



COURT FILE NUMBER 2303 06543

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE
GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD.,
279896 ALBERTA LTD., GRANDE PRAIRIE PLACE
ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and
627612 ALBERTA LTD.

APPLICANTS J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL
PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD.,
GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC.,
1170292 ALBERTA LTD. and 627612 ALBERTA LTD.

DOCUMENT **APPENDIX OF THE AUTHORITIES IN
SUPPORT OF THE BENCH BRIEF OF THE
APPLICANT FOR AN INITIAL CCAA ORDER**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING
THIS DOCUMENT

MLT AIKINS LLP
Barristers and Solicitors
2200, 10235 – 101 Street,
Edmonton, AB T5G 3G1
Telephone: 306.975.7136 / 780.969.3518
Fax No.: 306.975.7145 / 780.969.3549
Attention: Jeffrey M. Lee, K.C / Mandi A. Deren-Dube
File No.: 0159371.00008

INDEX OF AUTHORITIES

TAB	DESCRIPTION
1.	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36
2.	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3
3.	<i>Re Stelco Inc.</i> (2004), [2004] OJ No 1257 (Ont SCJ)
4.	9354-9186 <i>Québec inc. v Callidus Capital Corp.</i> , 2020 SCC 10
5.	<i>Industrial Properties Regina Limited v Copper Sands Land Corp.</i> , 2018 SKCA 36
6.	<i>First Leaside Wealth Management Inc. (Re)</i> , 2012 ONSC 1299
7.	<i>Alberta Treasury Branches v Tallgrass Energy Corp.</i> , 2013 ABQB 432
8.	<i>Re Canwest Publishing Inc. / Publications Canwest Inc.</i> , 2010 ONSC 222
9.	<i>Re Timminco Ltd.</i> , 2012 ONSC 506
10.	<i>North American Tungsten Corporation Ltd. (Re)</i> , 2015 BCSC 1376
11.	<i>JTI-Macdonald Corp., Re</i> , 2019 ONSC 1625

Canada Federal Statutes
Companies' Creditors Arrangement Act
Interpretation

Most Recently Cited in: [In the Matter of the Companies' Creditors Arrangement Act](#) , 2023 ONSC 753, 2023 CarswellOnt 1528 | (Ont. S.C.J. [Commercial List], Jan 30, 2023)

R.S.C. 1985, c. C-36, s. 2

s 2.

Currency

2.

2(1) Definitions

In this Act,

"aircraft objects" [Repealed 2012, c. 31, s. 419.]

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*"agent négociateur"*)

"bond" includes a debenture, debenture stock or other evidences of indebtedness; (*"obligation"*)

"cash-flow statement", in respect of a company, means the statement referred to in [paragraph 10\(2\)\(a\)](#) indicating the company's projected cash flow; (*"état de l'évolution de l'encaisse"*)

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of [section 2 of the Bankruptcy and Insolvency Act](#); (*"réclamation"*)

"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*"convention collective"*)

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

"court" means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, and

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;

("tribunal")

"debtor company" means any company that

(a) is bankrupt or insolvent,

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

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

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

("compagnie débitrice")

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; ("administrateur")

"eligible financial contract" means an agreement of a prescribed kind; ("contrat financier admissible")

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

("fiducie de revenu")

"initial application" means the first application made under this Act in respect of a company; *("demande initiale")*

"monitor", in respect of a company, means the person appointed under [section 11.7](#) to monitor the business and financial affairs of the company; *("contrôleur")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"prescribed" means prescribed by regulation; *("Version anglaise seulement")*

"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; *("créancier garanti")*

"shareholder" includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"Superintendent of Bankruptcy" means the Superintendent of Bankruptcy appointed under [subsection 5\(1\) of the Bankruptcy and Insolvency Act](#); *("surintendant des faillites")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under [subsection 5\(1\) of the Office of the Superintendent of Financial Institutions Act](#); *("surintendant des institutions financières")*

"title transfer credit support agreement" means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. *("créancier chirographaire")*

2(2) Meaning of "related" and "dealing at arm's length"

For the purpose of this Act, [section 4 of the *Bankruptcy and Insolvency Act*](#) applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

Amendment History

R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 3); 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 120; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15; 2005, c. 47, s. 124 [Amended 2007, c. 36, s. 105.]; 2007, c. 29, s. 104; 2007, c. 36, ss. 61(1), (2), (4); 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89

Currency

Federal English Statutes reflect amendments current to February 1, 2023

Federal English Regulations Current to Gazette Vol. 156:25 (December 7, 2022)

Canada Federal Statutes
Companies' Creditors Arrangement Act
Interpretation

Most Recently Cited in: [Roman Catholic Episcopal Corporation of St. John's \(Re\)](#) , 2022 NLSC 81, 2022 CarswellNfld 155, 2022 A.C.W.S. 1324, 98 C.B.R. (6th) 207 | (N.L. S.C., May 10, 2022)

R.S.C. 1985, c. C-36, s. 3

s 3.

[Currency](#)

3.

3(1)Application

This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with [section 20](#), is more than \$5,000,000 or any other amount that is prescribed.

3(2)Affiliated companies

For the purposes of this Act,

- (a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
- (b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

3(3)Company controlled

For the purposes of this Act, a company is controlled by a person or by two or more companies if

- (a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
- (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

3(4)Subsidiary

For the purposes of this Act, a company is a subsidiary of another company if

- (a) it is controlled by
 - (i) that other company,
 - (ii) that other company and one or more companies each of which is controlled by that other company, or
 - (iii) two or more companies each of which is controlled by that other company; or
- (b) it is a subsidiary of a company that is a subsidiary of that other company.

Amendment History

1997, c. 12, s. 121; 2005, c. 47, s. 125

Currency

Federal English Statutes reflect amendments current to February 1, 2023

Federal English Regulations Current to Gazette Vol. 156:25 (December 7, 2022)

End of Document

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

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: *In the Matter of the Companies' Creditors Arrangement Act And In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841, 2023 CarswellOnt 1354 | (Ont. S.C.J. [Commercial List], Feb 2, 2023)

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

11. General power of court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Currency

Federal English Statutes reflect amendments current to February 1, 2023

Federal English Regulations Current to Gazette Vol. 156:25 (December 7, 2022)

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: *In the Matter of the Companies' Creditors Arrangement Act*, 2023 ONSC 753, 2023 CarswellOnt 1528 | (Ont. S.C.J. [Commercial List], Jan 30, 2023)

R.S.C. 1985, c. C-36, s. 11.02

s 11.02

Currency

11.02

11.02(1) Stays, etc. — initial application

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 10 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.

11.02(2) Stays, etc. — other than initial application

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.

11.02(3) Burden of proof on application

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.

11.02(4) Restriction

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

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

Currency

Federal English Statutes reflect amendments current to February 1, 2023

Federal English Regulations Current to Gazette Vol. 156:25 (December 7, 2022)

End of Document

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

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: [In the Matter of the Companies' Creditors Arrangement Act](#) , 2023 ONSC 753, 2023 CarswellOnt 1528 | (Ont. S.C.J. [Commercial List], Jan 30, 2023)

R.S.C. 1985, c. C-36, s. 11.52

s 11.52

[Currency](#)

11.52

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

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

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

11.52(2) Priority

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

Amendment History

2005, c. 47, s. 128; 2007, c. 36, s. 66

Currency

Federal English Statutes reflect amendments current to February 1, 2023

Federal English Regulations Current to Gazette Vol. 156:25 (December 7, 2022)



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

L.R.C., 1985, ch. B-3

An Act respecting bankruptcy and insolvency

Loi concernant la faillite et l'insolvabilité

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act*.

R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Titre abrégé

Titre abrégé

1 *Loi sur la faillite et l'insolvabilité*.

L.R. (1985), ch. B-3, art. 1; 1992, ch. 27, art. 2.

