

COURT FILE NUMBER 2203-18660
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE
COMPANIES' CREDITORS
ARRANGEMENTS ACT, RSC 1985,
C c-36, AS AMENDED



AND IN THE MATTER OF
**MIDNIGHT INTEGRATED
FINANCIAL INC, TOWER
ADVENTURES LTD, BOOKER
ADVENTURE CORP, AND
COMSTOCK ADVENTURE CORP**

DOCUMENT **BRIEF OF LAW OF THE
ATTORNEY GENERAL OF
CANADA**

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INTRODUCTION

1. The Attorney General of Canada, acting for His Majesty the King in right of Canada, represented by the Minister of National Revenue (the “**Minister**”), herself represented by the Canada Revenue Agency (“**CRA**”), contests the application of Midnight Integrated Financial Inc. (“**MINT**”), Tower Adventures Ltd., Booker Adventure Corp., and Comstock Adventure Corp. (collectively, the “**Applicants**”). In particular, the Attorney General opposes the

application under the *Companies' Creditors Arrangement Act*,¹ for a stay of proceedings of the Minister's tax collection efforts against the Applicants.

2. The Attorney General's advances two arguments to oppose the application for a stay of proceedings:
 - (a) A stay of proceedings in this context is *not* consistent with the policy of the CCAA.
 - (b) The Applicants have not met the test for a stay of proceedings prescribed by CCAA [ss. 11.02\(2\)](#).
3. The Attorney General agrees with the facts as set out in paragraphs 1-9 of the Applicants' Brief.

ARGUMENT

(a) A stay of proceedings is not consistent with the policy of the CCAA and is inappropriate in the circumstances.

4. At paragraph 12 of the Applicants' Brief of Law (filed November 29, 2022), the Applicants cite the Supreme Court of Canada's decision in *Century Services Inc v Canada (Attorney General)*, [2010 SCC 60](#), for the proposition that one of the purposes of the CCAA "...was the creation of conditions for preserving the status quo while attempts were made to find common ground amongst stakeholders for reorganization which is fair to all. The alternative, of course, would be a bankruptcy or liquidation" (para 77).
5. The Attorney General agrees that one purpose of the CCAA is to afford the debtor companies time *to formulate a plan of reorganization or reorganization to put to their creditors*. Using the CCAA – and in particular the stay of proceedings under the CCAA – as a defensive tactic to enjoin the Minister from collecting an assessed and collectible tax liability while the debtor

¹ RSC 1985, c C-36, as amended ("CCAA").

companies pursue their objection and appeals process under the *Income Tax Act*² is not consistent with the purpose of the CCAA.

6. The Attorney General's expectation is that if the CCAA Initial Order is extended, nothing will happen in the CCAA proceedings except recurrent applications for extensions of the CCAA order until the tax objection/appeal process is concluded. Realistically, that process could very well take three to five years, not including any appeals to the Federal Court of Appeal or the Supreme Court of Canada.
7. The test to be applied in granting extensions of the CCAA order is set out in ss. 11.02(2)-(4), CCAA:

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.

² RSC 1985, c 1 (5th Supplement) ("*ITA*").

8. The critical test is set out in ss. 11.02(3): an applicant must satisfy the court that circumstances exist that make the extension order appropriate AND that the applicant has acted and is acting in good faith and with due diligence. The Applicants cannot meet either arm of that test.
9. First, Parliament has held that large corporations are required to pay one-half of assessed tax liability notwithstanding any objection or appeal of the assessment. This is a specific exception to the general stay of proceedings under the *ITA*.
10. In [section 225.1](#) of the *ITA*, Parliament has generally restricted the Minister from taking certain collection actions against taxpayers for certain periods:
 - (a) for 90 days following the issuance of a notice of assessment or reassessment, which period corresponds with the time for a taxpayer to file a notice of objection with the CRA to the assessment or reassessment;
 - (b) if the taxpayer files a notice of objection, for the period during which CRA is considering the taxpayer's objection;
 - (c) for 90 days following CRA's decision concerning the notice of objection, which 90 day period corresponds with the time for a taxpayer to file a notice of appeal with the Tax Court of Canada; and
 - (d) if the taxpayer files a notice of appeal with the Tax Court of Canada, for the period the appeal is before the Tax Court of Canada.³
11. However, Parliament made exceptions to the foregoing restrictions, particularly with respect to "large corporations" as defined in the *ITA*. Subsection 225.1(7) provides:

One-half collection

(7) If an amount has been assessed under this Act in respect of a corporation for a taxation year in which it was a large corporation, or in respect of a particular amount claimed under section 110.1 or 118.1 where the particular amount was claimed in respect of a tax shelter, then subsections (1) to (4) do not limit any action of the Minister to collect

(a) at any time on or before the particular day that is 90 days after the day of the sending of the notice of assessment, 1/2 of the amount so assessed; and

³ Section 225.1, *ITA*, **Tab O**.

(b) at any time after the particular day, the amount, if any, by which the amount so assessed exceeds the total of

(i) all amounts collected before that time with respect to the assessment, and

(ii) 1/2 of the amount in controversy at that time.⁴

12. In the Attorney General’s opinion, the Applicants are seeking protection under the CCAA for no purpose related to the CCAA itself – i.e., to determine if they can reorganize their affairs and if so, to formulate a viable plan to present to their creditors – but only as a defensive tactic to enjoin the Minister from collecting the collectible half of the assessed (or soon to be assessed) tax debts while they pursue their objection and appeal of the assessments.

13. With respect to the test under CCAA ss. 11.02, in *ATB v. Tallgrass Energy Corp*, [2013 ABQB 432](#),⁵ Romaine J. held that under the “appropriateness” test, the applicant must satisfy the court there is a reasonable possibility it can restructure its affairs ([para 14](#)). She noted:

However, there must be some evidence of what Farley J. in *Re Inducon Development Corp.*, 1991 CarswellOnt 219 referred to as the outline of a plan, what he called the “germ of a plan”: [para 14](#). I would add a further gloss on that phrase: there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. As noted in *Inducon* at [para 13](#), the CCAA is remedial, not preventative, and it should not be the “last gasp of a dying company”.

14. In *Callidus v. Carcap*, [2012 ONSC 163](#),⁶ Mesbur J. declined to grant a CCAA order to the corporation facing a receivership application by one of its secured creditors, finding that Carcap’s CCAA application was “more a defensive tactic than a bona fide attempt to restructure” ([para 58](#)).

15. In the present case, the Applicants seek only a stay of proceedings to prevent the Minister from collecting a tax debt which, pursuant to a very specific provision of the *ITA*, is immediately

⁴ Subsection 225.1(7), *ITA*, **Tab O**.

⁵ **Tab A**.

⁶ **Tab B**.

collectible. As discussed below, it is very unlikely the Applicants could obtain an injunction prohibiting the Minister from taking collection proceedings pending the resolution of their tax objection/appeal process. It is inappropriate for the Court to issue an injunction as a stay of proceedings under the *CCAA* in response to the Applicants' defensive tactic against the Ministers' collection activity if it has no intention of formulating a plan to present to its creditors.

(b) The Applicants have not met the test for a stay of proceedings.

16. Taxpayers have sought injunctions to prohibit the CRA from engaging in collection efforts while a tax assessment is under objection or appeal.⁷ These applications related to the enforcement of GST assessments while a tax appeal of the underlying assessment was underway.⁸ The injunction applications were heard in the Federal Courts, by way of judicial review. All the injunction applications sought to prevent the CRA from collecting on GST assessments while those assessments were being appeal. All were unsuccessful save one.⁹
17. The decisions referred to above relate to [subsection 315\(2\)](#) of the *Excise Tax Act* (“*ETA*”), which authorizes the CRA to collect on a GST tax assessment immediately after issuing a notice of assessment. There is no provision in the *ETA* restricting the CRA from collecting an assessed tax debt. Meaning, there is no counterpart to *ITA* s. 225.1 in the *Excise Tax Act*. As noted above, subsection 225.1(7) of the *ITA*¹⁰ authorizes the CRA to pursue collection efforts on 50% of the tax assessment owed by the Applicants even as they appeal the underlying tax assessment.

⁷ *Mason v Canada (Attorney General)*, [2015 FC 926](#) (“*Mason*”), **Tab C**; *Newave Consulting Inc v Canada (National Revenue)*, [2021 FC 1203](#) (“*Newave*”), **Tab D**; and *Iris Technologies Inc v Canada (National Revenue)*, [2021 FC 874](#) (“*Iris*”), affirmed [2022 FCA 180](#), **Tab E**.

