the project are acceptable or not and whether the project may proceed as proposed, upon further conditions or not at all.

35. Even where there are already other statutory or regulatory or quasi-regulatory standards in place for a particular type of undertaking, the EA process must examine the environmental effects of the proposed undertaking including perspectives of the public and First Nations. For instance, in considering a municipal waste water treatment facility proposed for a particular location, an EA would not take as a given that so long as the facility meets the requirements of the Wastewater Systems Effluent Regulations made under the Fisheries Act, the environmental effects of the undertaking are acceptable. I would expect that the EA Report would have to consider VECs associated with the surrounding environment and the uses to which it is put. Whether or not such a facility is acceptable within a certain distance from a sensitive marshland habitat or a popular beach would need to be examined and consideration would need to be given in the EA Report to whether more stringent standards are required than those contained in the regulations.

36. Similarly, it may be relevant whether "best in class" standards for emissions or effluent quality are being proposed for an undertaking but even assuming the best in class standards meet regulatory limits that would not alter the requirement that the EA process examine whether the proposed undertaking is likely to have unacceptable environmental effects.

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25. The Petitioners have not advanced the EA Process since the April 22, 2021 hearing, other than filing the new Class II Environmental Assessment Registration and mounting a public relations and legal campaign against the TOR. They have decided to recycle a play from their 2020 playbook and repeat their grievances with respect to the EA Process. In this case, the Petitioners state that "the final TOR do not provide a reasonable path forward for successful completion of the EA process". The Petitioners have appealed the TOR to the Minister pursuant to section 137 of the *Environment Act*, while simultaneously seeking judicial review in the Supreme Court of Nova Scotia of the decision issuing the TOR on essentially the same grounds, causing a multiplicity of proceedings that are doomed to failure. These proceedings by the Petitioners will be costly, not simply in time but also in expenditure. They will do nothing to advance the EA Process.

26. The Petitioners' objection seems to focus on the fact that the TOR do not stipulate the limits for water effluent and air omissions from the project. This repeated criticism of the TOR reflects a fundamental misunderstanding of the EA Process in Nova Scotia, as established in the *Environment Act* and the *Environmental Assessment Regulations*, NS Reg 26/95 (the "***EA Regulations***"). A thorough and concise description of the EA Process in Nova Scotia is contained in the TOR released March 14, 2022 and attached as Exhibit "D" to Affidavit No. 12 of Bruce Chapman. We refer to the following passages from this exhibit:

> *The EA process does not propose or identify specific effluent and emission limits. It is up to the proponent, based on a full identification and evaluation of the potential impacts of the project, the capacity of the environment to handle these impacts, and any mitigations that would reduce them, to determine the overall impact of the project and recommend specific limits that a particular receiving environment can support. If, through the EA review, the proponent demonstrates that it can mitigate the potential impacts of a project without causing significant environmental or adverse effects, the project may receive an EA approval, with terms and conditions for the project, as required, to ensure that the environment is protected. Specific limits (i.e., pertaining to effluent and emissions) are established through subsequent authorizations (i.e., industrial approval) once this planning phase and the environmental review is complete.* [15]

[15] Affidavit No. 12 of Bruce Chapman, Exhibit D, p. 106

…

This Terms of Reference has been developed based on a review of the proposed project described in NPNS's registration document. The purpose of the Terms of Reference is to guide the company in understanding the information required for inclusion in their Environmental Assessment report that will be evaluated through the Class II EA process. Comments from the Mi'kmaq, interested stakeholders, and the public, along with NPNS's response to these comments were considered in the development of the Terms of Reference requirements.

As per the regulations, all comments received on the draft Terms of Reference were provided to NPNS. NPNS, in turn, provided written input on these comments, which was also considered in the finalization of the Terms of Reference. NPNS will have up to two years from the date the final Terms of Reference are released to submit their Environmental Assessment report. NPNS is expected to prepare an Environmental Assessment Report that fulfills the intent of the final Terms of Reference. The Environmental Assessment Report must consider all the effects that are likely to arise from the project, including any not explicitly identified in the Terms of Reference.[16]

…

1.1 Background

The Mill Transformation and Effluent Treatment Facility Project (the project or undertaking) proposed by Northern Pulp Nova Scotia Corporation (NPNS or the Proponent) was registered for environmental assessment (EA) as a Class 2 undertaking pursuant to Part IV of the Environment Act on December 7, 2021.

1.2 Purpose of the Terms of Reference

An Environmental Assessment is a legislated planning, engagement, and decision-making process that allows sustainable development to occur while protecting the environment. It is through the EA process that the environmental effects of an undertaking are predicted and evaluated, and a subsequent decision is made on the acceptability of the undertaking. When a company registers its project for an environmental assessment, government's expectation is that the company provide a complete and comprehensive assessment of the project's potential risks and related mitigations.

[16] Affidavit No. 12 of Bruce Chapman, Exhibit D, p. 106-108

The purpose of this document is to identify for NPNS the information requirements for the preparation of an Environmental Assessment Report (EA Report) to be evaluated through the Class II EA process. NPNS is expected to prepare an EA Report which fulfills the intent of the Terms of Reference. The EA Report must consider all the effects that may be caused by the project, including any not explicitly identified in the Terms of Reference.

The Terms of Reference include Valued Ecosystem Components (VECs) which must be adequately addressed in the EA Report. While the Terms of Reference provides a framework for preparing a complete EA Report, it is the responsibility of NPNS to provide sufficient data and analysis on any potential environmental effects of the project presented in a clear format that can easily be reviewed and evaluated by the Minister, government reviewers, the Mi'kmaq of Nova Scotia, and the public.

Once the Minister refers the EA Report to the Environmental Assessment Review Panel (Panel), the EA Report will serve as the cornerstone of the Panel's review and evaluation of the potential effects of the project and thus must be a stand-alone document. The EA Report will also allow government reviewers, the Mi'kmaq of Nova Scotia, and members of the public to understand the project, the existing environment, and the potential environmental effects of the project. In addition, it will help with understanding of the potential impacts of the project to potential or established Aboriginal or Treaty rights.

The Panel is responsible to review the EA Report, conduct a public review of the EA Report, which can include public hearings, and prepare a report and recommendation to the Minister that includes input gathered through the public review and consultation with the M'kmaq.

The Minister then has the following decision options: If the Minister is of the opinion that any adverse effects or significant environmental effects related to the project can be mitigated, then the project may be approved, with or without conditions. If such effects cannot be mitigated, a project may be rejected. Any conditions of approval must be addressed within the prescribed timeframe, whether prior to commencement, construction, or operation of the undertaking. If applicable, conditions of the EA approval may identify requirements (i.e., emission/effluent criteria, management plans) that must be met in advance of obtaining subsequent approvals or authorizations (e.g., Industrial Approval, fisheries authorizations, etc.).[17]

[17] Affidavit No. 12 of Bruce Chapman, Exhibit D, p. 113-114

27. The TOR are well grounded in the *Environment Act* and the *EA Regulations*. In particular, we refer to section 43 of the *Environment Act*[18], which provides that a review panel is required to review an EA Report for an undertaking referred to it by the Minister, to consult with the public regarding the EA Report and to recommend to the Minister the approval or rejection of an undertaking or conditions that ought to be imposed upon an undertaking if it proceeds. As set out in section 40 of the *Environmental Act*,[19] upon receiving a recommendation from a review panel, the Minister shall approve (with or without conditions) or reject the undertaking.

28. In order to proceed with the Replacement ETF project following successful completion and approval of the environment assessment, the Petitioners will require an industrial approval issued pursuant to Part V of the *Environmental Act*.

29. Under section 56(2) of the *Environmental Act,* the Minister may issue an approval subject to any terms and conditions the Minister considers appropriate to prevent an adverse effect. Section 56(4) of the *Environmental Act* provides:[20]

> *Approval*
>
> *…*
>
> *56 (4) In environmentally sensitive areas, the terms and conditions of an approval may be more stringent, but may not be less stringent, than applicable terms and conditions provided in the regulations or standards adopted or incorporated by the Minister.*
>
> [Emphasis added]

30. The statute provides insight into the underlying principle for which environmental assessments do not at the outset stipulate the effluent or air emission limits to be met by the project being studied. The limits are informed by the results of the environmental assessment and the consideration of what the Minister considers appropriate to prevent an adverse effect. The requirement for an industrial approval is referred to in "*A Proponent's Guide to Environmental Assessment*".[21]

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[18] *Environment Act*, SNS 1994-95, c 1 (**Tab 7**), s. 43

[19] *Ibid*, s. 40

[20] *Environment Act*, s. 56(2), 56(4)

[21] Affidavit No. 1 of Peter Oram, Exhibit "C", p. 32

31. There are provisions in the *Environment Act* for joint assessment processes, for instances where the federal government or a municipality are also undertaking an assessment. There is no provision for merging of the EA Process and the industrial approval process into one. The scheme of the legislation is for the results of the decision on the EA Process to inform the content of the industrial approval.

32. The Province has repeatedly expressed concerns about the approach taken by the Petitioners to the EA Process, their unrealistic expectations for the TOR, their incomplete schedules and schedule projections. It has put forward expert evidence regarding the EA Process in the form of Affidavit No. 1 of Peter Oram. Many of the Province's concerns have been proven correct as events have evolved over the past two years. Despite all of this, the Petitioners have relied solely upon the affidavits of Bruce Chapman, who has no expertise in the field of environmental assessment.

33. As a major stakeholder in this CCAA proceeding, the Province's concerns deserve more attention. It is particularly disappointing that the Monitor, as an officer of the Court, has not, despite requests through Monitor's counsel on the part of the Province to do so, been troubled to better inform itself of the EA Process. The Monitor continues to offer nothing more than continued unqualified acceptance of the position of the Petitioners on these topics, despite a track record replete with failures and a sequence of events which have seen many of the Province's concerns ripened to fruition.

34. It is also telling that the Petitioners – despite having hired environmental consultants and having professed to provide them with full agency in the EA Process – have not put forward any of them as witnesses to support concerns expressed by Northern Pulp regarding the EA Process and the TOR. The inference to be drawn from this is clear: there is nothing unusual or unexpected about the EA Process administered by Nova Scotia Department of Environment and Climate Change nor the TOR, which have been issued with respect to the environmental assessment of this project. The concerns that have been raised, and which are now being litigated by Northern Pulp in the section 137 appeal and the judicial review application, are strategic and are not based in a desire to advance the EA Process in any timely and efficient fashion. They are a repeated attack on the integrity of Nova Scotia's EA Process and will be vigorously opposed and are doomed to failure.

Part 5: LEGAL BASIS

Issue 1 – Extension of the Stay

35. As stated above, the Province objects to any further extension of the stay. Contrary to the assertions of the Petitioners, the Province submits that an analysis of the Petitioners' actions in the CCAA Proceedings shows that there has been no progress on the EA Process. The public relations materials that have been at the heart of the Petitioners' efforts would suggest otherwise; however, it is clear that the Petitioners have no desire to advance the EA Process necessary to re-open Mill operations, unless and until they are granted special treatment under the EA Process.

36. It must be emphasized that such special treatment will not and cannot be granted, and not because the Minister or the Province have animosity or ill intent towards Northern Pulp and the Petitioners. There is an extremely high level of public interest and scrutiny in this project and the Mill, and a large number of engaged and potentially affected stakeholders, including Pictou Landing First Nation.

37. Without environmental approval, there can be no Replacement ETF and accordingly, the Mill cannot re-start. As a result, there is no longer any plan to be advanced by the Petitioners.

38. The Province repeats what has maintained since the beginning of these proceedings: the EA Process is not subject to interference, whether through the CCAA Proceedings or otherwise. Despite the Province's position being crystal clear, the Petitioners are now suggesting that a different process can and should apply to them. Such a suggestion is not only without merit, but also confirms that the Petitioners continue to focus on the litigation and ignore making any sort of progress on advancing the EA Process. As a result, the Petitioners are not acting in good faith or with due diligence, as required for the stay to be extended.