Interpretation

Definitions

2 In this Act,

affidavit includes statutory declaration and solemn affirmation; (*affidavit*)

aircraft objects [Repealed, 2012, c. 31, s. 414]

application, with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; (*Version anglaise seulement*)

assignment means an assignment filed with the official receiver; (*cession*)

bank means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association; (*banque*)

Définitions et interprétation

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit

Accord aux termes duquel une personne insolvable ou un failli transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actif à court terme Sommes en espèces, équivalents de trésorerie — notamment les effets négociables et dépôts à vue —, inventaire, comptes à recevoir ou produit de toute opération relative à ces actifs. (*current assets*)

actionnaire S'agissant d'une personne morale ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette personne morale ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une personne morale autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

income trust means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

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

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

- a) soit du prononcé de l'ordonnance de faillite la visant;
- b) soit du dépôt d'une cession de biens la visant;
- c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

- a) le dépôt d'une cession de biens la visant;
- b) le dépôt d'une proposition la visant;
- c) le dépôt d'un avis d'intention par elle;
- d) le dépôt de la première requête en faillite :
 - (i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),
 - (ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;
- e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;
- f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

**SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER
APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT
ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage and Geoff R. Hall*, for the Applicants
David Jacobs and Michael McCreary, for Locals 1005, 5328 and 8782 of the
United Steel Workers of America
Ken Rosenberg, Lily Harmer and Rob Centa, for United Steelworkers of America
Bob Thornton and Kyla Mahar, for Ernst & Young Inc., Monitor of the
Applicants
Kevin J. Zych, for the Informal Committee of Stelco Bondholders
David R. Byers, for CIT
Kevin McElcheran, for GE
Murray Gold and Andrew Hatnay, for Retired Salaried Beneficiaries
Lewis Gottheil, for CAW Canada and its Local 523
Virginie Gauthier, for Fleet
H. Whiteley, for CIBC
Gail Rubenstein, for FSCO
Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least \$5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of \$5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* ...

To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)...

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at p. 580:

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

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:

- (a) identification of the debtor's stakeholders and their interests;
- (b) arranging for a process of meaningful communication;
- (c) dealing with immediate relationship issues arising from a CCAA filing;
- (d) sharing information about the issues giving rise to the debtor's need to restructure;

**9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants***

v.

**Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
*Respondents***

and

**Ernst & Young Inc.,
IMF Bentham Limited (now known as
Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known
as Omni Bridgeway Capital (Canada)
Limited), Insolvency Institute of Canada and
Canadian Association of Insolvency and
Restructuring Professionals *Interveners***

- and -

**IMF Bentham Limited (now known as Omni
Bridgeway Limited) and
Bentham IMF Capital Limited (now known
as Omni Bridgeway Capital (Canada)
Limited) *Appellants***

v.

**Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
*Respondents***

and

**9354-9186 Québec inc. et
9354-9178 Québec inc. *Appelantes***

c.

**Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés***

et

**Ernst & Young Inc.,
IMF Bentham Limited (maintenant
connue sous le nom d’Omni Bridgeway
Limited), Corporation Bentham IMF
Capital (maintenant connue sous le nom de
Corporation Omni Bridgeway Capital
(Canada)), Institut d’insolvabilité du Canada
et Association canadienne des professionnels
de l’insolvabilité et de la réorganisation
*Intervenants***

- et -

**IMF Bentham Limited (maintenant
connue sous le nom d’Omni Bridgeway
Limited) et Corporation Bentham IMF
Capital (maintenant connue sous le nom de
Corporation Omni Bridgeway Capital
(Canada)) *Appelantes***

c.

**Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés***

et

to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

- (1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?
- (2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the CCAA?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the CCAA regime. Accordingly, before turning to those issues, we review (1) the evolving nature of CCAA proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

cette raison, il aurait dû être soumis au vote des créanciers. Elle conclut [TRADUCTION] « [qu']un arrangement ou une proposition peut englober une transaction visant les réclamations des créanciers ainsi que le processus suivi pour y donner suite » (par. 85). La cour juge que l'AFL est un plan d'arrangement parce qu'il a une incidence sur la participation des créanciers à l'indemnité susceptible d'être accordée à la suite d'un litige, qu'il oblige ceux-ci à attendre l'issue de tout litige, et qu'il est possible que les créanciers se retrouvent les mains vides. De plus, la cour conclut que le projet de Bluberi « dans son entièreté », soit la poursuite des réclamations réservées et l'AFL, doit être soumis à l'approbation des créanciers (par. 89).

[36] Bluberi et Bentham (collectivement, les « appelantes »), encore une fois appuyées par le contrôleur, se pourvoient maintenant devant notre Cour.

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

- (1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?
- (2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la LACC?

V. Analyse

A. *Considérations préliminaires*

[38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la LACC. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la LACC; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.

(1) The Evolving Nature of CCAA Proceedings

[39] The CCAA is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (“WURA”), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (WURA, s. 6(1)). While both the CCAA and the BIA enable reorganizations of insolvent companies, access to the CCAA is restricted to debtor companies facing total claims in excess of \$5 million (CCAA, s. 3(1)).

[40] Together, Canada’s insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially “catastrophic” impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor’s insolvency; preserving and maximizing the value of a debtor’s assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

(1) La nature évolutive des procédures intentées sous le régime de la LACC

[39] La LACC est l’une des trois principales lois canadiennes en matière d’insolvabilité. Les autres sont la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985 c. B-3 (« LFI »), qui traite de l’insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« LLR »), qui traite de l’insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d’assurance (LLR, par. 6(1)). Bien que la LACC et la LFI permettent toutes deux la restructuration de compagnies insolvables, l’accès à la LACC est limité aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (LACC, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l’insolvabilité poursuivent un grand nombre d’objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l’insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallistes*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l’insolvabilité d’un débiteur; préserver et maximiser la valeur des actifs d’un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l’intérêt public; et, dans le contexte d’une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d’une compagnie (J. P. Sarra, « The Oscillating Pendulum : Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2^e éd. 2013), p. 4-5 et 14; Comité sénatorial permanent des banques et du commerce, *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2^e éd. 2015), p. 4-5).

[41] Among these objectives, the CCAA generally prioritizes “avoiding the social and economic losses resulting from liquidation of an insolvent company” (*Century Services*, at para. 70). As a result, the typical CCAA case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the BIA regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the CCAA is fundamentally insolvency legislation, and thus it also “has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm’s financial distress . . . and enhancement of the credit system generally” (Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (“*Essar*”), at para. 103). In pursuit of those objectives, CCAA proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor’s assets under the auspices of the Act itself (Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, at pp. 19-21). Such scenarios are referred to as “liquidating CCAAs”, and they are now commonplace in the CCAA landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[41] Parmi ces objectifs, la LACC priorise en général le fait d’« éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable » (*Century Services*, par. 70). C’est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l’entreprise débitrice qui n’a pas encore déposé de proposition en la maintenant dans un état opérationnel, c’est-à-dire en permettant qu’elle poursuive ses activités. Lorsqu’une telle restructuration n’était pas possible, on considérait qu’il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la LFI. C’est précisément le résultat qui était recherché dans l’affaire *Century Services* (voir par. 14).

[42] Cela dit, la LACC est fondamentalement une loi sur l’insolvabilité, et à ce titre, elle a aussi [TRA-DUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d’exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l’entreprise [. . .] et d’améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (« *Essar* »), par. 103). Afin d’atteindre ces objectifs, les procédures intentées sous le régime de la LACC ont évolué de telle sorte qu’elles permettent des solutions qui évitent l’émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum : Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la LACC », sont maintenant courants dans le contexte de la LACC (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an “en bloc” sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, “Liquidating CCAAs: Discretion Gone Awry?”, in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] CCAA courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the CCAA being a “restructuring statute” (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff’d 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, “The History of the Companies’ Creditors Arrangement Act and the Future of Re-Structuring Law in Canada” (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the CCAA came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor

[43] Les procédures de liquidation sous le régime de la LACC revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d’entreprise en activité; la vente « en bloc » des éléments d’actif susceptibles d’être exploités par un acquéreur; une liquidation partielle de l’entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l’issue des procédures de liquidation introduites sous le régime de la LACC sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d’une autre entité viable (p. ex., les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont., Div. gén.)), alors que d’autres peuvent simplement aboutir à la vente des actifs et de l’inventaire sans donner naissance à une nouvelle entité (p. ex., la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D’autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s’occuper des actifs résiduels.