⁸ Under [subsection 315\(2\)](#), *Excise Tax Act*, RSC 1989, c E-15 (the “*ETA*”), **Tab P**.

⁹ *Re Swiftsure Taxi Co*, [2005 FCA 136](#), **Tab F**.

18. The Applicants seek a stay of proceedings to prohibit the CRA from engaging in tax collection efforts while they pursue their objections and appeals. The test for a stay of proceedings in this matter is the tripartite test outlined in *RJR – MacDonald Inc v Canada (Attorney General)*.¹¹ The Applicants must establish (1) there is serious issue; (2) irreparable harm will result if a stay is not granted and (3) the balance of convenience weights in favour of granting a stay.
19. The Attorney General’s position is that none of the three factors have been established and a stay of proceedings should not be granted.

Serious Issue

20. The first part of the test requires that the Applicants show that there is a serious issue to be tried; the appeal cannot be frivolous or vexatious. This is a low threshold and requires an “extremely limited review of the case on the merits.”¹²
21. In *Mason* and *Newave*, the Federal Court held that there was no serious issue to be tried and dismissed the taxpayers’ injunction applications.¹³ The taxpayers sought to prevent the Minister from engaging in tax collection efforts while GST tax assessments were being appealed. In *Mason*, Justice Gleason, the motion judge to first review the injunction application held:

The Applicant's application for judicial review does not raise a serious issue as it is clear that the Minister of National Revenue is entitled under sub-section 315(2) of the *Excise Tax Act*, RSC, 1985, c E-15, to enforce GST assessments while appeals are pending... In his Notice of Application, the Applicant offers no challenge to the Minister's collection activities other than stating that he has an appeal from the decision of the Tax Court pending before the Federal Court of Appeal. As the Minister is authorized to pursue collection activities irrespective of the appeal, the Applicant's application for judicial review does not raise a serious issue.¹⁴

¹⁰ Subsection 225.1(7), *ITA*, **Tab O**.

¹¹ [\[1994\] 1 SCR 311](#), [\[1994\] SCJ No 17](#) (“*RJR MacDonald*”), Applicants’ Book of Authorities at Tab 10.

¹² *RJR MacDonald* at para 83, Applicants’ Book of Authorities at Tab 10.

¹³ *Mason* at paras [23](#) and [42](#), **Tab C**; *Newave* at para [65](#), **Tab D**.

¹⁴ *Mason* at paras [23](#), **Tab C**. Emphasis added.

22. There is no serious issue to be tried in the Applicants' matter. There is nothing in *ITA* or the case law that bars the Minister from engaging in collection activities against the Applicants. In fact, the *ITA* expressly authorizes the Minister to engage in collection activities for 50% of the Applicants' tax assessment as a specific legislative exception to the general prohibition against collection during the objection/appeal process. The Applicants have an avenue to challenge their tax assessment: an appeal to the Tax Court of Canada, which is the proper forum to challenge tax disputes.
23. The Applicants have focused on the substantive merits of their tax appeal at the first stage of the *RJR MacDonald* test, to establish a serious issue in the *CCAA* process. This approach is incorrect. The focus should be on the tax collection efforts of the Minister. At the first stage of the test, the serious issue to be considered is whether the tax collection efforts of the Minister are unlawful or inappropriate, not whether the underlying tax appeal is meritorious. By law, pursuant to subsection [152\(8\)](#) of the *ITA*, "an assessment shall, subject to being varied or vacated on an objection under [Part I of the *Income Tax Act*] and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect, or omission in the assessment or in any proceeding under this Act relating thereto." That is, the assessment is deemed by law to be correct, unless and until it is varied by the objection and appeal process.
24. Under parts two and three of the *RJR MacDonald* test, the Applicants focus on the potential impacts of the tax collection efforts. The same issue should be in focus under the first part of the *RJR MacDonald* test.
25. In this Court, the Applicants seek to block the tax collection efforts of the Minister. In the Tax Court of Canada, the Applicants will have the opportunity to challenge the tax assessments, not the collection efforts. There is no evidence that the collection efforts of the Minister are

unlawful or outside the scope of the *ITA*. There is no evidence of improper conduct respecting the collections efforts. As such, there is no serious issue to be tried.