The Test for an Extension of the Stay

39. Sections 11.02(2) and (3) of the CCAA state:[22]

> *Stays, etc. — other than initial application*

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[22] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (**Tab 6**)

> *(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,*
>
> > *(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);*
> >
> > *(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and*
> >
> > *(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.*
>
> *Burden of proof on application*
>
> *(3) The court shall not make the order unless*
>
> > *(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and*
> >
> > *(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.*

40. Lloyd Houlden, Geoffrey Morawetz & Janis P. Sarra, in "The 2021-2022 Annotated Bankruptcy and Insolvency Act", state the following:[23]

> *An extension of a stay should only be granted in furtherance of the CCAA's fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors. Other factors to be considered on an application for a stay include the debtor's progress during the previous stay period toward a restructuring; whether the creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension.*

41. In *Rescue! The Companies' Creditors Arrangement Act*, Dr. Janis Sarra explains further at page 77: [24]

> *The British Columbia Supreme Court has held that the debtor corporation has an obligation to demonstrate measurable and*

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[23] Lloyd Houlden, Geoffrey Morawetz & Janis P. Sarra, "*The 2021-2022 Annotated Bankruptcy and Insolvency Act*", Thomson Reuters, (N§64, p.1471) (**Tab 8**)

[24] *Rescue! The Companies' Creditors Arrangement Act* (2d ed (Toronto: Thompson Reuters Canada, 2013)) ["*Rescue!*"] (**Tab 9**) at p. 77

> *substantive progress towards a plan if an extension is to be granted, and the court will also consider the economic impact on stakeholders and members of the surrounding community. Thus, even where the exercise of authority to extend the stay period is not as constrained by express statutory requirements as it is in the sanctioning of the plan, there is a substantial degree of certainty in the tests applied to applications for an extension. As with the initial stay order, the extension of a stay is only a temporary suspension of creditor's rights.*
>
> *…*
>
> *All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally.*
>
> *…*
>
> *[…] the applicants must establish that they have met the test set out in s.11.02(3), specifically, whether circumstances exist that make the order appropriate in advancing the policy objectives of the CCAA, and whether the applicant has acted, and is acting, in good faith and with due diligence.*
>
> [Emphasis added]

42. Dr. Sarra further states at p. 84:[25]

> *[T]he courts will exercise their discretion not to extend the stay where they find no evidence of progress being made in the development of a plan acceptable to creditors, or where they conclude that there is concern that the stay and interim financing are being used as a means to delay inevitable liquidation or where there is a lack of confidence in the governance of the debtor corporation.*

43. Over the course of these CCAA proceedings, the concerns raised by the Province over the progress of the EA Process have been minimized or outright ignored. The Petitioners and the Monitor talk about milestones in the EA Process, but neither have informed this Court that the assumptions underlying the milestones are unachievable and that the Petitioners have focused on challenging the EA Process, rather than complying with the *EA Regulations* in the Province of Nova Scotia.

44. As identified by the Province in the April 22, 2021 hearing, Northern Pulp based its schedule on the Replacement ETF being designated a Class I Project, when it was

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[25] *Rescue!* at p. 84

foreseeable it would be designated a Class II Project. The Province also pointed out that the schedule did not take into account the need for an industrial approval. The Province further pointed out in the October 2021 hearing that the TOR are not likely to include specified limits for effluent and air emissions. Now, in the current application, which is focused more upon the challenge to the TOR than the advancement of the EA Process, Northern Pulp has put forward a schedule that is unrealistically premised upon its success in challenging the TOR and achieving firm target limits, a process that results in concurrent issuance of an environmental assessment and industrial approvals, and modifications to the TOR and the review process. Northern Pulp has indicated that failure to achieve any of these objectives will have schedule consequences, which are not projected.[26]

45. Courts have refused to grant extensions to the stay of proceedings in other matters – particularly in circumstances where there is no chance of a successful plan or restructuring being advanced.

46. In *Re Scanwood Canada Ltd.*[27], the Court stated as follows at paragraph 18:

> *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: ... The B.C. Court of Appeal said that CCAA orders should only be made if there is a reasonable prospect of a successful restructuring. ... 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.*

47. In *Cliffs Over Maple Bay Investments Ltd. v Fisgard Capital Corp.*[28], the appellants, Fisgard Capital Corp., appealed an order by which the chambers judge extended the stay of proceedings that had been granted to the debtor company. The debtor company was in the process of developing a 300-acre site.

48. The Court of Appeal explained that a Court should only grant a stay of proceedings in furtherance of the CCAA's fundamental purpose, to "facilitate compromises and

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[26] Affidavit No. 12 of Bruce Chapman, para 26

[27] *Re Scanwood Canada Ltd*, 2011 NSSC 306 (**Tab 3**)

[28] *Cliffs Over Maple Bay Investments Ltd. v Fisgard Capital Corp.,* 2008 BCCA 327 ["*Cliffs Over Maple Bay*"] (**Tab 2**)

arrangements between companies and their creditors" (para 27). The Court further quoted at paras 28 and 29:

> *[28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in Re United Used Auto & Truck Parts Ltd., 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is A.G. Can. v. A.G. Que.(sub. nom. Reference re Companies' Creditors Arrangement Act), 1934 CanLII 72 (SCC), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:*
>
> > *. . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. Ex facie it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.*
> >
> > *The legislation is intended to have wide scope and 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.*
>
> *[29] The second decision is Hongkong Bank v. Chef Ready Foods (1990), 1990 CanLII 529 (BC CA), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315-16, where Gibbs J.A. said the following:*
>
> > *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. ll.*

49. Ultimately, the debtor company did not express any intention to propose an arrangement or compromise to its creditors before embarking on its restructuring plan, though it did

describe its proposed restructuring plan in its petition commencing the CCAA proceeding. The Court concluded at para 38:

> *[38] … The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.*

50. The Petitioners have failed to advance the EA Process. They have had notice that a Replacement ETF would eventually be required since 2008, and a statutorily imposed 5-year deadline with the passage of the *Boat Harbour Act* since 2015 and yet, the Petitioners have done very little to advance the EA Process, other than repeatedly attack the process, despite having years and funding to do so.

51. The CCAA Proceedings are no longer being employed by the Petitioners to advance the EA Process – the proceedings are exclusively being used to pursue litigation under the guise of restructuring. There is no hope that a successful restructuring plan will be advanced. The environmental process will not be amended to convenience the Petitioners.

52. The CCAA Proceedings have become a way for the Petitioners to subvert all inconveniences placed on them, either from the environmental process or the legal claim for damages in Nova Scotia statutorily barred since 2015, by seeking relief from this Court as purported restructuring. There is no risk to the Petitioners, as the litigation costs are being paid through the DIP Financing, continuing to further subordinate the security of the Province.

53. There is no restructuring in these CCAA Proceedings. There is no hope that the Petitioners will advance an acceptable plan of compromise. The continuation of the CCAA Proceedings will continue to advance the singular interests of the Petitioners and this is not the purpose of the CCAA.

54. The Province submits that the request for the extension of the stay be denied. The Province recognizes that should the stay not be extended, there are procedural decisions to be made; however, the first decision will belong to the DIP lenders as to how to proceed.

Issue 2 – The DIP Financing

55. The Province submits that this Court is not required to consider the Petitioners' request for additional DIP Financing, regardless of the ultimate determination on the stay extension.

56. As set out in the Petitioners' material, the Petitioners have failed to demonstrate the need for an additional $8 million in funding. The Province repeats submissions it has previously raised, in that the request for DIP financing does not further the purposes of the CCAA.

57. In *United Used Auto & Truck Parts*[29], the Court denied an application for DIP financing as, in the Court's view, it was not critical for the business to continue to operate or for the debtors to successfully restructure their affairs (para. 29). Further, the Court was not sufficiently confident in the cash flow statement provided by the debtors such that the Court could conclude that the benefit of the DIP financing clearly outweighed the potential prejudice to the secured lenders (para. 29).

58. In *Cliffs Over Maple Bay,* the debtor was the developer of a 300 acre site intended to include residential units, a golf course and a hotel. The debtor obtained protection under the CCAA and subsequently sought an extension of the stay of proceedings together with approval of financing that would permit it to complete material parts of the development. The debtor believed that the proceeds generated from the sale of the completed units would be sufficient to fund the remaining portions of the development and that, if the development were completed, there would be sufficient sale proceeds to satisfy all of the debtor's obligations. The debtor's creditors generally opposed the motion and sought to have initial stay set aside and a receiver appointed. The chambers judge granted the debtor's application and dismissed the creditor's application, however the creditors appealed. The British Columbia Court of Appeal allowed the appeal, denying the DIP financing and terminating the stay of proceedings under the CCAA. In reversing the chambers judge's decision, the Court held that access to the remedies under the CCAA is contingent upon the requested relief furthering fundamental purposes of the CCAA:

> *34 In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the CCAA proceeding:*

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[29] *United Used Auto & Truck Parts,* 1999 CarswellBC 2673 (**Tab 5**)

> *47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:*
>
> *(a) securing sufficient funds to complete Phase 2 and 3;*
>
> *(b) securing access to water for the irrigation system of the golf course; and*
>
> *(c) finishing the construction of the golf course.*
>
> *48 Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1-3, will be sufficient to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.*

35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the CCAA. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

36 Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

37 The failure of the chambers judge to consider the fundamental purpose of the CCAA and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the CCAA should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or

> *compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.*
>
> *38 I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.*
>
> [Emphasis added]

59. In *Tuan Development Inc., Re*[30], the debtor was the owner of unfinished resort development. During CCAA proceedings, the primary creditor of the debtor agreed to provide to fund the continued building of the project; however, subsequent to the approval of the financing, a fire destroyed the main lodge, which constituted a significant portion of the resort, and it was unclear the extent the loss would be covered by insurance. The debtor then proposed a second DIP financing arrangement to be used to discharge first DIP facility and to finance completion of a portion of the resort and, if necessary, to finance the rebuilding of the main lodge if not covered by insurance. The debtor contended that that value of the development would be maximized by the completion of the unfinished units and the lodge, and that by granting the DIP lender priority over its primary secured creditor in order to complete the phase one units and rebuild the lodge, the position of the secured creditor would not be impaired. The secured creditor opposed the second DIP financing, arguing, among other things, that what was proposed was not really DIP financing but was, in effect, a forced restructuring.

60. The Court noted that the proposed plan of arrangement, should the DIP financing go ahead, included: (i) completion of the phase one units and reconstruction of the lodge; (ii) repayment of part of the existing DIP financing; (iii) payment of the new DIP financing; (iv) payment of the primary secured creditor's mortgages in part; and (v) refinancing for the balance owing to the primary secured creditor and some form of arrangement with the

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[30] *Tuan Development Inc., Re*, 2007 BCSC 1827 (**Tab 4**)

debtor's third mortgagee and the unsecured creditors (para. 31). While the Court noted that the denial of DIP financing would effectively bring the restructuring proceedings to an end (para. 30), the Court agreed with the primary secured creditor that the proposed second DIP financing went beyond the scope of appropriate DIP financing in the circumstances:

> *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.*
>
> [Emphasis added]

61. The Court further considered whether, on the evidence before it, there was a reasonable chance of success of the restructuring given the significant risk the financing would impose on the primary secured creditor, and continued as follows:

> *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.*
>
> [Emphasis added]

62. The Province submits that the request for additional DIP financing is the Applicants' plan under these CCAA proceedings. As was the case in *Cliffs Over Maple Bay,* what the Applicants are endeavouring to accomplish in the circumstances is to freeze the rights of all their creditors while they neglect the EA Process, other than seeking to amend the environmental legislation and regulations. The additional DIP financing will only allow the Applicants (and their shareholders) to protect their interests by prioritizing funding for funding whatever litigation the Petitioners decide to pursue.

Issue 3 – Relief Sought in relation to the Amendment to the *Boat Harbour Act*

63. The Province strongly opposes the basis of the application and the relief sought and will make representations as necessary, at a future date. This will include, if required and the stay is extended, an application by the Province to permit it to lift the stay so it can file and schedule a summary judgment motion on the pleadings in the legal action currently before the Nova Scotia Supreme Court, to formally dismiss the claim pursuant to the valid and constitutional statutory bar against damages contained within the original and now amended *Boat Harbour Act.*[31]

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit of Duff Montgomerie sworn July 22, 2020 (already on file with the Court)
2. Affidavit of Peter Oram sworn October 26, 2021 (already on file with the Court)
3. Affidavit of Christine Sisneros sworn April 28, 2022

The Application Respondent estimates that the application will not take more than the allotted time.