[44] Les tribunaux chargés de l’application de la LACC ont d’abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L’émergence de cette pratique a fait l’objet de critiques, essentiellement parce qu’elle semblait incompatible avec l’objectif de « restructuration » de la LACC (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies’ Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] Toutefois, depuis que l’art. 36 de la LACC est entré en vigueur en 2009, les tribunaux l’utilisent pour consentir à une liquidation sous le régime de la LACC. L’article 36 confère aux tribunaux le pouvoir

company's assets outside the ordinary course of business.³ Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the CCAA, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the CCAA in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires³. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la LACC et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4^e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la LACC afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

[46] Ultimately, the relative weight that the different objectives of the CCAA take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the BIA context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the BIA serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However,

[46] En définitive, le poids relatif attribué aux différents objectifs de la LACC dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la LFI. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la LFI vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où

³ We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the CCAA as opposed to requiring the parties to proceed to liquidation under a receivership or the BIA regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

³ Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la LACC plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la LFI (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the CCAA, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the CCAA leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

[47] One of the principal means through which the CCAA achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each CCAA proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The CCAA capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and “meet contemporary business and social needs” (*Century Services*, at para. 58) in “real-time” (para. 58, citing R. B. Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge “to make any order that [the judge] considers appropriate in the circumstances”. This section has been described as “the engine” driving the statutory scheme (*Stelco*

la société débitrice ne s’extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la LACC, lorsque la restructuration d’une société débitrice qui n’a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d’exploitation et à maintenir ses activités courantes peut devenir l’objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l’objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l’expliquerons, la structure de la LACC laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la LACC

[47] Un des principaux moyens par lesquels la LACC atteint ses objectifs réside dans le rôle particulier de surveillance qu’elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la LACC est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La LACC mise sur la position avantageuse qu’occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d’ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s’adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d’ancrage de ce pouvoir discrétionnaire est l’art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu’il estime indiquée ». Cette disposition a été décrite

Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three “baseline considerations” (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the CCAA context. Appropriateness “is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA” (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the CCAA, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act*, 2019, No. 1, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the CCAA regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la LACC n’est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la LACC, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l’esprit les trois « considérations de base » (par. 70) qu’il incombe au demandeur de démontrer : (1) que l’ordonnance demandée est indiquée, et (2) qu’il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l’opportunité et la bonne foi, sont largement connues dans le contexte de la LACC. Le tribunal « évalue l’opportunité de l’ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l’exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d’insolvabilité est depuis peu mentionnée de façon expresse à l’art. 18.6 de la LACC, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d’agir de bonne foi dans le cadre d’une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S’il est convaincu que l’intéressé n’agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu’il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi n° 1 d’exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu’on s’y attarde. Conformément au régime de la LACC en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n’usent

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the CCAA rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the CCAA regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the CCAA (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as “the eyes and the ears of the court” throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see CCAA, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la LACC se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la LACC, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la LACC (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir LACC, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (*“Re Edgewater Casino Inc.”*), at para. 20, are apt:

... one of the principal functions of the judge supervising the CCAA proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... CCAA proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

(3) Le contrôle en appel de l'exercice du pouvoir discrétionnaire du juge surveillant

[53] Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable (voir *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, par. 98; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, par. 23). Elles doivent prendre garde de ne pas substituer leur propre pouvoir discrétionnaire à celui du juge surveillant (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, par. 20).

[54] Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision. À cet égard, les observations formulées par le juge Tysoe dans *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (« *Re Edgewater Casino Inc.* »), par. 20, sont pertinentes :

[TRADUCTION] ... une des fonctions principales du juge chargé de la supervision de la procédure fondée sur la LACC est d'essayer d'établir un équilibre entre les intérêts des différents intéressés durant le processus de restructuration, et il sera bien souvent inopportun d'examiner une des décisions qu'il aura rendues à cet égard isolément des autres. [...] Les procédures intentées sous le régime de la LACC sont de nature dynamique et le juge surveillant a une connaissance intime du processus de restructuration. La nature du processus l'oblige souvent à prendre des décisions rapides dans des situations complexes.

[55] En gardant ce qui précède à l'esprit, nous passons maintenant aux questions soulevées par le présent pourvoi.

Court of Appeal for Saskatchewan

Citation: *Industrial Properties Regina
Limited v Copper Sands Land Corp.,
2018 SKCA 36*

Date: 2018-05-23

Docket: CACV3176

Between:

Industrial Properties Regina Limited

*Appellant
(Respondent)*

And

**Copper Sands Land Corp., Willow Rush Development Corp., Midtdal
Developments & Investments Corp., Prairie Country Homes Ltd., JJJ
Developments & Investments Corp. and MDI Utility Corp.**

*Respondents
(Applicants)*

Docket: CACV3177

Between:

101297277 Saskatchewan Ltd.

*Appellant
(Respondent)*

And

**Copper Sands Land Corp., Willow Rush Development Corp., Midtdal
Developments & Investments Corp., Prairie Country Homes Ltd., JJJ
Developments & Investments Corp. and MDI Utility Corp.**

*Respondents
(Applicants)*

Docket: CACV3178

Between:

Affinity Credit Union 2013

*Appellant
(Respondent)*

And

**Copper Sands Land Corp., Willow Rush Development Corp., Midtdal
Developments & Investments Corp., Prairie Country Homes Ltd., JJI
Developments & Investments Corp. and MDI Utility Corp.**

*Respondents
(Applicants)*

REVISED JUDGMENT: The text of the original judgment has been corrected with text of the
erratum (released May 23, 2018) appended.

Before: Herauf, Ryan-Froslic and Schwann JJ.A.

Disposition: Appeal allowed in part

Written reasons by: The Honourable Mr. Justice Herauf
In concurrence: The Honourable Madam Justice Ryan-Froslic
The Honourable Madam Justice Schwann

On Appeal From: QBG 1693 of 2017, Saskatoon
Appeal Heard: March 5, 2018

Counsel: Diana K. Lee, Q.C. and Alexander Shalashniy
for Industrial Properties Regina Ltd.
Rick Van Beselaere, Q.C. for 101297277 Saskatchewan Ltd.
Ryan A. Pederson for Affinity Credit Union
Jeffery M. Lee, Q.C. and Paul Olfert for the Respondents

Court in *Century Services* determined good faith and due diligence applies to initial orders as well:

[69] The CCAA also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (CCAA, ss. 11(3), (4) and (6)).

[70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. ...

[23] Although it is a consideration for granting an initial order, courts generally defer the in-depth analysis of good faith and due diligence to subsequent applications, such as the extension of the initial 30-day order: Rogers, Sieradski & Kanter, “What Does ‘Good Faith’ Mean in Insolvency Proceedings?” Vol 4-4 Insolvency Institute of Canada (Articles) (WL). If, however, the court determines the debtor corporation is not seeking CCAA protection in good faith or there is convincing evidence of a lack of due diligence, the court may deny an initial order on the basis of a failure to satisfy the baseline requirement in s. 11.02(3)(b): see *Alberta Treasury*.

C. Did the Chambers judge err in granting the initial order?

[24] The appellants submit the Chambers judge erred in concluding the respondents had satisfied the “appropriate circumstances” and “good faith and due diligence” requirements contained in ss. 11.02(3)(a) and (b).

[25] In support of this argument, the appellants contend CCAA proceedings are not appropriate as the respondents have only one active business, the Copper Sands Trailer Park, which has only two employees. The appellants argue CCAA proceedings are not needed to “avoid the social and economic costs of liquidating assets” as there are no such consequences given the minimal business activity of the respondents.

[26] In addition, the appellants submit the Chambers judge failed to consider the creditors’ lack of faith and confidence in management when determining whether the initial order was appropriate. The appellants also allege the Chambers judge failed to provide adequate reasons for his conclusion that the respondents were acting in good faith and with due diligence.

[27] The Chambers judge determined the respondents were engaged in active business, which was “facing a looming liquidity condition or crisis” if an initial order and a stay of proceedings were not granted (*November fiat* at para 15). The Chambers judge concluded the “initial stay of proceedings [would] give the applicants the time to restructure and refinance their operations” (*December fiat* at para 14).

[28] The Chambers judge was satisfied the respondents were not seeking CCAA protection merely to postpone inevitable liquidation:

[10] In this case I find that the applicants, or at least MDI Utility Corp. and CSLC, are engaged in an active business rather than being simply real estate developers as alleged by the respondents. CSLC operates a mobile home park. MDI Utility Corp. is completing a water treatment utility to provide wastewater treatment services to both the existing mobile home park and an upcoming Tanglewood development on CSLC lands. This is not a situation where the applicants seek CCAA protection for the purpose of obtaining more time to sell or refinance property as was the situation in *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145; *Redekop Properties Inc. (Re)*, 2001 BCSC 1892; and *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 AR 296.

(*December fiat*)

[29] As for whether there was a reasonable possibility of restructuring, the Chambers judge noted he was “satisfied that the completion of the water treatment utility [would] add to the overall net worth” of the respondents (*December fiat* at para 13). The Chambers judge also noted that the respondents had, at the time of the initial application, secured an interim financier willing to fund the completion of the water treatment utility and the CCAA proceedings.

[30] On this basis, the Chambers judge concluded as follows:

[14] I am satisfied that the applicants have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that an order for an initial stay of proceedings is appropriate. ...