26. In the alternative, if this Court views the underlying tax assessment as the serious issue under the *RJR MacDonald* test, a stay of proceedings should nonetheless *not* be granted.

27. A stay of proceedings, in these circumstances, is outside this Court’s jurisdiction. The Applicants’ case is an appeal of a tax assessment. The determination of that appeal turns on the statutory interpretation of “tax shelters” under section 237.1 of the *ITA*. The correctness of assessments made under the *ITA* falls under the exclusive jurisdiction of the Tax Court of Canada.¹⁵ Under the first stage of the *RJR MacDonald* test, a court must assess the merits of the case. Even on an extremely limited view of the merits of the Applicants’ case, this Court would still be interpreting the *ITA* and the substantive merits of the assessment. This Court would be exercising power outside its jurisdiction. On this basis, the application for a preemptive stay of the Minister’s tax collection efforts should be dismissed.

Irreparable Harm

28. The second part of the test requires the Applicants to demonstrate that they will suffer irreparable harm between the date of the injunction application and the underlying review of the tax assessment on the merits. The irreparable harm must be such that it cannot be cured by collecting damages from the other party.¹⁶ When the harm alleged is financial harm, “clear and

¹⁵ [Section 169, ITA](#), **Tab Q**; [Section 18.5, Federal Courts Act](#), RSC 1985, c F-7, **Tab R**; [Section 12, Tax Court of Canada Act](#), RSC, 1985, c T-2, **Tab S**; *Addison & Leyen Ltd v Canada*, [2007 SCC 33](#), at [para 11](#), **Tab G**; *JP Morgan Asset Management (Canada) Inc v Minister of National Revenue*, [2013 FCA 250](#), at [para 82](#), **Tab H**; *Leroux v Canada Revenue Agency*, [2012 BCCA 63](#), at paras 18 – 19, **Tab I**; *Tennant v Minister of National Revenue*, [2013 ABCA 81](#) (leave to appeal to the SCC denied, [464 NR 396 \(note\)](#), [584 AR 400 \(note\)](#)), **Tab J**.

¹⁶ *RJR MacDonald* at para 64, Applicants’ Book of Authorities at Tab 10.

compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence.”¹⁷

29. The harm alleged is primarily investment losses and a winding up of the business if tax collection efforts proceed.¹⁸ The Applicants allege that there is insufficient cash flow and assets to cover the penalties and interests that would be imposed through the tax collection process. This is financial harm. Limited evidence has been put forward substantiate irreparable financial harm.
30. The financial circumstances of the Applicants, in particular MINT, presents a different scenario than the one alleged. The book value of MINT’s investment assets is \$230,431,479.81.¹⁹ No evidence is presented to explain why a portion of the investment assets cannot be liquidated to satisfy the tax liabilities – or at least to satisfy the interest on the tax liabilities that would accrue while the tax appeal is challenged. No evidence is presented to explain why MINT, or any of the other Applicants, cannot obtain a loan from a third party to satisfy the tax liabilities. Finally, no evidence has been put forward to substantiate the “catastrophic chain reaction”²⁰ that would lead to the wind-up of the Applicants’ business if tax collection efforts go forward. Where financial harm is alleged as the irreparable harm, clear and compelling evidence is required. The Applicants’ have not put forward that clear and compelling evidence.
31. At paragraph 10 of their Brief, the Applicants assert the CRA is taking steps to commence collection activity. This assertion is based on paragraph 74 of Mr. Gilbert’s Affidavit and Exhibit “U” of that Affidavit – a letter from CRA to Booker Adventure Corp. dated October 20,

¹⁷ *Newbould v Canada (Attorney General)*, [2017 FCA 106](#), at para 29, **Tab K**.

¹⁸ Para 73, Applicants’ Brief.

¹⁹ Affidavit of Jon Gilbert at para 62 and Exhibit ‘P’.

²⁰ Para 73, Applicants’ Brief.