[31] Affidavit of Christine Sisneros sworn April 28, 2022, Exhibit "C"

[X] The Application Respondent has not filed in this proceeding a document that contains an address for service. The Application Respondent's ADDRESS FOR SERVICE is:

Stewart McKelvey
600-1741 Lower Water Street
P.O. Box 997
Halifax, NS B3J 2X2
Tel: (902) 420-3200
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DATED: April 28, 2022

Robert G. Grant, Q.C.
Maurice P. Chiasson, Q.C
Sean Foreman, Q.C.
Counsel for the Province

Appendix A – List of Authorities

Tab	Authority
1.	*1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359
2.	*Cliffs Over Maple Bay Investments Ltd. v Fisgard Capital Corp.,* 2008 BCCA 327
3.	*Re Scanwood Canada Ltd*, 2011 NSSC 306
4.	*Tuan Development Inc., Re*, 2007 BCSC 1827
5.	*United Used Auto & Truck Parts, Re,* 1999 CarswellBC 2673, 1999 CanLII 5374 (BC SC)
	Legislation
6.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
7.	*Environment Act*, SNS 1994-95, c 1
	Secondary Sources
8.	Lloyd Houlden, Geoffrey Morawetz & Janis P. Sarra, "*The 2021-2022 Annotated Bankruptcy and Insolvency Act*", Thomson Reuters
9.	*Rescue! The Companies' Creditors Arrangement Act* (2d ed (Toronto: Thompson Reuters Canada, 2013))

TAB 1

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1057863 B.C. Ltd. (Re),*
2020 BCSC 1359

Date: 20200914
Docket: S206189
Registry: Vancouver

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

and

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

and

In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	S. Collins W.W. MacLeod J. Roberts
Counsel for Province of Nova Scotia:	R.G. Grant, Q.C. M.P. Chiasson, Q.C.
Counsel for Paper Excellence Canada Holdings Corporation:	P.J. Reardon
Counsel for the Monitor, Ernst & Young Inc.:	E. Pillon L. Nicholson

Counsel for Unifor, Local 440:	R.A. Pink, QC
Counsel Pacific Harbor North American Resources Ltd, as the proposed interim lender:	B. Brammall
Counsel for Atlas Holdings LLC and Blue Wolf Capital Management, LLC:	N. MacParland
Counsel for Envirosystems Inc., dba Terrapure Environmental:	H. P. Whiteley
Counsel for Pictou Landing First Nation:	B. Hebert
Counsel for Nova Scotia Superintendent of Pensions:	S. Choo
Place and Date of Hearing:	Vancouver, B.C. July 31 and August 5, 2020
Place and Date of Ruling with Written Reasons to Follow:	Vancouver, B.C. August 6, 2020
Place and Date of Written Reasons:	Vancouver, B.C. September 14, 2020

INTRODUCTION

[1] On June 17, 2020, the petitioners filed these proceedings seeking a restructuring solution to their financial problems, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] The petitioner, 1057863 B.C. Ltd., a British Columbia company, is the parent company of the other petitioners. The corporate group also includes various limited partnerships that are not named petitioners. Together, the group operates a pulp mill in Pictou County, Nova Scotia (the "Pulp Mill"). They also conduct related forestry activities in the Province of Nova Scotia to support those operations. I will refer to the group collectively as the "Petitioners".

[3] On January 31, 2020, the Petitioners were required to shut down the Pulp Mill, resulting in a complete cessation of its business activities. At the centre of the reasons for the shut down is an Effluent Treatment Facility ("ETF") that became inoperable after that date. The ETF is source of considerable controversy with certain of the stakeholders.

[4] Without the ability to use the ETF, the Pulp Mill could not operate.

[5] The Petitioners describe that the shut down of the Pulp Mill had a "devastating effect" on them and their partners. Indeed, most employees were laid off after the shut down.

[6] On June 19, 2020, the Petitioners sought and the Court granted an initial order under the *CCAA* (the "Initial Order"). The Petitioners' stated intention at that time was to continue to ensure the orderly hibernation, care and maintenance of the Pulp Mill while they investigated and assessed various restructuring options. The Initial Order granted was what is colloquially termed a "skinny" order, particularly in light of new strictures under s. 11.001 of the *CCAA* that limit the initial relief to what is reasonably necessary during the initial stay period.

[7] In the Initial Order, I appointed Ernst & Young Inc. as Monitor. I granted a Director's Charge limited to $500,000. I extended the stay of proceedings to the limited partnerships, as appropriate in these circumstances: *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37. Finally, I granted an Administration Charge of $500,000. At the time of the initial hearing, the Petitioners indicated that it was their intention to come back to the Court to seek approval of interim financing and other relief, including approval of a Key Employee Retention Plan ("KERP") and authority to pay certain pre-filing amounts.

[8] Since June 19, 2020, I have extended the stay a number of times to allow further discussions between the Petitioners and their stakeholders toward a possible resolution, including with the Province of Nova Scotia ("Nova Scotia"), their major secured creditor. The Monitor supported those extensions, as set out in its first report to the Court dated July 2, 2020 (the "First Report").

[9] Unfortunately, considerable disagreement remains as to whether this proceeding should continue and if so, on what terms.

[10] This hearing was essentially the comeback hearing. The Petitioners sought an Amended and Restated Initial Order ("ARIO") to incorporate the original relief in the Initial Order, with some amendments; significantly, they sought approval for interim financing that would allow their restructuring activities to continue.

[11] On August 6, 2020, I granted an ARIO that incorporated much of the relief sought. In addition, I granted the order sought by Unifor, Local 440 ("Unifor") for representative status in this proceeding. These reasons follow from my decisions at that time.

BACKGROUND

[12] The Pulp Mill has a considerable history leading to the current and fraught relationship between the owners of the Pulp Mill and other stakeholders, being Nova Scotia in particular. I will only provide a very high-level description of that history as is relevant to this application.

[13] The Pulp Mill has been in operation since 1967. It is located on Abercrombie Point in Pictou County, NS. The process of producing pulp at the Pulp Mill creates wastewater, and it is necessary to treat that wastewater before discharge. Since 1972, the treatment of the wastewater was done at the ETF, which is located near "Boat Harbour". Nova Scotia owns the ETF and has leased it to the Pulp Mill's owners over the years. As stated, the Pulp Mill cannot operate without treating the wastewater at the ETF.

[14] The Pulp Mill is adjacent to reserve lands of the Pictou Landing First Nation ("PLFN"), a Mi'kmaq First Nation.

[15] In 2011, Paper Excellence Canada Holdings Corporation ("PEC") directly or indirectly acquired ownership of the Petitioners. PEC describes having spent more than $118 million in respect of the operations of the Pulp Mill and related activities.

[16] Events leading to the Petitioners' financial difficulties include:

a) In 2014, there was an effluent leak in the pipeline from the Pulp Mill to the ETF; that event led to PLFN members blockading the area;

b) In 2015, Nova Scotia passed the *Boat Harbour Act*, S.N.S. 2015, c. 4 (the "*BHAct*"). The *BHAct* required the Petitioners cease using the ETF for the reception and treatment of effluent from the Pulp Mill by January 31, 2020. The deadline set in this legislation was contrary to the terms of the lease between Nova Scotia and the Pulp Mill (entered into prior to PEC's involvement) that contemplated use of the ETF until December 31, 2030;

c) The Petitioners set about planning for a replacement ETF ("RETF") that would allow the Pulp Mill's operations to continue past January 2020. The Petitioners have spent considerable monies to advance the project, with financial and other contributions by Nova Scotia;

d) The Petitioners' efforts to establish the RETF involved, understandably, considerable input and agreement from Nova Scotia under its environmental and regulatory process and requirements;

e) The RETF approval process did not go smoothly, at least from the Petitioners' point of view. In part, the process took place in the face of litigation between Nova Scotia and PLFN relating to Nova Scotia's decisions in relation to the Petitioners and the Pulp Mill;

f) The Petitioners say that they told Nova Scotia that it was not possible to complete the RETF by January 2020. Nova Scotia says that they never gave the Petitioners any inkling that a possible extension would be afforded to them;

g) Matters came to a head somewhat in late December 2019. Nova Scotia's Minister of Environment ("MOE") determined that a further environmental assessment report ("EAR") was required for the RETF. Almost immediately thereafter, Nova Scotia gave formal notice to the Petitioners that no extension under the *BHAct* was forthcoming;

h) In January 2020, the Petitioners filed a judicial review proceeding challenging the MOE's requirement to file a further EAR (the "Judicial Review");

i) The Pulp Mill ceased operations on January 12, 2020;

j) Commencing January 29, 2020, the MOE issued various orders to the Petitioners in respect of the orderly shutdown of the Pulp Mill. The MOE's May 14, 2020 order was appealed to the Supreme Court of Nova Scotia (the "Appeal"); and

k) The Petitioners have clearly signalled to Nova Scotia that they are seeking financial redress from the Province arising from the passage and implementation of the *BHAct* (the "BH Claim"). As matters stand,

> the Judicial Review and Appeal are in abeyance, along with the Petitioners' consideration of the BH Claim against Nova Scotia.

[17] The primary debt owed by the Petitioners is to PEC and Nova Scotia. The Petitioners owe PEC approximately $213 million; $30 million of that amount is secured against the Petitioners' assets. The Petitioners owe Nova Scotia approximately $85 million, which has a first ranking secured position against the assets. The Petitioners also owe Nova Scotia $1.3 million on an unsecured basis.

[18] In addition to unsecured amounts owed to PEC, Nova Scotia and employees, the Petitioners owe approximately $4.3 million to trade creditors and owners of the timberlands that they harvested.

[19] Before the shutdown of the Pulp Mill, the Petitioners employed approximately 200 unionized persons, represented by Unifor. In addition, there were approximately 135 other full-time employees, including salaried personnel. The Petitioners also retained approximately 600 contractors on a full or part-time basis.

[20] As of June 2020, approximately 32 employees and 18 seasonal part-time employees remained. The rest of the employees were laid off or terminated.

[21] Considered more broadly, the impact of the shutdown of the Pulp Mill has had far-reaching and considerable negative consequences for the stakeholders.

[22] The Monitor confirms in the First Report that the Petitioners contributed more than $279 million annually to the Nova Scotia economy, arising from purchases of goods and services. The Petitioners maintained a supply chain of approximately 1,379 companies who supported the operations of the Pulp Mill. Finally, the Pulp Mill provided employment for an estimated 2,679 full-time equivalent jobs, generating an estimated $38 million annually in provincial and federal taxes.

INTERIM FINANCING

[23] The Petitioners seek court approval of an interim financing term sheet (the "Term Sheet") for a financing facility (the "Interim Lending Facility") between the

Petitioners, as borrowers, PEC, as arranger and agent, and PEC together with Pacific Harbor North American Resources Ltd., as lenders (collectively, the "Interim Lenders").

[24] The Interim Lending Facility contemplates a maximum principal amount of $50 million. However, the Petitioners presently only seek approval of an initial advance of $15 million and a corresponding charge in favour of the Interim Lenders over the Petitioners' assets in first ranking priority (the "Interim Financing Charge"). The stated purpose for these initial funds is to allow payment of the Petitioners' expenses to December 2020. If the Term Sheet is approved, the Petitioners intend to make later applications for court approval to access further draws.

[25] In support of their request, the Petitioners prepared a budget to detail the uses of the $50 million (the "Financing Budget"). The Financing Budget indicates the projected financing requirements of the Petitioners to June 2022. As stated by Bruce Chapman, the general manager of the Petitioners and PEC, those projections were based on a "successful outcome" of these proceedings, said to include: the successful shutdown of the ETF; hibernation of the Pulp Mill; identifying, designing, and obtaining approvals for the RETF; and, negotiating contributions and financing associated with those activities.

[26] After the Petitioners' introduced the Financing Budget as part of this application, Nova Scotia raised a variety of objections. Nova Scotia's response at para. 2, filed in opposition to the application, sets out those objections:

> (a) there is no restructuring plan being pursued by the Applicants;
>
> (b) the DIP financing will be used to fund the Applicants' pre-filing obligations;
>
> (c) the DIP financing will be an inappropriate re-prioritization of security;
>
> (d) the cash flow statements are not supported by appropriate documentation; and
>
> (e) the Applicants have not engaged the Province in any meaningful way, other than to continue to pursue their agenda for obtaining the DIP financing to fund existing obligations.