(*December fiat*)

[31] As discussed, the purpose of the initial order is to stay creditor enforcement to grant the debtor corporation a limited period of time to attempt to devise a viable restructuring plan. To obtain an initial order, the debtor corporation must satisfy the court that the initial order will “usefully further” its efforts towards attempted reorganization. The debtor corporation is not required, at this stage of the proceedings, to provide a full-fledged restructuring plan, but is required to show, at the very least, it has a “germ of a plan”: see *Alberta Treasury*. The court

must be convinced the debtor corporation is not seeking CCAA proceedings simply to delay the inevitable liquidation in order to “buy time”.

[32] It is clear the Chambers judge was cognizant of these purposes and the baseline considerations, which the respondents had to satisfy prior to receiving the initial order. The Chambers judge concluded the initial order would usefully further the remedial purposes of the CCAA by providing the conditions upon which the respondents could attempt to reorganize their affairs. He was satisfied on the evidence before him, that there was at least a “germ of a plan”, given the fact the respondents had secured interim financing to facilitate the commissioning of the water treatment facility.

[33] It is also clear the Chambers judge considered the creditors’ lack of confidence. In his fiat, the Chambers judge stated: “[u]fortunately, and unlike many CCAA applications, all of the respondent secured creditors oppose the application” (*November fiat* at para 21). Despite this, the Chambers judge determined the initial order was appropriate in the circumstances based on the factors discussed above. The Chambers judge was entitled to reach this conclusion. Whether the creditors have lost confidence in the debtor corporation’s management is something the court must consider when assessing whether to grant an initial order. However, the creditors’ lack of faith is not determinative and does not necessarily dictate denying an initial application: *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para 27, 96 BCLR (4th) 77; *Pacific Shores Resort & Spa Ltd., Re.*, 2011 BCSC 1775 at paras 40–44 and 49(c).

[34] Upon review, although his reasons are not extensive, it is clear the Chambers judge properly considered whether the baseline considerations contained in ss. 11.02(3)(a) and (b) were satisfied. Given the real time nature of CCAA proceedings, Chambers judges are not required to give extensive reasons addressing each and every argument raised by the parties when granting initial applications (*Alberta Treasury Branches v Conserve Oil Corporation*, 2016 ABCA 87 at paras 14–15, 35 CBR (6th) 6). We also note that the Chambers judge was not required to undertake an in-depth analysis to determine good faith and due diligence at this stage of the proceedings as a more in-depth analysis will be taken if the respondents make an application to extend the order or if they seek additional court orders.

[35] Given the deference afforded to a chambers judge making CCAA decisions, this Court will only intervene if the lack of reasons leads to a reasonable belief that the Chambers judge ignored or misconceived the evidence *in a way that affected his conclusion* (*York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, 2010 ONCA 393, 262 OAC 232). This threshold for intervention is not met in this case. Therefore, the appellants' appeal regarding the initial order is dismissed.

V. INTERIM FINANCING

[36] In addition to granting the initial order, the Chambers judge authorized the respondents to obtain interim financing up to \$1.25 million. The interim financing was given a priority charge upon the respondents' assets and over the claims of the appellants. The appellants appealed this order on the grounds the Chambers judge failed to consider the relevant factors pursuant to s. 11.2(4) of the CCAA prior to granting the order with respect to interim financing.

[37] Pursuant to s. 11.2(1) of the CCAA, a debtor corporation may apply to the court at any stage of the proceedings for interim financing. As Dr. Janis Sarra explains, "interim financing" refers primarily to the working capital that the debtor corporation requires in order to continue operating during restructuring proceedings, as well as to finance the costs of the CCAA process (*Rescue! The Companies' Creditors Arrangement Act* at 197). The underlying premise of interim financing is that it is a benefit to all stakeholders "as it allows the debtor to protect going-concern value while it attempts to devise a plan of compromise or arrangement acceptable to creditors" (at 197). Interim financing is generally granted to ensure the debtor corporation can continue its essential operations, such as "keeping the lights on" and paying employees, while it undergoes the CCAA proceedings.

[38] Before an order allowing interim financing to be obtained can be granted, the court must consider, among other things, the factors enumerated in s. 11.2(4). If granted, the court may order the interim financing have a priority charge over the corporation's assets pursuant to s. 11.2(2):

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by

CITATION: First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299
COURT FILE NO.: CV-12-9617-00CL
DATE: 20120226

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc., Applicants

BEFORE: D. M. Brown J.

COUNSEL: J. Birch and D. Ward, for the Applicants

P. Huff and C. Burr, for the proposed Monitor, Grant Thornton Limited

D. Bish, for the Independent Directors

B. Empey, for Investment Industry Regulatory Organization of Canada

J. Grout, for the Ontario Securities Commission

R. Oliver, for Kenaidan Contracting Limited

J. Dietrich, the proposed Representative Counsel for the investors

E. Garbe, for Structform International Limited

circumstances of this case it does not. The jurisprudence under the CCAA provides that the protection of the Act may be extended not only to a “debtor company”, but also to entities who, in a very practical sense, are “necessary parties” to ensure that that stay order works. Morawetz J. put the matter the following way in *Priszm Income Fund (Re)*:

The CCAA definition of an eligible company does not expressly include partnerships. However, CCAA courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehndorff, supra*, and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (S.C.J.).

The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.⁴

[30] Although section 3(1) of the CCAA requires a court on an initial application to inquire into the solvency of any applicant, the jurisprudence also requires a court to take into account the relationship between any particular company and the larger group of which it is a member, as well as the need to place that company within the protection of the Initial Order so that the order will work effectively. On the evidence filed I had no hesitation in concluding that given the insolvency of the overall First Leaside Group and the high degree of inter-connectedness amongst the members of that group, the protection of the CCAA needed to extend both to the Applicants and the limited partnerships listed in Schedule “A” to the Initial Order. The presence of all those entities within the ambit of the Initial Order is necessary to effect an orderly winding-up of the insolvent group as a whole. Consequently, whether Queenston Manor General Partner Inc. falls under the Initial Order by virtue of being a “debtor company”, or by virtue of being a necessary party as part of an intertwined whole, is, in the circumstances of this case, a distinction without a practical difference.

[31] In sum, I am satisfied that those Applicants identified as “insolvent” on the chart attached to Mr. MacLeod’s supplementary affidavit are “debtor companies” within the meaning of the CCAA and that the other Applicants, as well as the limited partnerships listed on Schedule “A” of the Initial Order, are entities to which it is necessary and appropriate to extend CCAA protection.

C. “Liquidation” CCAA

[32] While in most circumstances resort is made to the CCAA to “permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets” and to create “conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all”, the

⁴ 2011 ONSC 2061, paras. 26-27.

reality is that “reorganizations of differing complexity require different legal mechanisms.”⁵ That reality has led courts to recognize that the CCAA may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership,⁶ or to wind-up or liquidate it. In *Lehndorff General Partner Ltd. (Re)*⁷ Farley J. observed:

It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Assoc. Investors, supra*, at p. 318; *Re Amirault Co.* (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

[33] In the decision of *Associated Investors of Canada Ltd. (Re)* referred to by Farley J., the Alberta Court of Queen’s Bench stated:

The realities of the modern marketplace dictate that courts of law respond to commercial problems in innovative ways without sacrificing legal principle. In my opinion, the Companies' Creditors Arrangement Act is not restricted in its application to companies which are to be kept in business. Moreover, the Court is not without the ability to address within its jurisdiction the concerns expressed in the Ontario cases. The Act may be invoked as a means of liquidating a company and winding-up its affairs but only if certain conditions precedent are met:

1. It must be demonstrated that benefits would likely flow to Creditors that would not otherwise be available if liquidation were effected pursuant to the Bankruptcy Act or the Winding-Up Act.
2. The Court must concurrently provide directions pursuant to compatible legislation that ensures judicial control over the liquidation process and an effective means whereby the affairs of the company may be investigated and the results of that investigation made available to the Court.
3. A Plan of Arrangement should not receive judicial sanction until the Court has in its possession, all of the evidence necessary to allow the Court to properly

⁵ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paras. 15, 77 and 78.

⁶ *Nortel Networks Corp. (Re)*, 2009 ONCA 833, para. 46; see Kevin P. McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), pp. 284 et seq.