2022. While the letter requests payment of 50% of the assessed amount, the letter also provides an alternative:

If you filed or intend to file an objection or appeal against your assessment and want to offer security for half of the disputed amount, please call me at [telephone number]. The Canada Revenue Agency will stop applying credits to your disputed debt after we accept the security that you offer. If we do not accept the security, we will continue to apply credits to half the amount you owe during the time of the objection or appeal.

32. There is no evidence the Applicants have offered security to the Minister or that the Minister has been afforded the opportunity to consider any offer of security.
33. Irreparable harm requires that damages cannot be collected from the other party. If the Applicants succeed in the tax appeal, the Minister would refund the tax collected to the Applicants. The Applicants have not provided a sufficient evidentiary foundation for irreparable harm and have not demonstrated that the harm in this case is truly irreparable, as required by the second part of the *RJR MacDonald* test.

Balance of Convenience

34. The third part of the test requires a determination of which of the parties will suffer the greater harm from the granting or refusal of the stay, pending a decision on the merits.²¹ There is a public interest component to this part of the test:

When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.²²

²¹ *RJR MacDonald* at para 67, Applicants' Book of Authorities at Tab 10.

²² *RJR MacDonald* at para 85, Applicants' Book of Authorities at Tab 10.

35. The *ITA* is legislation designed to provide a public benefit – the collection of taxes to fund public services. Public interest weighs in favour of the lawful collection of due tax debts:

...the public interest militates in favour of the collection of lawfully due tax debts. While the collection measures contemplated by the Agency inconvenience and adversely affect the respondents, the tax authority also risks being left empty-handed if these measures are suspended.²³

36. As noted above, the Minister’s right to collect half of the assessed amount is a specific statutory exception to the general stay of proceedings imposed by ss. 225.1 of the *ITA*. It applies only to large corporations, as defined in the *ITA*²⁴. The Applicants assert, in essence, that the provision is “not fair” and ask the Court to substitute its opinion for that of Parliament.

37. While the activities of the Applicants would be under the supervision of a Court appointed Monitor, the value of the Applicants’ assets could still be reduced. This is by the very nature of the Applicants’ business. The Applicants are engaged in active trading in capital markets, including trading of foreign currencies on decentralized global exchanges.²⁵ These investment strategies inherently carry risks and are susceptible to market fluctuations. The public interest is best served by permitting tax collection efforts instead of delaying them, resulting in the risk that the Minister will be left empty-handed due to the very nature of the Applicants’ business. The Applicants fail to meet the third part of the stay of proceedings test.

CONCLUSION AND RELIEF SOUGHT

38. A stay of proceedings in this circumstance is inconsistent with the spirit and purpose of the *CCAA* and should not be granted. The Applicants are essentially seeking an injunction to

²³ *Canada v Gilbert*, [2007 FCA 254](#), at para 6, **Tab L**.

²⁴ [ITA ss. 225.1\(8\)](#) defines “large corporation” to mean a corporation or a group of corporations which employ more than \$10 million in taxable capital.

²⁵ Para 4(b), Applicants’ Brief.

prevent the Minister from lawfully collecting taxes while the Applicants appeal their tax assessment. The Applicants are attempting to secure a remedy in a provincial superior court which has been consistently denied by the Federal Courts. Injunctions cannot be issued where the Minister is acting within the powers granted by law.²⁶

39. The Applicants do not meet the *RJR MacDonald* test. When assessed with the appropriate focus, the Applicants do not present a serious issue. No evidence has been presented to show irreparable harm. Finally, the balance of convenience favours the lawful collection of tax debt by the Minister. The Attorney General submits that this application should be dismissed.

Alternative Remedy

40. In the alternative, if this Court is inclined to grant an order extending the stay of proceedings under the *CCAA*, such extension should be limited to approximately 60 days (e.g., to Friday February 17, 2023) with the proviso that the Applicants are to present cogent evidence of a realistic and reasonable plan of reorganization, and not simply evidence they are pursuing an objection or appeal of the assessments.

All of which is respectfully submitted.

Attorney General of Canada



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²⁶ *North of Smokey Fisherman's Assn v Canada (Attorney General)*, [2003 FCT 33](#), at paras 10 – 11, **Tab M**; *Pacific Salmon Industries Inc v R*, [1985] 1 FC 504, [1984 CanLII 5395 \(FC\)](#), at para 10, **Tab N**.