[27] The Monitor has brought considerable balance and objectivity forward in terms of assisting the stakeholders in understanding the Financing Budget. In particular, the Monitor has sought to address Nova Scotia's concerns in the face of significant disputes between the Petitioners and Nova Scotia.

[28] In the Monitor's second report dated July 23, 2020 (the "Second Report"), the Monitor introduced the concept of milestones. The milestones set out categories of work or activities required to move the overall restructuring toward the anticipated "success" date of June 2022. Target Completion Dates are identified in the "Milestones Schedule" at Appendix C to the Second Report, along with Evaluation Dates and the Cumulative DIP Draw required by the respective dates. This "Milestones Schedule" provides, in my view, considerable structure to the approval process and it will allow, in the future, the Court, the Monitor and the stakeholders (particularly Nova Scotia) to gauge the ongoing progress of the Petitioners' efforts.

[29] In addition, the Monitor assisted in the development of an interim budget to December 2020 (the "Interim Budget"). That document, discussed in the Monitor's Second Report and its Supplemental Report dated July 30, 2020, provides a detailed breakdown of the activities and the estimated cost of those activities under the initial draw of $15 million. Those activities and costs are:

Activity	**Activity Costs**
Boat Harbour operations and de-commissioning costs and environmental costs	$6,846,698
Mill operating costs	$1,231,650
Financing and administration costs	$407,734
Employee costs	$1,161,104
Severance and salary continuations	$2,646,498
Professional fees (includes approx. $575,000 for the Judicial Review and Appeal)	$3,481,625
TOTAL	**$15,775,308**

[30] The Monitor anticipates that, with cash on hand of approximately $4.8 million, the Petitioners will have sufficient funding through to the end of 2020 with this interim financing.

[31] Section 11.2(1) and (2) of the *CCAA* confirms the Court's jurisdiction to approve interim financing and approve a charge in priority to existing secured creditors:

> (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 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.

[32] The Supreme Court of Canada recently commented on the importance of the relief available under s. 11.2, including the granting of an interim lenders' charge. In *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 85-86, the Court confirmed that a court may exercise its discretion to approve such financing to achieve the important statutory objective under the *CCAA* of not only providing working capital, but also enabling the "preservation and realization of the value of a debtor's assets".

[33] The Court in *Callidus* also acknowledged that a court's ability to grant a charge in favour of an interim financier is often necessarily and practically the only way to secure this benefit:

> [89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies. As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors. Although super-priority charges do subordinate secured creditors' security positions to

> the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) [citations omitted].

[34] Section 11.2(4) of the *CCAA* sets out certain non-exhaustive factors to be considered by the court in deciding whether to approve interim financing and grant an interim lenders' charge:

> (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…

[35] No one factor set out in s. 11.2(4) governs or limits the Court's consideration. The exercise is necessarily one of balancing the respective interests of the debtors and its stakeholders towards ensuring, if appropriate, that the financing will assist the debtor company to obtain the "breathing room" said to be needed to hopefully achieve a restructuring acceptable to the creditors and the court: *White Birch Paper Holding Co. (Re)*, 2010 QCCS 1176, at para. 33 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49.

[36] I will discuss the factors in turn.

[37] These proceedings were filed in mid-June 2020. Despite the Petitioners' initial intentions to undertake a restructuring process to mid-2022 under the Interim Lending Facility, their ambitions have been significantly curtailed, at least in the short term. Under the present proposal, the Petitioners seek only to extend these proceedings to December 2020, when hopefully there will be further clarity about how the restructuring may proceed. This shortened period will allow the Court, the

Monitor and the stakeholders to get a sense of the Petitioners' progress toward assessing whether any further extension of the proceedings is justified.

[38] Nova Scotia submitted that, if the Court approved the interim financing and extended the stay, that stay period should only be to October 2020, when the Court could assess matters then.

[39] I would not accede to this submission. There is considerable cost and energy to bring matters forward to the Court, which may not necessarily be justified depending on the status of matters in October 2020. Rather, I accept that the financing is justified in order to allow further operations to December 2020. I have specifically ordered the Monitor to provide oversight with respect to the Petitioners' expenditures to ensure that they are consistent with the Interim Budget. In addition, I ordered that the Monitor file a formal report with the Court by no later than October 31, 2020 as to the status of the Petitioners' restructuring efforts and spending under the Interim Budget. That information will of course be available to the stakeholders. If anything arises from that report, the Monitor or any stakeholder may apply to the Court.

[40] Nova Scotia has raised, however obliquely, concerns regarding how the Petitioners' business and financial affairs will be managed during the proceedings. In my view, this largely arises from the great degree of mistrust and suspicion, if not downright animosity, that exists in the chasm that separates Nova Scotia and the Petitioners.

[41] Nova Scotia filed various affidavits in support of its opposition to this application, being those of Duff MacKay Montgomerie, Paul Bradley and Kenneth Swain. All of these affidavits were intended to provide Nova Scotia's side of the "story" and respond to Mr. Chapman's various affidavits. Mr. Chapman replied to the points raised in Nova Scotia's affidavits.

[42] Clearly, the disagreements between the Petitioners and Nova Scotia are many, and some long-standing. Two major issues relate to (a) payments made by

the Petitioners to PEC as a shareholder some years ago when monies were owed to Nova Scotia, and (b) the use of monies advanced by Nova Scotia to the Petitioners for environmental expenses under a Contribution Agreement. I only note the existence of those disputes; in my view, there is no need at this time and in these proceedings to resolve those disputes. Whether those disputes need to be resolved in the fullness of time remains to be seen.

[43] I accept that Nova Scotia's concerns give rise to some question as to the future conduct of these proceedings. However, this question is largely answered by the Monitor, who raises no concerns regarding the conduct of the Petitioners' management from the time of the Initial Order. As stated in *Pacific Shores* at para. 31, the good faith requirement to support the relief on this application relates to conduct within the proceeding, not conduct pre-existing the filing. The Monitor continues to provide oversight with respect to the Petitioners' activities.

[44] One of the major factors is whether the loan would enhance the prospect of the Petitioners making a viable compromise or arrangement with their creditors.

[45] The result of not approving this financing is stark. The shutdown of the Pulp Mill has resulted in a complete cessation of any revenue. Both Mr. Chapman and the Monitor confirm that, without the financing, the Petitioners cannot continue any restructuring efforts or even the continued hibernation of the Pulp Mill. The Monitor confirms that a lack of funding would likely result in a receivership or bankruptcy, with the usual dire result of yielding nothing for the majority of the stakeholders.

[46] A large portion of the $15 million interim financing is earmarked for what Mr. Chapman calls "critical expenses" relating to the direct and indirect expenses of the hibernation of the Pulp Mill. In its opposition, Nova Scotia does not address what would happen in the event that PEC walked away from its investment in the Petitioners and the Pulp Mill. As best I can tell, Nova Scotia seems to be ready to test PEC's resolve to determine if PEC will, as the shareholder, fund the ongoing costs itself without any interim financing and related charge.

[47] In my view, given the sensitive nature of the assets, and the potential and negative consequences particular to the environment and local population arising on a liquidation, I do not consider it is reasonable to allow a "game of chicken" to take place between Nova Scotia and PEC. It appears to be the case that even if a receivership takes place (perhaps at the behest of Nova Scotia), many of these costs would be incurred in any event: *Pacific Shores* at para. 49(f).

[48] Nova Scotia also takes issue with payment of pre-filing unsecured amounts, including amounts owed to employees and former employees, which the Petitioners seek to fund under the Financing Budget and the Interim Budget. I will address that issue separately below.

[49] Finally, Nova Scotia takes great umbrage in having an Interim Financing Charge placed ahead of its own charge when some of the funds under the Financing and Interim Budgets are to be used to some extent to advance litigation (or potential litigation) against it. Paragraph 10 of the Term Sheet provides that the purpose of the facility is in part to fund expenses associated with:

> … the evaluation, settlement or progression of claims and other legal remedies that may be available to the Borrowers and to pay transaction costs, fees and expenses [including all reasonable fees and expenses in connection with any other proceeding pursued or defended by the Borrowers relating to the Northern Pulp facility and business] …

[50] It is common ground that the "claims and other legal remedies" include the Judicial Review, the Appeal and the potential BH Claim against Nova Scotia. The estimated cost in the Interim Budget of professional fees toward those matters is approximately $575,000. Nova Scotia questions whether the Interim Financing Facility is simply to improve the Petitioners' negotiating position with Nova Scotia.

[51] The Petitioners state that they remain committed to pursuing the re-start of the Pulp Mill in an environmentally responsible manner by ultimately constructing the RETF and resuming operations. The Petitioners believe that a re-start of operations affords Nova Scotia the best opportunity to recover its secured claims for money

advanced. Nova Scotia disagrees and appears to have considered the consequences of a complete and permanent shutdown of the Pulp Mill.

[52] The Petitioners say that they have continued the litigation – and are still considering the BH Claim – against Nova Scotia only as a backstop if they are not able to resolve their outstanding claims against Nova Scotia through negotiation and settlement. As noted by the Petitioners' counsel, the rights of the Petitioners under the Judicial Review, the Appeal and the BH Claim are choses in action and part of the Petitioners' assets. In *Callidus* at para. 96, the Court recognized that funding to preserve a "litigation asset" may be appropriate if it is intended to preserve and realize upon that asset for the benefit of the stakeholders.

[53] In my view, in the overall context, the limited amount of litigation funding proposed to be spent between now and December 2020 is justified in these circumstances. If the proceedings are extended beyond that date, and further funding for that purpose is requested, the Court may revisit the matter.

[54] Another factor is the nature and value of the Petitioners' property. The Monitor sets out in the First Report that the 2019 unaudited consolidated assets of the Petitioners (at book value) was approximately $343 million. The estimated liabilities as of mid-June 2020 were approximately $311 million. By any measure, most of the value of the Petitioners' assets, particularly the Pulp Mill, will only be realized if the Pulp Mill begins operations again. That necessarily involves the establishment of the RETF.

[55] The Interim Financing Facility, as limited by the initial draw under the Interim Budget, will allow the Petitioners a short period (some five months) to show real progress toward that objective of enhancing the value of their assets. I do not agree with Nova Scotia that the Petitioners have failed to identify any restructuring plan or that the Interim Financing Facility *is* the plan. The materials before the Court clearly show a "kernel of a plan" – namely the restart of the Pulp Mill and the Petitioners' operations, all intended to alleviate the dire financial circumstances here and allow the Petitioners to fashion a way forward with the support of their creditors. The

Petitioners should be allowed some opportunity to advance their efforts to that end, if possible.

[56] Another significant factor here is whether any creditor would be materially prejudiced if the Interim Financing Charge is granted. Clearly, Nova Scotia, as the major and presently first ranking secured creditor thinks so. It is not difficult to discern that Nova Scotia faces a myriad of concerns with respect to the Petitioners and the Pulp Mill, including relating to the environment, employment of its citizens, the general welfare of the employees, obligations to the PLFN and the state of its economy.

[57] It is not my role on this application to judge how Nova Scotia has seen fit to balance its duties and obligations in this complex situation. Nova Scotia is clearly frustrated with the Petitioners, noting in particular that it has already contributed significant amounts of public money and other benefits to assist them in meeting their environmental obligations.

[58] I agree that Nova Scotia faces prejudice, although not to the degree submitted by its counsel. As stated above, it remains the case that, if a receivership occurs, a receiver would incur some of these expenses anyway. This is particularly so, with respect to the expenses (both direct and indirect) intended to protect the environment and the citizens of Pictou County in the Pulp Mill hibernation process.

[59] I have no concerns that Nova Scotia is anything but committed to the well-being of the environment and its citizens, particularly those living near the Pulp Mill, such as members of the PLFN. I acknowledge Nova Scotia's concerns, but they must be balanced against other stakeholder interests and prejudice faced by those stakeholders if the financing is not approved: *Pacific Shores* at para. 49.