⁷ [1993] O.J. No. 14 (Gen. Div.). In *Brake Pro, Ltd. (Re)*, [2008] O.J. No. 2180 (S.C.J.), Wilton-Siegel J. stated, at paragraph 10: “While reservations are expressed from time to time regarding the appropriateness of a “liquidating” CCAA proceeding, such proceedings are permissible under the CCAA.”

exercise its discretion according to standards of fairness and reasonableness, absent any findings of illegality.⁸

The editors of *The 2012 Annotated Bankruptcy and Insolvency Act* take some issue with the extent of those conditions:

With respect, these conditions may be too rigorous. If the court finds that the plan is fair and reasonable and in the best interests of creditors, and there are cogent reasons for using the statute rather than the *BIA* or *WURA*, there seems no reason why an orderly liquidation could not be carried out under the *CCAA*.⁹

[34] Mr. MacLeod, the CRO, deposed that no viable plan exists to continue First Leaside as a going concern and that the most appropriate course of action is to effect an orderly wind-down of First Leaside's operations over a period of time and in a manner which will create the opportunity to realize improved net asset value. In his professional judgment the *CCAA* offered the most appropriate mechanism by which to conduct such an orderly liquidation:

[T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues – especially the numerous investor and creditor claims and the inter-company claims – can be dealt with in one forum under the supervision of the court.

In its Pre-filing Report the Monitor also supported using the *CCAA* to implement the “restructuring/wind-up plan(s) in a stabilized environment”.

[35] Both the CRO and the proposed Monitor possess extensive knowledge about the workings of the Applicants. Both support a process conducted under the *CCAA* as the most practical and effective way in which to deal with the affairs of this insolvent group of companies. No party contested the availability of the *CCAA* to conduct an orderly winding-up of the affairs of the Applicants (although, as noted, some parties questioned whether certain entities should be included within the scope of the Initial Order). Given that state of affairs, I saw no reason not to accept the professional judgment of the CRO and the proposed Monitor that a liquidation under the *CCAA* was the most appropriate route to take.

[36] Moreover, I saw no prejudice to claimant creditors by permitting the winding-up of the First Leaside Group to proceed under the *CCAA* instead of under the *BIA* in view of the convergence which exists between the *CCAA* and *BIA* on the issue of priorities. As the Supreme Court of Canada pointed out in *Century Services*:

⁸ *First Investors Corp. (Re)* (1987), 46 D.L.R. (4th) 669 (Alta. Q.B.), para. 36.

⁹ Houlden, Morawetz & Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act*, N§1, p. 1099.

Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful.¹⁰

As the British Columbia Court of Appeal observed in *Caterpillar Financial Services Ltd. v. 360networks corp.* interested parties also use that priorities backdrop to negotiate successful CCAA reorganizations:

While it might be suggested that CCAA proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan.¹¹

[37] I therefore concluded that the CCAA was available to the Applicants in the circumstances, and I so ordered.

V. Representative Counsel, CRO and Monitor

[38] The Applicants sought the appointment of Fraser Milner Casgrain (“FMC”) as Representative Counsel to represent the interests of the some 1,200 clients of FLSI in this proceeding, subject to the right of any client to opt-out of such representation. The proposed Monitor expressed the view that it would be in the best interests of the FL Group and its investors to appoint Representative Counsel. No party objected to such an appointment. I reviewed the qualifications and experience of proposed Representative Counsel and its proposed fees, and I was satisfied that it would be appropriate to appoint FMC as Representative Counsel on the terms set out in the Initial Order.

[39] The Applicants sought the appointment of G.S. MacLeod & Associates Inc. as CRO of First Lease. No party objected to that appointment. The Applicants included a copy of the CRO’s December 21, 2011 Retention Agreement in their materials. The proposed Monitor stated that the appointment of a CRO was important to ensure an adequate level of senior corporate governance leadership. I agree, especially in light of the withdrawal of Mr. Phillips last November from the management of the Group. The proposed Monitor reported that the terms and conditions of the Retention Agreement were consistent with similar arrangements approved by other courts in CCAA proceedings and the remuneration payable was reasonable in the circumstances. As a result, I confirmed the appointment of G.S. MacLeod & Associates Inc. as CRO of First Lease.

¹⁰ *Century Services, supra.*, para. 23.

¹¹ (2007), 279 D.L.R. (4th) 701 (B.C.C.A.), para. 42.

Court of Queen's Bench of Alberta

Citation: Alberta Treasury Branches v Tallgrass Energy Corp, 2013 ABQB 432

Date: 20130806

Docket: 1301 08759; 1301 08497

Registry: Calgary

Between:

Alberta Treasury Branches

Plaintiff

- and -

Tallgrass Energy Corp.

Defendant

1301 08497

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

And in the Matter of the *Alberta Business Corporation Act*, R.S.A. 2000, c. B-9, as amended

-and-

Tallgrass Energy Corp.

Defendant

**Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine**

Introduction

[1] Tallgrass Energy Corp applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended. That application was opposed by its secured creditors, Alberta Treasury Branches and Toscana Capital Corporation, which prior to Tallgrass' application for CCAA protection had applied for an order appointing a receiver over the property and assets of the company. I dismissed Tallgrass' application for an initial CCAA order and allowed the receivership application. These are my reasons.

Facts

[2] In July, 2012, ATB extended a \$12 million credit facility to Tallgrass, payable on demand and secured by a first charge on all of the company's assets. At about the same time, Toscana granted Tallgrass a bridge loan credit facility in the amount of \$6 million secured by a second in priority charge against the assets. This bridge loan facility matured on April 30, 2013.

[3] In July, 2012, John McAdam, the CEO of Tallgrass, began the process of looking for traditional financing to replace the Toscana bridge financing. In early 2013, Mr. McAdam realized that no conventional financing was available, and Tallgrass began to explore the availability of non-traditional forms of financing.

[4] Tallgrass management decided to attempt to obtain \$100 million of non-traditional financing, as there were no third parties willing to step into the shoes of Toscana's subordinate position. The company retained an advisor in March, 2013 to aid in the search.

[5] After the Toscana facility matured on April 30, 2013, Tallgrass acknowledged that the loan was in default. Toscana agreed to forbear enforcement until May 31, 2013 to provide Tallgrass with additional time to finalize certain financing alternatives that were being explored.

[6] On June 17, 2013, Toscana issued a demand to Tallgrass, and on June 25, 2013, ATB followed with its demand. There is no issue that Tallgrass is also in default of the ATB credit facility.

[7] On June 27, 2013, at the request of the secured lenders, Tallgrass retained Grant Thornton Limited as financial advisor, on the condition that Grant Thornton would provide financial information and reports to the secured lenders. Grant Thornton provided two reports to the lenders, on July 4 and on July 11, 2013. The lenders granted further forbearance during this period and continuing until July 17, 2013.

[8] On about July 15, 2013, on the basis of the information and reports received from Grant Thornton, Toscana advised Tallgrass that it would not be prepared to grant further forbearance, and that it intended to bring an application to appoint a receiver on Wednesday, July 24, 2013. On July 16, 2013, ATB advised Tallgrass that it was taking the same position, and that after July 17, 2013, Tallgrass would have no further access to the remaining \$100,000 available under the line of credit.

[9] Tallgrass sought an initial order under the CCAA on July 17, 2013. The application was put over to July 24, 2013 to be heard at the same time as the receivership application, with a temporary stay to preserve the status quo. ATB agreed to allow Tallgrass access to up to \$50,000 of the line of credit to pay certain critical suppliers.

[10] In its application, Tallgrass represented that it currently has assets of \$28,829,874 and liabilities of \$28,896,371. The secured lenders are owed approximately \$18 million and Tallgrass has unsecured accounts payable in the amount of roughly \$3 million, decommissioning liabilities as of March 31, 2013 in the amount of approximately \$7.4 million and a financing contract under which approximately \$484,000 is outstanding as of March 31, 2013.

[11] The company values its property, plant and equipment, including undeveloped land, at approximately \$21.6 million.

Analysis

[12] As a preliminary matter, it is clear that Tallgrass meets the technical requirements for protection under the CCAA. It is also clear and uncontested that Tallgrass has breached various provisions of the ATB credit facility and the Toscana bridge loan facility, and that the secured lenders are entitled to apply for a receivership order. In fact, there was no question that, if Tallgrass's application for an initial order under the CCAA did not succeed, a receivership would follow.

[13] As I indicated in *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, (1 August 2006), Docket No. 060108395, a section 11 order under the CCAA is not granted merely upon the fact of its application. Tallgrass must satisfy the court that circumstances exist that make the order appropriate, and that it has acted and is acting in good faith and with due diligence. The CCAA therefore requires that the court hearing the application exercise discretion in making these determinations.

[14] A key issue here is whether Tallgrass can establish that there is any reasonable possibility that it will be able to restructure its affairs. The burden placed on an applicant for an initial CCAA order in this regard is not a very onerous one, in that it is not necessary for an applicant company to have a fully-developed plan or the support of its secured creditors, although either or both are desirable and helpful. 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”. Unfortunately, Tallgrass appears to be at that desperate stage.