[60] The final factor is whether the monitor supports the financing. That is clearly the case here. As stated above, the Monitor has attempt to bridge the gap between Nova Scotia's concerns and the objectives of the Petitioners. It has succeeded to some degree.

[61] The Monitor has carefully analyzed the proposed financing terms. In its various reports, the Monitor has provided a detailed summary of the key elements of the Term Sheet, including specific terms that Nova Scotia questioned (including those provisions relating to payment-in-kind terms, change of control, right of first refusal and right to match, a prohibition on voluntary provisions and certain default terms). In light of submissions made by the Petitioners, and comments of the Monitor, I have no concerns regarding those matters.

[62] Nova Scotia also raised an issue with respect to possible action by the Interim Lenders if there is an Event of Default (para. 23 of the Term Sheet). Again, I had no concerns in that respect as those were normal terms. I ordered an amendment to the draft ARIO to ensure that it was consistent with the provisions in the Term Sheet.

[63] The Monitor recommends approval of the Interim Financing Facility, limited to the initial draw under the Interim Budget. I expect that the Monitor will work closely with the Petitioners in the next few months to ensure that proper expenditures are made in accordance with the Interim Budget. Such oversight will allow adequate protection to the stakeholders in this critical interim period while the Petitioners explore what options are available to them in the future with or without certain stakeholder support.

[64] I conclude that the Interim Financing Facility is reasonable and appropriate in the circumstances. I approve the interim draw of $15 million, as sought. This financing will provide a viable short term path forward to allow the Petitioners to explore restructuring options, all for the benefit of the entire large stakeholder group, including Nova Scotia, the employees (both past and present) and members of the PLFN, all of whom were represented on this application.

[65] As noted by Petitioners' counsel, no other viable alternatives are available to avoid the significant and negative social, economic and environmental consequences if the Petitioners do not receive the funding they need to advance their restructuring plan.

SEVERANCE / SALARY CONTINUATION PAYMENTS

[66] The Initial Order provided that the Petitioners could pay certain employee expenses incurred prior to that date:

> 4. The Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:
>
> (a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred …

[67] The pre-filing unsecured employee obligations fall into two categories:

a) 191 unionized employees were terminated before filing (or expect to be terminated shortly), trigging severance obligations under Unifor's collective bargaining agreements (the "Severance Obligations"). Before the filing, approximately half of that amount ($1.65 million) was paid, leaving approximately $1.94 million to be paid (some already due and the rest to be funded into July 2021); and

b) Between January and June 2020, 45 salaried employees were terminated. In that event, their employment agreements require payment of salary continuance (the "Salary Continuance"). Before the filing, $3.3 million of Salary Continuance was paid. Under the terms of the Initial Order, $370,000 was paid to these employees. The remaining estimated amount of Salary Continuance budgeted to be paid from August 2020 to September 2024 is approximately $3.5 million.

[68] The Interim Budget provides for payment of the Severance Obligations and the Salary Continuance, together with benefits to retired employees. The Petitioners seek an order allowing them to make such payments, estimated in total at $2.9 million to December 2020.

[69] Unifor understandably supports the Petitioners' request to make pre-filing payments of the Severance Obligations in accordance with the Interim Budget.

[70] There is no dispute between the parties that I have the jurisdiction to authorize payment of pre-filing unsecured obligations. Section 11 of the *CCAA* provides a broad discretion to the Court to make any order as may be "appropriate in the circumstances". The more difficult question is whether I *should* exercise my discretion to allow such payments here.

[71] Nova Scotia disputes that these payments are appropriate in the circumstances. The Monitor presents, appropriately, a neutral exposition of the relevant circumstances, without recommendation.

[72] The Petitioners refer to *Cinram International Inc. (Re)*, 2012 ONSC 3767. In *Cinram*, the Court authorized payments to certain employees, including any obligations that arose prior to the filing. However, as noted at paras. 23 and 43, the Court did so in the context of Cinram's "ongoing business operations" and with respect to the "active employment of employees in the ordinary course".

[73] In this case, there are no ongoing business operations as discussed in *Cinram*; in addition, the payments are to be made to *former* employees who were terminated before the filing.

[74] The circumstances considered in *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 are also unhelpful to the Petitioners. At paras. 24-25, the Court's discussion of payment of pre-filing employee claims took place within the context of "critical suppliers" and the need to ensure continued delivery of necessary goods and services for the debtor's operations and to support the restructuring. The Court accepted the recommendation of the proposed monitor that pre and post-filing "payroll and benefits" be paid. The monitor's reasons included that many of the relevant payments would have priority status and/or give rise to director liability if not paid. Further, in the proposed monitor's experience, it is common to pay pre-filing and post-filing obligations to employees in the normal course, to ensure continued

and uninterrupted service by employees. Importantly, the debtor had sufficient cash on hand to pay these expenses, which is not the case here.

[75] The reasons advanced by the Petitioners in asserting that these payments are "critical" are much more ephemeral than the reasons advanced in *JTI-Macdonald*. The Petitioners argue that allowing payment of the pre-filing unsecured employee amounts (in addition to ongoing employee expenses) is necessary to:

a) preserve the Petitioners' going concern value;

b) ensure that the other activities provided for in the Interim Financing Budget can be carried out by the Petitioners' remaining employees;

c) mitigate the adverse effects of the Pulp Mill's closure in the communities in which the Petitioners operate. The Petitioners emphasize the significant negative consequences suffered by the lay-offs and terminations, particularly in the face of the COVID-19 pandemic;

d) preserve their relationships with the employees who are no longer working, many of whom are expected to be called upon to return to employment at the Pulp Mill in the future if the construction of the RETF is undertaken; and

e) preserve their relationship with Unifor. The Petitioners state that unions as a whole will inevitably be present in some form if the Petitioners resume operations. They say that preserving an effective working relationship with Unifor, consistent with Unifor's collective bargaining agreements, will provide an additional benefit to them, both during and after these proceedings.

[76] The Petitioners also reiterate that payment of these pre-filing employee amounts will signal their commitment to the stakeholders to develop and implement

a plan to recommence the Pulp Mill's operations and in doing so, alleviate financial hardship within what they describe is a critical stakeholder group.

[77] I appreciate that court approval to allow payment to employees, even for pre-filing unsecured amounts, is often granted. When a debtor is conducting ongoing operations during a proceeding, it will often be necessary to ensure that employment relationships are not disrupted so as to hinder the restructuring efforts.

[78] However, the starting point for this discussion continues to be that *all* pre-filing unsecured amounts are not to be paid in a *CCAA* proceeding, even if owed to employees. All pre-filing creditors are covered under the general stay of proceedings; any payment is the exception to the general rule. That starting point is intended to preserve the *status quo* between creditors of the debtor pending the debtor advancing a fair and equitable proposal at the end of the day in respect of all of its obligations.

[79] At that later stage, it is generally anticipated that unsecured creditors will be treated fairly and equitably in any plan of arrangement, usually by way of a *pro rata* payment, subject to certain minimum requirements with respect to employee claims, as set out in s. 6(5) of the *CCAA*.

[80] Two Ontario decisions, cited by Nova Scotia, are of assistance.

[81] The first decision is *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558 (Ont. S.C.J.) aff'd *Sproule v. Nortel Networks Corp.*, 2009 ONCA 833. In the lower court, Justice Morawetz (as he then was) was addressing requests from the union and former employees for payment of their pre-filing claims for retirement allowance payments, voluntary retirement options, vacation pay, benefit options and termination and severance pay.

[82] At para. 51 of *Nortel*, Morawetz J. noted that it was necessary to take into account the overall financial picture of the applicants, who opposed the applications. There, as here, the debtor was not in a position to pay their obligations to all creditors and a number of defaults were present, including those relating to the

unionized and former employees. At para. 57, Morawetz J. described that *Nortel* was not carrying on "business as usual", which is also the case here. The Court dismissed the application stating:

> [60] An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.
>
> . . .
>
> [80] At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

[83] In *Sproule*, the Court of Appeal agreed that the stay applied to these types of claims:

> [39] The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

[84] The Court in *Nortel* asked the monitor to investigate whether an interim payment might be made to the employees in any event. That request was made, however, in very different circumstances where there were no significant secured creditors and a distribution to the unsecured creditors seemed likely in any event:

> [87] However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

[85] In *Windsor Machine & Stamping Ltd. (Re)*, [2009] O.J. No. 3195 (Ont. S.C.J.), the union brought an application to require the debtors to pay termination and

severance pay owing as a result of post-filing terminations. The major secured creditor objected. Justice Morawetz similarly rejected this application, citing the priority of that secured creditor:

> [43] First, the priority of secured creditors must, in my view, be recognized. Counsel to the Union made the submission that the Applicants and the Bank are advancing a priority argument that may be relevant in a bankruptcy or receivership proceeding but not in a CCAA proceeding, as there is no priority distribution scheme in the CCAA. In my view this submission is misguided. Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents secured creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement proceedings should not result in an enhanced position for unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the *status quo* during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.
>
> [44] Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *Re 1231640 Ontario Inc. (State Group)* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.
>
> [45] Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

> [46] In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank pari passu with other unsecured creditors and subordinate to the interests of the secured creditors. (See also *Indalex Limited*, [2009] O.J. No. 3165, CV-09-8122-00CL – July 24, 2009 on this point.)
>
> [47] I acknowledge that the situation facing the employees is unfortunate and that in *Nortel*, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.

[86] The circumstances here are more resonant with the facts discussed in *Nortel* and *Windsor Machine*. Given that this proceeding is very much in its early days, I cannot conclude that a distribution to pre-filing unsecured claims (including to the employees) is likely at the end of the day. There are no ongoing operations; there is no cash with which to pay these amounts.

[87] Significantly, Nova Scotia, the major secured creditor, whose security would be primed by these payments, objects. In the absence of any objection by Nova Scotia, and with the general support of the Petitioners and the stakeholders appearing on this application, I might have come to a different conclusion.

[88] The Petitioners also argue that the Severance Obligations constitute inchoate priority charges under provisions of the Nova Scotia *Labour Standards Code*, R.S.N.S. 1989, c. 246 (the "*Code*"). They argue that these provisions would be triggered if an employee makes a successful claim to the Nova Scotia Labour Board (the "Board") and the Board issues an order. They refer to s. 88 of the *Code* that provides that amounts in an order are a debt due to the Board secured by a lien or mortgage that has priority over all other liens, charges, or mortgages. They also refer to ss. 90 and 90A of the *Code* with respect to potential actions by the Board. However, any such actions are currently stayed under the Initial Order, just as they

are with respect to any action that might have been taken by Nova Scotia as a secured creditor.

[89] This is an unpersuasive argument by the Petitioners in any event. It is well taken that a province cannot create priorities that alter the federal scheme of distribution in the event of a bankruptcy: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 86-87, 136: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Given that these proceedings are in their nascent days, it is anyone's guess on the outcome. A bankruptcy remains a possibility, however slight in the Petitioners' minds.

[90] I accept, without hesitation, that these hard working and dedicated employees will meet my decision with a great deal of disappointment, if not dismay. The reasons for the closure and shutdown are completely divorced from their commitment to their jobs. I also appreciate that this vulnerable group of stakeholders will suffer arising from my decision. I say this knowing that the Petitioners represented – or at least previously represented – a significant employer in the province and in Pictou County, particularly. I expect that many of these lost jobs, no doubt some with expertise involving work at pulp mills, cannot be easily replaced, if at all.

[91] The Petitioners have emphasized the need to maintain the goodwill of their workforce in the event that the RETF is constructed and operations recommence. Whether or not the Petitioners will achieve that objective is simply unknown at this time.

[92] Unfortunately, I conclude that there is no principled basis upon which I could exercise my discretion to grant this relief. The Petitioners have not advanced a persuasive case toward authorizing such payments in such nebulous circumstances, particularly when it would amount to prioritizing those unsecured creditors over the existing security of Nova Scotia and where Nova Scotia objects.

TERRAPURE

[93] Before and after the *CCAA* filing, Envirosystems Inc., dba Terrapure Environmental ("Terrapure") provided services to the Petitioners relating to the removal of wastewater. The pre-filing debt owed to Terrapure for its services is approximately $1.1 million.

[94] The Petitioners do not seek any relief in favour of Terrapure, such as a declaration that it is a "critical supplier". Indeed, by the date of this application, the Petitioners had found an alternate means to remove the wastewater and they advised that it is unlikely they will need any further services from Terrapure.

[95] Terrapure's position on this application is to support the approval of the Interim Financing Facility and the payment of the unsecured pre-filing claims of the employees, but only if Terrapure is similarly paid its pre-filing unsecured claim.

[96] The general discussion above regarding the general application of the stay of proceedings with respect to unsecured creditors equally applies to Terrapure. Nova Scotia similarly objects to any payment to Terrapure, since the means to make any such payment could only arise from the Interim Financing Facility.

[97] In my view, there is no basis to prefer Terrapure in this case by allowing payment of its pre-filing unsecured claim. All claims by unsecured creditors are equally covered by the stay under the Initial Order, including the claims by employees, as discussed above, and Terrapure.

[98] In the event that the Court did not approve payment of its pre-filing debt, Terrapure requested the addition of a term in the ARIO to confirm that it has no further obligation to provide services to the Petitioners. No one raised any objections to that provision and I grant that relief.

KEY EMPLOYEE RETENTION PLAN (KERP)

[99] The Petitioners seek approval of a KERP and the granting of a Court ordered KERP charge to a maximum of $342,207 (the "KERP Charge"). They say that the

KERP is for a select group of key employees to incentivize their continued retention, which is necessary if there is to be any viable prospect for the Petitioners to pursue their restructuring strategy.

[100] They propose that the KERP Charge rank directly below the Directors' Charge.

[101] The Court may exercise its discretion under its general statutory jurisdiction under s. 11 of the *CCAA* to approve a KERP and grant a KERP Charge: *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 27.

[102] As the Petitioners note, courts across Canada have approved key employee incentive plans in numerous *CCAA* proceedings: for example, *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (Ont. S.C.J.) and *U.S. Steel Canada*.

[103] In *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107, this Court stated:

> [58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[104] In *Walter Energy* at para. 59, I discussed the *Grant Forest Products* factors, as follows:

- Is this employee important to the restructuring process?
- Does the employee have specialized knowledge that cannot be easily replaced?
- Will the employee consider other employment options if the KERP is not approved?
- Was the KERP developed through a consultative process involving the Monitor and other professionals?; and
- Does the Monitor support the KERP and a charge?

[105] More recently, in *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as

discussed in the relevant case law: arm's length safeguards, necessity and reasonableness of design.

[106] As Mr. Chapman describes, the KERP has been designed to facilitate and encourage the continued participation of select key employees of the Petitioners who are contemplated to either (a) provide necessary services up to the expiry of the stay period (to December 2020); or (b) guide the business through the restructuring and preserve value for stakeholders over the length of the case.

[107] The KERP consists of two independent programs: the Key Management Employee Retention Plan (the "Management KERP") and the Key Technical Employee Retention Plan (the "Technical KERP"). These plans would apply to a small number of employees: five under the Management KERP; two under the Technical KERP. Payments under the Technical KERP are conditional on the proceedings continuing on the date that each payment is to be made and do not amount to a long-term payment commitment if the restructuring fails.

[108] The Petitioners' evidence on this application fully supports an affirmative answer to all of the above questions set out in *Walter Energy*. These employees are important to the restructuring process; the Monitor describes a "knowledge and operational void" if their employment is not further secured in some fashion. Given the nature of the assets in question, I agree that these employees, both management and technical, have specialized knowledge that cannot be easily replaced.

[109] There is no evidence on this application that any of these employees are considering other employment options if the KERP is not approved. However, that lack of evidence is not fatal to approval of the KERP since that very scenario is intended to be avoided by approval of the KERP.

[110] The KERP was developed through a consultative process involving the Monitor. The Monitor supports the KERP and the KERP Charge, noting that without

securing this “human capital”, the ability of the Petitioners to restructure their affairs will be greatly impaired.

[111] The Monitor notes in particular that Mr. Chapman, a PEC employee and general manager of the Pulp Mill, is included in the KERP. The Monitor describes Mr. Chapman as a “key resource” and provides that his continued support is “critical” toward achieving a successful restructuring. Mr. Chapman has been the person providing significant evidence in support of the Petitioners in this proceeding to date, which speaks to that fact.

[112] No stakeholder opposes this relief. In my view, such relief is appropriate. I approve the KERP and I grant the KERP Charge on the terms sought.

ADMINISTRATION / DIRECTORS’ CHARGES

[113] The Petitioners have not sought an increase of the Administration Charge on this application. The Petitioners seek the continuation of the Administration Charge in its previously approved amount (not to exceed $500,000) to secure professional fees and disbursements of the Monitor, counsel to the Monitor and the Petitioners' counsel.

[114] The Petitioners have also determined that they do not require an increase of the Directors’ Charge at this time. The Petitioners seek the continuation of the Directors’ Charge in its previously approved amount (not to exceed $500,000) to secure the indemnity provided for in the Initial Order.

[115] Again, no opposition arises. In my view, continuing this relief from the Initial Order is appropriate and I grant it.

STAY EXTENSION

[116] The Petitioners seek an extension of the stay to December 31, 2020.

[117] Under s. 11.02(2) of the *CCAA*, the Court has broad jurisdiction to extend a stay of proceedings where the circumstances warrant and for any period the Court considers necessary. Baseline considerations include those set out in s. 11.02(3) of

the *CCAA*, including confirmation that the debtor is acting with due diligence and in good faith and that the relief sought is appropriate.

[118] The comments of court in *Timminco Limited (Re)*, 2012 ONSC 2515 aptly set out the statutory objectives intended to be achieved by the stay:

> [15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the [debtors] with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

[119] Throughout this proceeding, and to this time, the Monitor confirms its view that the Petitioners have been working in good faith and with due diligence. The Monitor recommends the extension of the stay to December 31, 2020.

[120] It will be more than apparent from the discussion above and the orders I have granted, particularly as to the Interim Financing Facility, that I have concluded that an extension of the stay to December 31, 2020 is appropriate in the circumstances. As discussed above, there is somewhat of a "check" on the proceedings arising from the Monitor's report that will be filed before the end of October 2020.

[121] The stay period to December 2020 will allow the Petitioners to advance their objective of securing a restructuring option for the benefit of the stakeholders. I conclude that they should be afforded the opportunity to do so here.

UNIFOR APPLICATION

[122] Unifor seeks an order authorizing it to represent the current and former union members of the local, including pensioners, retirees, deferred vested participants, and their surviving spouses and dependants, employed or formerly employed by the Petitioners, in these proceedings. Unifor does not seek any court ordered funding to secure its participation or that of Pink Larkin, its counsel.

[123] The Petitioners support this relief and no stakeholder objects.

[124] As with much of the above relief, the Court has jurisdiction to exercise its discretion to grant the order sought under its broad statutory jurisdiction found in s. 11 of the *CCAA*.

[125] In *Canwest Publishing Inc.*, 2010 ONSC 1328, the Court discussed the factors typically considered in granting such relief. Justice Pepall (as she then was) set those out as follows:

> [21] Factors that have been considered by courts in granting these orders include:
>
> - the vulnerability and resources of the group sought to be represented;
> - any benefit to the companies under *CCAA* protection;
> - any social benefit to be derived from representation of the group;
> - the facilitation of the administration of the proceedings and efficiency;
> - the avoidance of a multiplicity of legal retainers;
> - the balance of convenience and whether it is fair and just including to the creditors of the Estate;
> - whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
> - the position of other stakeholders and the Monitor.

See also *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 61.

[126] I agree that these employees presently have a commonality of interest that is best represented in this proceeding as an entire group. Wanda Skinner is the president of the Unifor local. Ms. Skinner's affidavit #2 sworn July 28, 2020 supports the vulnerability of the unionized employees arising from the disastrous economic consequences to them of losing their jobs and benefits.

[127] Unifor clearly has a relationship with this cohort and is in the best position to advance the entire group's interests, at least at this time. That representation will be a benefit to the Petitioners in advancing this restructuring by facilitating discussions between them. The estate will incur no cost by reason of Unifor's representation, welcome news given the lack of cash resources available to the Petitioners.

[128] The order sought by Unifor is consistent with the order granted in the Fraser Papers Inc. restructuring: see *Fraser Papers Inc. (Re)*, 2009 CanLII 55115 and 2009 CanLII 63589 (Ont. S.C.J.).

[129] I am satisfied that the terms of the order sought are appropriate, with one exception. In para. 3 of the draft order, Unifor seeks authority to "determine, file, advance or compromise" any claims of its current or former employees. The only change I would make to that provision is to amend it to provide that any compromise proposed to be made by Unifor will be subject to court approval. This will ensure some oversight in respect of any decisions that Unifor seeks to make for the employee group they will represent.

"Fitzpatrick J."

TAB 2

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,*** 2008 BCCA 327

Date: 20080815
Docket: CA036261

Between:

Cliffs Over Maple Bay Investments Ltd.

Respondent
(Petitioner/Respondent)

And

Fisgard Capital Corp. and Liberty Holdings Excel Corp.

Appellants
(Respondents/Applicants)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

Oral Reasons for Judgment

G.J. Tucker A. Frydenlund	Counsel for the Appellants
H.M.B. Ferris P.J. Roberts	Counsel for the Respondent
M. Sennott	Counsel for Century Services Inc.
M.B. Paine	Counsel for the Monitor, The Bowra Group
Place and Date of Hearing:	Vancouver, British Columbia 12 August 2008
Place and Date of Judgment:	Vancouver, British Columbia 15 August 2008

[1] **TYSOE, J.A.**: The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

[2] The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, (the "***CCAA***") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the ***CCAA***, no notice was given to the appellants or any other of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the ***CCAA***, the stay contained in the order was expressed to expire on June 25.

[3] The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

Background

[4] The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

[5] The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

[6] Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

[7] The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

[8] There are four mortgages registered against the development. The first two mortgages are not significant – the first mortgage secures an amount of $900,000

that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

[9] The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

[10] In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

$4,460,000 – trade creditors
1,700,000 – equipment leases
1,135,000 – loans from related parties
45,000 – unpaid source deductions
$7,340,000

[11] The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008

when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

[12] It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

[13] The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the ***CCAA*** proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the ***CCAA*** and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

[14] When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the ***CCAA*** (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing for the development, the Monitor estimated the value of the development under the following three scenarios:

(a) liquidation value with no source of water for irrigation - $10 million;

(b) liquidation value with a source of water for irrigation - $28 million;

(c) going concern value with completion of the development - $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

[15] In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court with respect to the completion of the

development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

Decision of the Chambers Judge

[16] The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the ***CCAA*** because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the ***CCAA***, which reads as follows:

> 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.

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the Debtor Company's business.

[17] The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

[18] Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

Appraisal Evidence

[19] The affidavit of the principal of the Debtor Company filed at the time of the commencement of the ***CCAA*** proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

[20] In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

[21] Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In ***Reza v. Canada***, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61, the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (¶ 20).

[22] In ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1, the Court quoted the

following statement in ***Charles Osenton & Co. v. Johnston***, [1942] A.C. 130 at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the ***CCAA***, ***Re New Skeena Forest Products Inc.***, 2005 BCCA 192 at ¶ 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in ***CCAA*** matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at ¶ 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

[23] In my opinion, the comments of Newbury J.A. in ***New Skeena*** were directed at ongoing ***CCAA*** matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need

not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of ***CCAA*** proceedings.

Analysis

[24] On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the ***CCAA*** should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the ***CCAA*** applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the ***CCAA*** and it satisfies the criterion contained in s. 3(1) of the ***CCAA*** of having liabilities in excess of $5 million. The ***CCAA*** clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the ***CCAA***. The real question is whether a stay of proceedings should have been granted under s. 11 of the ***CCAA*** for the benefit of the Debtor Company.

[25] I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did

give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

[26] In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the ***CCAA***, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the ***CCAA***'s fundamental purpose.

[27] The fundamental purpose of the ***CCAA*** is expressed in the long title of the statute:

> "An Act to facilitate compromises and arrangements between companies and their creditors".

[28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in ***Re United Used Auto & Truck Parts Ltd.***, 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is ***A.G. Can. v. A.G. Que.***(*sub. nom.* ***Reference re Companies' Creditors Arrangement Act***), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."