[15] While it is certainly true that the fundamental purpose of the CCAA is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets, this is a company with very few employees, a handful of independent contractors, and relatively minor unsecured debt. Tallgrass does not carry on a business that has broader community or social implications that may require greater flexibility from creditors. The major stakeholders here are the secured lenders who oppose the application, and the equity holders.

[16] The secured lenders submit that the restructuring options presented by Tallgrass are commercially unrealistic and unlikely to come to fruition, that it is obvious that a liquidation of the assets will be the end result for this company, and that they have lost confidence in the management of Tallgrass to effect such a liquidation. They submit that, as they are likely the only parties with any economic interest in the company, their preference for a receivership over what would ultimately be a liquidating CCAA should be taken into account.

[17] I must agree that the restructuring options proposed by Tallgrass, while more detailed than the kind of general good intentions offered by the applicant in *Matco*, are not realistic or commercially reasonable. Specifically:

1. Tallgrass concedes that it has exhausted any chance of conventional financing after nearly a year of attempting to find a conventional lender to take out its existing secured debt, turning in early 2013 to what it calls non-traditional sources;
2. Company management decided in March of this year to pursue \$100 million in non-traditional debt rather than merely retiring existing secured debt of \$18 million. As noted by the secured lenders, it is unrealistic for a small public company with a market capitalization of approximately \$800,000 and existing assets worth roughly \$29 million, which has already encountered difficulties finding sources of funding to take out Toscana’s subordinate position, to attempt to obtain \$100 million in financing within a reasonable time frame. The unsatisfactory and uncertain results of approximately six months of effort in that regard must be analyzed carefully;
3. Tallgrass has obtained no firm commitments for refinancing. What it has been able to obtain is the following:

a) a letter dated July 23, 2013 from a financing broker that purports to be a “commitment letter”. This “commitment” to lend \$100 million states that the broker will source the finding through an unnamed “top 25 bank”. It requires an upfront “bank guarantee fee” of \$2 million. The letter provides that the broker shall have no liability to Tallgrass “under any theory of law or equity” for the failure of any transaction contemplated by the loan commitment letter. The secured lenders have pointed out the many unusual provisions of this letter, and ask, reasonably enough, why a “top 25 bank” would contemplate a loan of \$100 million to Tallgrass in its present circumstances. Tallgrass management has had no direct discussion with any financial institution and is relying on assurances from the broker that the source of funding would be reputable.

This “commitment letter” lacks credibility. At any rate, Tallgrass is unable in its current financial state even to fund the \$2 million bank guarantee fee necessary to take the proposal to a next step. This leads to the next proposal.

b) Tallgrass has obtained a letter from a friend of its CEO that indicates that he has obtained verbal commitments from Chinese investors in the amount of \$10 million for the purpose of investing in the company, and that they are willing to fund the \$2 million required by the above-noted proposal. The secured lenders note that this potential funding source has no track record or experience with respect to Canadian oil and gas assets, and that, even if the commitment became firm, the amount is insufficient to pay off existing indebtedness.

c) Tallgrass has identified a further option, a potential loan in the process of negotiations with a broker, not a source lender, that would involve the broker earning approximately \$16 million in fees to find a source for a \$100 million loan. This is an even softer proposal, with no real commitment. Tallgrass’ CEO concedes in understatement that this would be “expensive funding”.

[18] Given that these options are not commercially realistic, I must conclude that the secured lenders are correct in their view that this would likely be a liquidating CCAA. While this does not in itself preclude the use of the statute, the secured lenders object to Tallgrass management controlling the liquidation process under CCAA protection as they have lost faith in such management. The secured lenders have identified concerns about management’s estimate of the value of Tallgrass’ oil and gas assets, concerns about the effect of abandonment liabilities on realization values, and concerns about discrepancies between the Cost Flow Projections contained in the CCAA application as compared to those prepared by Grant Thornton. The secured lenders also have concerns with respect to how management is executing its alternate financing strategy, particularly its decision to pursue financing from the kind of sources it has identified, and what they feel is a lack of attention from senior management to realistic

alternatives and options. They are critical of management's decisions with respect to covering short-term liabilities in the course of these applications.

[19] Tallgrass submits that the opinions given by an officer of Toscana, Dean Jensen, on behalf of the secured lenders with respect to the value of its oil and gas assets should be given little weight as Mr. Jensen does not have the proper expertise to comment on the reserve reports. I take Mr. Jensen's comments to be the opinions of a banker experienced with loans in the oil and gas sector and with familiarity with reserve reports. What Mr. Jensen is really questioning is whether Tallgrass would be able to achieve a price for these assets equal to management's projections, and whether such projections are reliable. He thus questions whether the secured lenders are assured of recovery or whether they are at risk.

[20] The concern expressed by Mr. Jensen with respect to cost flow projections relates to whether the costs of a CCAA proceeding will be as projected by Tallgrass, and, again, a lack of confidence with respect to management's projections in that regard. While it appears that Mr. Jensen may have misunderstood some of the calculations, there remain unanswered questions about the projections.

[21] This is not a case where the secured lenders have acted precipitously, or where the debtor has not had a more than adequate opportunity to canvass the market for refinancing and restructuring options. This process has been ongoing for more than a year under Tallgrass management, which was not able to obtain take-out financing for Toscana's bridge loan, nor obtain sufficient financing to satisfy its licensee liability rating report requirements and provide funding necessary for further development activities. It is also clear that Tallgrass and its major secured stakeholders are in an adversarial mode, which does not bode well for an efficient or relatively inexpensive CCAA restructuring. Tallgrass was most likely a liquidating CCAA, and given the lack of confidence and the adversarial relationship between the company and the secured lenders at risk, I was not satisfied that a CCAA order would be appropriate in the circumstances. I dismissed Tallgrass' application.

[22] It thus followed that the secured lenders' application for a receivership order must succeed.

Heard on the 24th day of July, 2013.

Dated at the City of Calgary, Alberta this 6th day of August, 2013.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Thomas Cumming and Jeffrey Oliver
for the Plaintiff Alberta Treasury Branches

Howard Gorman
for Toscana Capital Corporation

Ryan Zahara and Matthew Beavers
for the Defendant Tallgrass Energy Corp.

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior
Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior
Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting
Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

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

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of \$3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

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

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

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

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

¹³ This exception also applies to the other charges granted.

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

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

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

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

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

CITATION: Timminco Limited (Re), 2012 ONSC 506
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants**

**D.W. Ellickson, for Communications, Energy and Paperworkers' Union of
Canada**

C. Sinclair, for United Steelworkers' Union

K. Peters, for AMG Advance Metallurgical Group NV

M. Bailey, for Superintendent of Financial Services (Ontario)

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD: **January 12, 2012**

RELEASED: **January 16, 2012**

REASONS: **February 2, 2012**

ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

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

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

11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[40] Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities' liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

[41] Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

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

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

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

Analysis

(i) Administration Charge and D&O Charge

[42] It seems apparent that the position of the unions' is in direct conflict with the Applicants' positions.

[43] The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

[44] Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

[45] Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

[46] It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timminco Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

[47] The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

[48] Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.*, (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corporation (Re)*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corporation (Re)*, (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

[49] It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5, at para. 36:

In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

[50] Further, as I indicated in *Nortel Networks Corporation (Re)*, (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

[51] The Court of Appeal in *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...

...

What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

[52] The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

[53] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

[54] Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities' CCAA proceedings.

[55] The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).

[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

[58] The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

[59] Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex (Re)*, *supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA

suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[63] In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial and Nortel Networks Corporation (Re)*).

[64] In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

[65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

[66] In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

[67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

[68] For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

[69] I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities' obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

[70] I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

[71] Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

[72] In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities' CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is \$269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corporation (Re)*, (2009) O.J. No. 1044 (S.C.J.), *Grant Forest Products Inc. (Re)*, (2009) 57 C.B.R. (5th) 128 (Ont. S.C.J.) [Commercial List], and *Canwest Global Communications Corp. (Re)*, (2009) 59 C.B.R. (5th) 72 (Ont. S.C.J.).

[73] In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

[74] The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

[75] I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be

2015 BCSC 1376

British Columbia Supreme Court

North American Tungsten Corp., Re

2015 CarswellBC 2232, 2015 BCSC 1376, [2015] B.C.W.L.D. 6686, [2015] B.C.W.L.D. 6687, 256 A.C.W.S. (3d) 767

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of North American Tungsten Corporation Ltd. Petitioner

Butler J., In Chambers

Heard: July 8, 2015

Judgment: July 9, 2015

Docket: Vancouver S154746

Counsel: John R. Sandrelli, Jordan D. Schultz, for Petitioner

Kibben M. Jackson, for Monitor, Alvarex & Marsal Canada Inc.