> The legislation is intended to have wide scope and 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.

[29] The second decision is ***Hongkong Bank v. Chef Ready Foods*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315-16, where Gibbs J.A. said the following:

> 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. ll.

[30] Sections 4 and 5 of the ***CCAA*** provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

[31] The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see ***Re Fairview Industries Ltd.*** (1991), 109

N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of ***Re Ursel Investments Ltd.*** (1990), 2 C.B.R. 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the ***CCAA*** because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

[32] Counsel for the Debtor Company has cited two decisions containing comments approving the use of the ***CCAA*** to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, ***Re Lehndorff General Partner Ltd.*** (1992), 17 C.B.R. (3d) 24 at ¶ 7(Ont. Ct. Jus. – Gen. Div.) and ***Re Anvil Range Mining Corp.*** (2001), 25 C.B.R. (4th) 1 at ¶ 11 (Ont. Sup. Ct. Jus.), aff'd (2002) 34 C.B.R. (4th) 157 at ¶ 32 (Ont. C.A.). I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the ***CCAA*** to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that

the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

[33] Counsel for the Debtor Company also relies upon the decision in ***Re Skeena Cellulose Inc.*** (2001), 29 C.B.R. (4th) 157 (B.C.S.C.), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

[34] In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the ***CCAA*** proceeding:

> 47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
>
> (b) securing access to water for the irrigation system of the golf course; and
>
> (c) finishing the construction of the golf course.
>
> 48. Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1 – 3, will be sufficient

> to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

[35] It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the ***CCAA***. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

[36] Although the ***CCAA*** can apply to companies whose sole business is a single land development as long as the requirements set out in the ***CCAA*** are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue

it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[37] The failure of the chambers judge to consider the fundamental purpose of the ***CCAA*** and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the ***CCAA*** should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

[38] I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The ***CCAA*** was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan

that does not involve an arrangement or compromise upon which the creditors may vote.

Other Matters

[39] In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

[40] The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

[41] I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

[42] **FRANKEL, J.A.**: I agree.

[43] **D. SMITH, J.A.**: I agree.

[44] **FRANKEL, J.A.**: The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

"The Honourable Mr. Justice Tysoe"

TAB 3

SUPREME COURT OF NOVA SCOTIA
Citation: Scanwood Canada Ltd. (Re), 2011 NSSC 306

Date: 20110418
Docket: Hfx. No. 342377
Registry: Halifax

IN THE MATTER OF: The *Companies' Creditors Arrangement Act*, 1985, c. C-36, as amended

IN THE MATTER OF: A Plan of Compromise or Arrangement of Scanwood Canada Limited, a body corporate under the laws of the Province of Nova Scotia

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LIBRARY HEADING

Judge: The Honourable Justice Suzanne M. Hood

Heard: April 18, 2011

Written Decision: July 27, 2011, in Halifax, Nova Scotia *(Written release of Oral Decision of April 18, 2011)*

Subject: CCAA: Extension of protection

Summary: Scanwood seeks a further extension of the CCAA protection

Issues: Should the extension be granted?

Result: Extension not granted.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

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D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: April 18, 2011 in Halifax, Nova Scotia

Written Decision: July 27, 2011 *(Written release of Oral Decision of April 18, 2011)*

Counsel:
D. Bruce Clarke, Q.C. for the Appellant
Thomas Boyne, Q.C. for Royal Bank of Canada
Stephen Kingston, Q.C. & **Joe McNally** for Business Development Bank of Canada
Gavin MacDonald for Green Hunt Wedlake
Tim Hill for Uniboard Canada Inc.
Brian Stilwell and **Thomas Khattar (AC)** for IKEA

Joseph Pettigrew and **Sheldon Shoo** for the Province of Nova Scotia
Susan Taylor, for ACOA

By the Court:

[1] Scanwood seeks a further extension of the CCAA protection. It is supported in this application by Uniboard, an unsecured creditor. IKEA does not oppose the extension. The Province of Nova Scotia and the Federal Government take no position on it. It is opposed by BDC and RBC. The Monitor, in his fifth report dated April 15, says on page 11:

> Despite our belief that Scanwood has been acting in good faith and with due diligence, unless further evidence to support an extension of the Stay of Proceedings is presented and appropriately justified, it is the Monitor's opinion that the extension requested is not appropriate in these circumstances.

[2] Since the date of that report, an Eighth Affidavit has been filed by Mr. Thorn. He attaches to it a revised manufacturing model which he says will "increase productivity and profitability." It says it "will allow Scanwood to attract equity investment which will then allow us to return to the development of a viable Plan of Arrangement."

[3] He says in para. 10:

> Ikea has expressed great interest in our re-development plan and has advised me that it does not oppose our extension application.

[4] The Monitor says that he has not had sufficient opportunity to review this model and can offer no comments on it. He reiterates his position taken in the fifth report that he does not support an extension.

[5] Scanwood says there are three options available to me today: 1) I can grant the extension; 2) I can grant the extension and give additional powers to the Monitor pursuant to s. 23(1) (k) and s. 36(1) of the *Act* or 3) I could grant the receivership which has been proposed by BDC, which application I note has not yet been heard.

[6] The *Act* provides in s. 11.02(2) that I may grant an extension. Section 11.02(3) provides that:

> 11.0.2(3) the court shall not make the order unless:
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

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

[7] No one has expressed any concern with respect to item b) and no one has said that that has not been satisfied. I conclude that the applicant has acted and is acting in good faith and with due diligence.

[8] The real question for me is whether the order is appropriate. BDC and RBC say it is not. They refer to decisions where "appropriate circumstances" have been considered.

[9] In *Starcom International Optics Corp.*, Re, [1998 B.C.J. No. 506 (S.C.)], the court said an important consideration is whether the attempt to restructure is "doomed to failure." (para. 23) In *Re: Federal Gypsum Company*, 2007 NSSC 347, the same phrase was used. In *Hunters Trailer & Marine Ltd., Re* 2000 ABQB 952, Wachowich, A.C.J.Q.B. said in para. 18:

> 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: ... The B.C. Court of Appeal said that CCAA orders should only be made if there is a reasonable prospect of a successful restructuring. ... 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.

[10] Both Mr. Kingston and Mr. Boyne referred to Mr. Thorn's Seventh Affidavit. They say that a restructuring is doomed to fail and that granting an extension would merely prolong the inevitable. The factors to which they refer are (paraphrasing from Mr. Thorn's Affidavit): that Scanwood has acknowledged it not longer believes it is possible for it to file a viable Plan of Arrangement; its own draft projections indicate that it could at best produce a seven percent rate of return prior to principal repayments and dividends to unsecured creditors; that BDC has lost confidence in Scanwood; that the RBC requires Scanwood's operating line of credit be paid out; that Scanwood would be obliged to find a new operating lender; that IKEA has refused to waive its setoff; that IKEA's sales of products such as those Scanwood manufactures is showing a decreasing trend; that IDEA is Scanwood's sole customer and it has refused to allow its Supply Agreement with Scanwood to be assigned to a new owner or new control group; and that Scanwood had asked its employees to agreed to certain concessions and the request was overwhelmingly rejected; the Federal Government proposes to apply to seek to have GST credits go to the payment of CRA and ACOA debt; Scanwood's attempts to sell its assets to a third party failed; a substantial equity investment is

required and the problems with respect to that are set out in Mr. Thorn's Affidavit at para. 23.

> 23. Scanwood has spoken with several potential equity investors in an attempt to create a viable Plan. We have not been able to find anyone willing to invest in Scanwood because:
>
> (a) Scanwood may not have a term lender if BDC wishes to be paid out;
>
> (b) Scanwood must pay out the RBC line of credit;
>
> (c) Scanwood can not readily arrange for a replacement operating lender due to IKEA's right of set-off unless the IKEA loan can be paid out in full;
>
> (d) Projections do not reliably support sufficient cash flows back to investors after payment of operating costs, principal debt repayment and CCAA dividend payments;
>
> (e) Our employees are not prepared to make any concessions that would assist us in achieving reliable profitability.

[11] Boyne's written submissions as well refer to that Affidavit. He also expressed concern about the jeopardy to creditors, including his client, RBC, of a further extension devaluing its security.

[12] Scanwood says that Option No. 2 is the best option. It would allow Scanwood the opportunity to find investors willing to invest based upon the model attached to the Eighth Affidavit. At the same time, if additional powers are granted to the Monitor, it would allow the Monitor to have the same powers as a receiver. If no plan was then forthcoming, the work done by the Monitor with expanded powers would be useful in a receivership.

[13] Mr. Hill for Uniboard says this option does not merely delay the inevitable. He points out that the purpose of the *Act* is to allow for the rehabilitation of companies in financial distress. He says there is potential with the revised business plan for equity investment. He says the position of creditors is not jeopardized because the assets are still there, the building and equipment, and no additional financing is being requested.

[14] .Mr. Clarke for Scanwood says the court should be careful not to take the liquidated values as fair market values. He says there is still $20 million in assets.

[15] .The onus is on Scanwood to satisfy me that the extension is appropriate in the circumstances. A new manufacturing model has been put before the court this

morning. The Monitor has not had an opportunity to consider it. It is so recent that there is no indication of its ability to attract equity investors. BDC has characterized it as a "last gasp" referring to the decision cited by Mr. Boyne *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) where the court said the CCAA:

> ... is not, however, designed to be preventative. CCAA should not be the last gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

[16] Of particular importance to me is the position of the Monitor. The Monitor is independent not only of Scanwood but also of the creditors. His position should carry some considerable weight with the court. The Monitor has reviewed the company's financial position and prospects. In this case, the Monitor does not support the extension. That in itself does not mean I must do as the Monitor says, but it is a factor in determining if an extension is appropriate and whether Scanwood has satisfied me that it is so.

[17] .I have reviewed the Affidavits of Mr. Thorn and, in particular, the Seventh and Eighth Supplemental Affidavits. I conclude that a further extension of thirty days is not appropriate in the circumstances. The circumstances of Scanwood are

set out in the Seventh Affidavit, which I have paraphrased above. The need for additional DIP financing in early May is a factor in this conclusion. It is not now being sought but, in Mr. Thorn's Seventh Affidavit, he says in para. 37:

> 37. Scanwood can remain operational on a reduced basis for at least 2 weeks without further DIP financing.

[18] In my view, the recent revised manufacturing model is too late to satisfy me that, within 30 days, there could be a plan of arrangement. Having so concluded, it is not necessary for me to consider Option 2 which includes greater powers to a Monitor. I do, however, have some reservations about the applicability of that section to be used as proposed.

[19] The request for an extension of CCAA protections is denied.

Hood, J.

TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Re Tuan Development Inc.,***
2007 BCSC 1827

Date: 20071120
Docket: S073456
Registry: Vancouver

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.

Before: The Honourable Mr. Justice Sigurdson

Oral Reasons for Judgment

In Chambers
November 20, 2007

Counsel for Gibraltar Mortgage Ltd.:	D.P. Church A.J. Pearson
Counsel for Tuan Development Inc.:	D. Fitzpatrick
Counsel for the Monitor, MacKay & Company:	M. Peerson
Counsel for a Creditor, Best Buy Canada:	C. Schuld B. Lewis-Hand
Date and Place of Hearing:	November 13 &14, 2007 Vancouver, B.C.

[1] **THE COURT:** 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 ***Re United Used Auto & Truck Parts Ltd.*** (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 ***Re United Used Auto & Truck Parts Ltd.***, 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.

"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson

TAB 5

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Arrangement relatif à Montreal, Maine & Atlantic Canada Co. (Montréal, Maine & Atlantique Canada Cie) | 2021 QCCS 2271, 2021 CarswellQue 7082, 337 A.C.W.S. (3d) 19, EYB 2021-391670 | (C.S. Qué., Jun 4, 2021)

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
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.ii Good faith
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
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 Century Services;
>
> (b) the Monitor is directed to list the lands with Colliers Macauly 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

TAB 6

Companies' Creditors Arrangement Act

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

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act,* R.S., c. C-25, s. 1.

...