William E.J. Skelly, for Callidus Capital Corporation

Mary Buttery, H. Lance Williams, for Government of Northwest Territories

Jonathan McLean, Angela L. Crimeni, for Wolfram Bergbau and Hütten AG, Global Tungsten & Powders Corp.

Subject: Civil Practice and Procedure; 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.vii Extension of order](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

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

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

Headnote

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

Debtor company was involved in exploration, development, mining and processing of tungsten and other minerals — World market for tungsten was depressed — Debtor sought protection under [Companies' Creditors Arrangement Act](#) — At time of initial order, debtor had significant cash flow problems — Debtor applied for extension of stay of proceedings granted in initial order, and for approval of interim financing — Applications granted — Extension of stay was appropriate.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Debtor company was involved in exploration, development, mining and processing of tungsten and other minerals — World market for tungsten was depressed — Debtor sought protection under [Companies' Creditors Arrangement Act](#) — At time of initial order, petitioner had significant cash flow problems — Debtor had extensive discussions with monitor and stakeholders to put in place potential Sale and Investment Solicitation Process (SISP), and arrived at agreement for interim financing which would be secured by debtor's property and take priority over all secured creditors — Debtor applied for extension of stay of

proceedings, and for approval of interim financing — Applications granted — Interim financing approved — Operating plan debtor had implemented responded to cash flow problems and was intended to put debtor in position to enhance prospects of viable restructuring and/or future SISF — Interim financing would allow debtor to satisfy obligations along with its ongoing revenues from operations through to November 2015 — By that time SISF should be well underway and perhaps concluded.

Table of Authorities

Cases considered by *Butler J., In Chambers*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Azure Dynamics Corp., Re (2012), 2012 BCSC 781, 2012 CarswellBC 1545, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — followed

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

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

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

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

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

APPLICATIONS by debtor company for extension of stay of proceedings, and for approval of interim financing.

Butler J., In Chambers:

THE COURT: This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to [s. 11.2 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36](#).

2 I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.

Background

3 The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

4 The Company sought protection under the [CCAA](#) as a result of circumstances mostly beyond its control, including a severely depressed world market for tungsten. At the reduced price the Company has been receiving for its tungsten, the Cantung Mine was generating sufficient cash flow to pay the majority of its operational and administrative costs but was unable to meet its financing costs. At the time of the Initial Order, the Company was experiencing significant cash flow problems.

5 Alvarez & Marsal Canada Inc. was appointed Monitor under the Initial Order. A summary of the amounts claimed as owing by secured creditors and their respective security interests as at July 7, 2015 is set out in the Monitor's Fourth report. I will refer to that summary because an understanding of the security interests held by the principal creditors is necessary to consider the issues raised on this application.

6 Callidus Capital Corporation is owed approximately \$13.33 million. This is secured by all present and after-acquired property not related to Mactung. That includes more than 200 pieces of mining equipment used at the Cantung Mine. The Monitor has opined that there is sufficient value in the equipment to satisfy that debt.

7 The Government of Northwest Territories ("GNWT") is owed \$24.67 million. This is secured by all present and after-acquired property related to Mactung. While there is some issue and ongoing negotiation about the actual amount of debt which arises from the Company's reclamation obligations, it is significant.

8 Global Tungsten & Powders Corp. ("GTP") and Wolfram Bergbau und Hütten AG ("WBH") are the Company's only two customers for all of the tungsten produced from the Cantung Mine. The total indebtedness to the customers is approximately \$8.16 million. They also hold security over all present and after-acquired property related to Mactung.

9 Debenture holders are owed \$13.58 million, which is secured by all present and after-acquired property of the Company.

10 Queenwood Capital Partners II LLC ("Queenwood II") is owed approximately \$18.51 million, secured by all present and after-acquired property of the Company. The principals of Queenwood II are related to Company insiders.

11 The total amount of the secured debt is in the range of \$80 million. There is also approximately \$14 million in unsecured liabilities. The reported book value of the assets at the time of the Initial Order was approximately \$64 million, which included a value of \$20 million for the Mactung property. The fair market value or realizable value has not been determined by the Monitor.

12 The somewhat unique situation here is that Callidus does not have security over the Mactung property and the GNWT and the customers do not have security over the Cantung property.

13 The stay granted by the Initial Order expired yesterday, but I extended it until July 10, 2015 to allow me to consider the arguments advanced on this application. Since the Initial Order, management of the Company has been working in good faith to develop a plan of arrangement. Management has developed an operating plan to manage cash flow through the next several months. I will not refer to the projected cash flow except to say that it anticipates receipt of the interim financing and continued revenues of more than \$22 million from operations.

14 The Company has been involved in extensive discussions with the Monitor and stakeholders to put in place a potential Sale and Investment Solicitation Process ("SISP"). To date the plan has involved re-focusing on surface mining and milling ore stockpiles rather than underground mining. Employees have been terminated. If the interim financing is obtained, the Company plans to continue operations at the mine until the end of October 2015, including management of environmental care. It plans to conduct an orderly wind down of underground mining activities, including a staged sale of equipment used in the underground work. It plans to reconfigure the mill facilities to facilitate tailings reprocessing so that it can use existing tailings stores as well as the surface extraction as a revenue source. It also plans to undertake limited expenditures on Cantung reclamation and Mactung environmental work with a view to increasing asset values. It hopes to seek court approval of a SISP in the next couple of weeks.

15 As a result of difficulties arising from timing of receipt of payments from GTP, one of the customers, the cash flow problems for the Company became critical within the last ten days. The Company sought interim financing and received an offer from a third party. Callidus was opposed to that offer of financing and the Company eventually obtained a \$500,000 loan from Callidus on June 29, 2015 on a short-term basis (the "Gap Advance"). They continued to negotiate and arrived at an agreement for interim financing (the "Interim Facility") and a forbearance agreement (the "Forbearance Agreement"). These form the basis for the application before this court. Terms of these agreements which are relevant to the application include:

- a) the \$500,000 Gap Advance would be deemed to be an advance under the Interim Facility;
- b) Callidus will advance an additional \$2.5 million, which along with the Gap Advance would be secured over all of the property of the Company and have priority over the secured creditors; and
- c) the Company will have to make repayments to Callidus by certain dates and those payments include payments of interest and principal on the existing loan facility (the "**Post-Filing Payments**").

16 At the hearing of the application, one of the more contentious issues was the Company's request that the court make the order in relation to the Gap Advance *nunc pro tunc*. This term was sought because s. 11.2(1) of the CCAA allows a court to make an order for interim financing but "The security or charge may not secure an obligation that exists before the order is made."

17 Of course the Gap Advance was an obligation which existed before the making of any order for interim financing. During the course of argument yesterday, the Company withdrew the application for a *nunc pro tunc* order in relation to the Gap Advance. This occurred because Callidus agreed to modify the terms of the Interim Facility such that the Gap Advance will be treated as an advance under its existing facility. In other words, the proposed Interim Facility is now for a \$2.5 million loan facility and not \$3.0 million, as set out in the application.

Position of the Company

18 The Company says that in all of the circumstances, proceeding with the Forbearance Agreement and the Interim Facility is better for the petitioner's restructuring efforts and necessary given the urgent need for funding. It stresses that without access to the interim financing, it will be unable to meet its ongoing payroll obligations or its negotiated payment terms for the post-filing obligations. It will be unable to continue restructuring and will likely face liquidation by its secured creditors. It also says there is greater value for all stakeholders if the Company is permitted to continue operating as a going concern. It says there would likely be no recovery for creditors other than the senior secured creditors without access to the Interim Facility. The local community of Watson Lake and local businesses would suffer significantly, as 100 employees would be out of work. Further, the Company says there is little prejudice to the secured creditors. In addition, it says if the mine site is abandoned,

there would be a larger reclamation obligation, which would be to the detriment of the GNWT and other creditors with claims against an interest in the Mactung property.

Position of the Customers

19 The customers oppose the Interim Facility and the extension of the stay. They argue that the financing of \$2.5 million at interest rates of 21% will not help the Company emerge from this process with a workable plan. They argue that putting the Cantung Mine into care and maintenance as of November and hoping that tungsten prices rise in the future is not a workable plan.

20 The customers say the result of approval of the Interim Facility is that the security interests of WBH and GTP would be prejudiced because those interests would be subordinated to Callidus as well as the GNWT. Finally, they argue that the bankruptcy of the Company and sale of its assets is inevitable no matter what happens.