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

Stays, etc. — other than initial application

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

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

TAB 7

Environment Act

CHAPTER 1 OF THE ACTS OF 1994-95

as amended by

1998, c. 18, s. 557; 1999 (2nd Sess.), c. 12, s. 76;
2001, c. 6, s. 103; 2004, c. 3, ss. 20, 21; 2006, c. 2, s. 3;
2006, c. 30; 2011, c. 61; 2017, c. 10

Published by Authority of the Speaker of the House of Assembly
Halifax

(4) and **(5)** *repealed 2011, c. 61, s. 16.*

1994-95, c. 1, s. 42; 2011, c. 61, s. 16.

Duties of review panel

43 A review panel shall

(a) review an environmental-assessment report with respect to an undertaking referred to the review panel by the Minister in accordance with the directions of the Minister;

(b) consult with the public in accordance with this Act; and

(c) recommend to the Minister the approval or rejection of an undertaking, or conditions that ought to be imposed upon an undertaking if it proceeds.

(d) *repealed 2011, c. 61, s. 17.*

1994-95, c. 1, s. 43; 2011, c. 61, s. 17.

Public consultation

44 (1) In reviewing an environmental-assessment report pursuant to Section 43, a review panel shall consult with the public by inviting written submissions from the public, by conducting a public hearing or review or in such other manner as determined by the review panel.

(2) A public hearing or review conducted pursuant to subsection (1) shall be conducted in accordance with the regulations.

(3) For the purpose of any public hearing or review conducted pursuant to subsection (1), a review panel may

(a) administer oaths to witnesses and require the witnesses to give evidence under oath;

(b) issue summonses requiring the attendance of witnesses and the production of documents and things;

(c) pay witnesses summonsed to give evidence before the review panel. 1994-95, c. 1, s. 44; 2011, c. 61, s. 18.

Municipal approvals

45 The Minister may require a proponent to obtain any municipal approval, permit or other authorization required at the time of registration pursuant to this Part before the Minister approves or rejects the undertaking. 1994-95, c. 1, s. 45.

Other enactments

46 This Part does not exempt the proponent of any undertaking, whether or not the proponent has submitted an environmental-assessment report, from the requirements of any other enactment or other provision of this Act. 1994-95, c. 1, s. 46.

Approval

56 **(1)** The Minister may issue or refuse to issue an approval.

(1A) Without restricting the generality of subsection (1), the Minister shall refuse to issue an approval if the written confirmation required by subsection 53(5) has not been submitted.

(2) The Minister may issue an approval subject to any terms and conditions the Minister considers appropriate to prevent an adverse effect.

(3) Without restricting the generality of subsection (2), the Minister may require rehabilitation plans, implementation schedules and security from the approval holder.

(4) In environmentally sensitive areas, the terms and conditions of an approval may be more stringent, but may not be less stringent, than applicable terms and conditions provided in the regulations or standards adopted or incorporated by the Minister. 1994-95, c. 1, s. 56; 1999 (2nd Sess.), c. 12, s. 76; 2011, c. 61, s. 24.

Temporary approval

57 **(1)** The Minister may issue a temporary approval to the owner of a designated activity who is operating without an approval as required by this Act or the regulations.

(2) A temporary approval issued pursuant to subsection (1) must contain the terms and conditions and the dates for compliance that must be followed by the owner to whom the temporary approval was issued.

(3) Where the owner to whom the temporary approval was issued does not fully comply with all the terms or conditions or time requirements of the temporary approval, the temporary approval is void. 2011, c. 61, s. 25.

Amendment of approval

58 **(1)** On application by an approval holder, the Minister may amend a term or condition of, add a term or condition to or delete a term or condition from an approval, if the Minister considers it appropriate to do so.

(2) The Minister may amend a term or condition of, add a term or condition to or delete a term or condition from an approval

(a) if an adverse effect has occurred or may occur;

(b) for the purpose of addressing matters related to a temporary suspension of the activity by the approval holder;

(c) if, since the approval was issued, a standard has changed or been created for an activity to which the approval relates;

TAB 8

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THE 2021-2022 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

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Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

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1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

THOMSON REUTERS®

A cataloguing record for this publication is available from Library and Archives Canada.

ISSN 1197-8503

ISBN 978-1-7319-0807-0 (2021-2022 Edition)

Printed in the United States by Thomson Reuters.

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The Alberta Court of Queen's Bench declined to extend a *CCAA* stay of proceedings. The debtor was comprised of 21 companies involved in land acquisition, the business being to purchase property, financed by way of mortgages and private investors. Justice Kent held that the objectives of the *CCAA* and the large number of unsecured investors were appropriate considerations; however, there was a strong likelihood that continuing the proceeding would not enhance the value of the real property assets and could potentially put the secured creditors at risk: *Re Shire International Real Estate Investments Ltd.* (2010), 2010 CarswellAlta 234, 64 C.B.R. (5th) 92 (Alta. Q.B.).

The court held that the reference to "applicant" in s. 11.02(3)(b) means the debtor company; the court is not concerned with the conduct of any creditor in considering an extension to stay. Here, the lack of good faith and due diligence on the part of the debtors was fatal to the relief sought by a secured creditor and the request for the extension was dismissed: *Re Envision Engineering & Contracting Inc.* (2011), 2011 CarswellOnt 371, 2011 ONSC 631 (Ont. S.C.J.).

An extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors. Other factors to be considered on an application for a stay include the debtor's progress during the previous stay period toward a restructuring; whether the creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension. Here, the extension would not materially prejudice any creditor or stakeholder and at this point, the *CCAA* restructuring offered the best option for all stakeholders: *Re Worldspan Marine Inc.* (2011), 2011 CarswellBC 3667, 86 C.B.R. (5th) 119 (B.C. S.C.).

The Alberta Court of Queen's Bench granted a *CCAA* stay extension over the objection of the secured creditor who had applied for appointment of a receiver. Pursuant to s. 11.02(3), the applicant is required to demonstrate that it has acted, and continues to act, in good faith. Hillier J. noted that the legislative objective of a *CCAA* order is to provide the court considerable scope to maintain the *status quo* for a company to make arrangements to facilitate remaining in operation for a collective benefit. Hillier J. was satisfied that the CRO had begun consultations with interested parties and that a structure for such a plan was an important priority. Three weeks did not prove long enough to complete the steps necessary to create a plan of arrangement. Hillier J. was satisfied that the group had established due diligence. While raising questions, the evidence adduced on this application fell short of supporting a finding of bad faith. Hillier J. found the extension of the stay was in the best interest, however, a further vigorous review had to take place within a reasonable period of time. The Court extended the stay for two months as opposed to the requested three and a half months: *Re Canada North Group Inc.*, 2017 CarswellAlta 1609, 51 C.B.R. (6th) 282, 2017 ABQB 508 (Alta. Q.B.).

N§65 — Scope of Order under Initial Application

Pursuant to s. 11.02(1), a court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, but not for more than 10 days, staying, restraining or prohibiting commencement of proceedings under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*; or any action, suit or proceeding against the company.

Mr. Justice Gascon of the Québec Superior Court approved an application for an interim order for the holding of a noteholders' and lenders' meetings and a stay of proceedings with respect to an arrangement under ss. 192 and 248 of the *Canada Business Corporations Act (CBCA)*. The proposed arrangement did not affect the claims of employees, pension plans or

TAB 9

Rescue!

The Companies' Creditors Arrangement Act

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Second edition

2013

CARSWELL®

Includes text of *Companies' Creditors Arrangement Act*.

ISBN 978-0-7798-5537-7

A cataloguing record for this publication is available from Library and Archives Canada.

Composition: Computer Composition of Canada LP

Printed in Canada by Thomson Reuters.

THOMSON REUTERS

CARSWELL, A DIVISION OF THOMSON REUTERS CANADA LIMITED

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appropriate; and that the applicant has acted and continues to act in good faith and with due diligence.[112]

The British Columbia Supreme Court has held that the debtor corporation has an obligation to demonstrate measurable and substantive progress towards a plan if an extension is to be granted, and the court will also consider the economic impact on stakeholders and members of the surrounding community.[113] Thus, even where the exercise of authority to extend the stay period is not as constrained by express statutory requirements as it is in the sanctioning of the plan, there is a substantial degree of certainty in the tests applied to applications for an extension. As with the initial stay order, the extension of a stay is only a temporary suspension of creditors' rights.

Generally, the court wants assurance that corporate officers understand the reason for the firm's insolvency, so that they have a realistic sense of whether there is a potentially viable plan that can be devised. On granting an extension, the court will usually order the monitor to report on cash-flow projections on a regular basis to senior creditors and others so that they have timely notice of any further deterioration in the financial position of the debtor corporation.[114]

The courts have held that approval of the creditors is not a prerequisite for extension of a stay; rather, the extension is for the benefit of all the company's stakeholders, not just the creditors.[115] All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders and the public generally.[116] The Ontario Court of Appeal in *Re Stelco Inc.* held that it must be a matter of judgment for the supervising judge to determine whether a proposed plan is doomed to fail, and that where a plan is supported by the other stakeholders and the independent monitor, and is a product of the business judgment of the board, it is open to the supervising judge to conclude that the plan was not doomed to fail and that the process should continue.[117]

On an application for an extension of the stay pursuant to s. 11.02(2) of the *CCAA*, the applicants must establish that they have met the test set out in s. 11.02(3), specifically, whether circumstances exist that make the order appropriate in advancing the policy objectives of the *CCAA*, and whether the applicant has acted, and is acting, in good faith and with due diligence.[118] The *CCAA* debtor

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[112] Section 11.02(3), *CCAA*.

[113] *Re Skeena Cellulose Inc.*, 2001 CarswellBC 2226, 2001 BCSC 1423 (B.C.S.C.).

[114] *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C.S.C. [In Chambers]).

[115] *Taché Construction ltée c. Banque Lloyds du Canada* (1990), 5 C.B.R. (3d) 151 (Que. S.C.).

[116] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.).

[117] *Re Stelco Inc.*, 2005 CarswellOnt 6283 (Ont. C.A.) at para. 24, affirming 2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List]).

[118] *Re Worldspan Marine Inc.*, 2011 BCSC 1758, 2011 CarswellBC 3667 (B.C.S.C.) at para. 12.

financing arrangements may mean that the debtor has difficulty proposing a plan that is more advantageous than the remedies already available to creditors.[168] It continued to be open to the debtor company to propose to its creditors a compromise or arrangement restructuring plan. However, the *CCAA* is not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve a compromise or arrangement on which creditors may vote.[169]

Hence, the courts will exercise their discretion not to extend the stay where they find no evidence of progress being made in the development of a plan acceptable to creditors, or where they conclude that there is concern that the stay and interim financing are being used as a means to delay inevitable liquidation, or where there is a lack of confidence in the governance of the debtor corporation. The courts have sometimes treated real estate cases differently, given that the stay may be sought to complete a development project rather than to help an active business develop a viable going-forward business plan. In such instances, the courts pay careful attention to the views of creditors and other stakeholders that may be directly affected by the decision. In some instances, the court determines that it is better not to extend the stay and allow receivership or other proceedings to resolve the situation.

In 2010, in *Dura Automotive Systems (Canada) Ltd.*, the debtor sought an order for an extension of the stay of proceedings.[170] The monitor did not support the extension as it did not believe the debtor was acting in good faith and with due diligence and because a creditor that had the ability to block a plan had made it clear it was unacceptable to it. Justice Morawetz held that he was not satisfied that the debtor had met the test required to obtain an extension of the stay period; the fundamental issue in the proceedings was the pension plan deficit of approximately $9 million and Morawetz J. held that in negotiating with the pension plan administrator and unions, the debtor had changed its tactics at the eleventh hour to present the plan to the retirees, when the debtor realized that negotiations with the original group were not going to be successful, the Court finding a lack of good faith. The debtor gave every appearance that it was negotiating with the appropriate representative groups and then "by questioning the representative status of the parties at the last possible moment", the debtor had demonstrated that it was not acting in good faith and with due diligence.

In summary, in considering motions for an extension of the stay, the courts consider a number of factors in addition to the statutory requirements of good faith and due diligence, including the balance of prejudice to multiple stakeholders,

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168 *Ibid.* at para. 36.
169 *Ibid.* at para. 38.
170 *Re Dura Automotive Systems (Canada) Ltd.*, 2010 CarswellOnt 894, [2010] O.J. No. 654 (Ont. S.C.J.).