Position of the GNWT

21 The GNWT does not oppose the extension of the stay nor the granting of the Interim Facility. However, it opposes the Forbearance Agreement which would grant the Interim Facility priority over the GNWT Mactung security, which it holds to secure the environmental and reclamation obligations of the Company. It says that it would be prejudiced as a result of the granting of that priority and that in the circumstances here there is no reason to do so. It says that Callidus would effectively receive approximately \$1.5 million in **Post-Filing Payments** in very short order, which essentially allows it an unfair priority.

The Monitor

22 The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.
- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.
- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.
- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.
- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

23 The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISP being undertaken by the Company. Overall... the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application..."

Extension of the Stay

24 I turn now to the reasons for granting the extension of the stay. [Subsection 11.02\(2\) of the CCAA](#) provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. [Subsection 11.02\(3\)](#) provides:

(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.

25 A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Ted Leroy Trucking Ltd., Re*, [2010 SCC 60](#) (S.C.C.), the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the [CCAA](#). Justice Deschamps stated at para. 70:

... Appropriateness under the [CCAA](#) is assessed by inquiring whether the order sought advances the policy objectives underlying the [CCAA](#). The question is whether the order will usefully further efforts to achieve the remedial purpose of the [CCAA](#) — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

26 When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the [CCAA](#). The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corp., Re*, [2012 BCSC 781](#) (B.C. S.C. [In Chambers]).

27 It is also appropriate for the company to use the [CCAA](#) to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp., Re* (2001), [25 C.B.R. \(4th\) 1](#) (Ont. S.C.J. [Commercial List]).

28 When [CCAA](#) proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of [s. 11.02\(3\)](#) have been met. See, for example, *Pacific Shores Resort & Spa Ltd., Re*, [2011 BCSC 1775](#) (B.C. S.C. [In Chambers]).

29 The good faith and due diligence requirement of [s. 11.02\(3\)](#) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the [CCAA](#) process.

30 I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

31 It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

The Interim Facility

32 I turn to my reasons for approving the interim financing. [Subsection 11.2\(4\) of the CCAA](#) sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

(a) the period during which the company is expected to be subject to proceedings under this Act;

...

(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... if any.

33 While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Ltd., Re*, [2012 ONCA 552](#) (Ont. C.A.) at para. 6, and I am paraphrasing:

a) without interim financing would the petitioner be forced to stop operating;

b) whether bankruptcy would be in the interests of the stakeholders; and

c) would the interim lender have provided financing without a super priority charge...

34 In *Indalex Ltd., Re*, [2013 SCC 6](#) (S.C.C.) at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

a) the applicants needed additional financing to support operations during the period of the going concern restructuring;

b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;

c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

35 When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

- The cash flow projections show that the \$2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.

- I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.

- I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.

- The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.

- Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.
- It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover **Post-Filing Payments**, those will likely be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.
- I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.
- Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

36 Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the **Post-Filing Payments** to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the **Post-Filing Payments** may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

37 In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of \$2.5 million, and as previously indicated, the Gap Advance is not included in that.

38 What about the date for an extension of the stay?

39

MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISF. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

40

THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

41

MR. SCHULTZ: Okay.

42

THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

43

MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

44

THE COURT: All right. The stay is extended to July 17, 2015.

Applications granted.

2019 ONSC 1625

Ontario Superior Court of Justice [Commercial List]

JTI-Macdonald Corp., Re

2019 CarswellOnt 3653, 2019 ONSC 1625, 303 A.C.W.S. (3d) 241, 69 C.B.R. (6th) 285

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP. (Applicant)

Hainey J.

Heard: March 8, 2019

Judgment: March 12, 2019

Docket: CV-19-615862-00CL

Counsel: Robert I. Thornton, Leanne M. Williams, Rachel Bengino, Mitch Grossell, for Applicant

Scott A. Bomhof, Adam M. Slavens, for Respondents, JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald
TM

Pamela L.J. Huff, Linc A. Rogers, Christopher Burr, for Proposed Monitor, Deloitte Restructuring Inc.

Subject: 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.vi Maintenance of status quo](#)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Maintenance of status quo

As result of judgment from Quebec Court of Appeal, debtor and four others were found liable to pay damages of \$13.5 billion — Debtor claimed it did not have sufficient assets to satisfy judgment and that enforcement would lead to its demise, impacting its 500 employees, 1,300 suppliers, 28,000 retailers and 790,000 consumers — Debtor was also defendant in significant number of health care costs recovery actions claiming damages of more than \$500 billion — On basis it wanted opportunity to seek collective solution to all proceedings, for benefit of all stakeholders, debtor brought application for initial order under [Companies' Creditors Arrangement Act](#) — Application granted — Given amount of judgment debt and debtor's apparent inability to pay, there was no question debtor was insolvent company to which Act applied — On basis primary purpose of Act was to maintain status quo while debtor consulted with creditors and stakeholders with view to continuing operations for benefit of company, creditors and stakeholders, it was appropriate to grant stay of proceedings — On basis goal was to reach collective solution, including other defendants in tobacco litigation, it was appropriate to extend stay to those non-applicant third parties — Appointment of proposed monitor was approved — Administrative charges in favour of counsel, restructuring officer and monitor and its counsel in amount of \$3 million were authorized — In order to ensure ongoing stability of debtor's business during proceeding, directors' charges in amount of \$4.1 million were authorized — In order to protect directors and officers from personal liability, payment of sales taxes, excise taxes and duties of \$127 million was authorized — Also in order to maintain debtor's business as going concern, payment of various pre-existing and ongoing obligations arising in ordinary course of business, to employees, trade creditors and like, was authorized — Appointment of proposed restructuring officer, on terms set out in engagement letter, was approved — Debtor was entitled to order sealing engagement letter, which contained

commercially sensitive information — Debtor was granted permission to continue application for leave to appeal to Supreme Court of Canada.

Table of Authorities

Cases considered by *Hainey J.*:

Canwest Publishing Inc./Publications Canwest Inc., Re (2012), 2012 ONSC 633, 2012 CarswellOnt 1134, 89 C.B.R. (5th) 332 (Ont. S.C.J. [Commercial List]) — considered

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

Pacific Exploration & Production Corp., Re (2016), 2016 ONSC 5429, 2016 CarswellOnt 13733, 40 C.B.R. (6th) 64 (Ont. S.C.J. [Commercial List]) — considered

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

Tamerlane Ventures Inc., Re (2013), 2013 ONSC 5461, 2013 CarswellOnt 12213, 6 C.B.R. (6th) 328 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — considered

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

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

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

s. 137(2) — considered

APPLICATION by debtor for initial order under *Companies' Creditors Arrangement Act*.

Hainey J.:

Background

1 On March 8, 2019 JTI-Macdonald Corp. ("JTIM" or "Applicant") sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* ("CCAA"). I granted the Initial Order and endorsed the record as follows:

I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

2 These are my Reasons.

Facts

3 As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding ("Quebec Class Action"), JTIM and two other defendants are liable for damages totaling \$13.5 billion ("Quebec Judgment"). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

4 According to JTIM, enforcement of the Quebec Judgment would destroy the company's value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM's products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of \$1.3 billion paid annually in connection with JTIM's operations (of which \$500 million per year is paid directly by JTIM and another \$800 million per year is paid by third parties and consumers).

5 JTIM is also a defendant in a number of significant health care costs recovery actions ("HCCR Actions"). The total claims in the HCCR Actions exceed \$500 billion.

6 JTIM wishes to seek a "collective solution" to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the [CCAA](#).

7 In its application JTIM seeks protection from its creditors and the following additional relief under the [CCAA](#):

- (a) declaring that it is a company to which the [CCAA](#) applies;
- (b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;
- (c) appointing Deloitte Restructuring Inc. ("Proposed Monitor") as Monitor in these [CCAA](#) proceedings;
- (d) granting an Administrative Charge, Directors' Charge and Tax Charge;
- (e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay **post-filing interest** of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;
- (f) approving the engagement letter dated April 23, 2018 (the "CRO Engagement Letter") appointing Blue Tree Advisors Inc. as the Applicant's Chief Restructuring Officer ("CRO");
- (g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and
- (h) sealing Confidential Exhibit "1" of Robert Master's affidavit.

Issues

8 I must decide the following issues:

- (a) Should the Court grant protection to JTIM under the [CCAA](#)?
- (b) Is it appropriate to grant the requested stay of proceedings?
- (c) Should the Proposed Monitor be appointed as Monitor in these proceedings?
- (d) Should the Court grant the requested charges?
- (e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?
- (f) Should Blue Tree Advisors be appointed as CRO?

(g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

Analysis

Should the Court grant protection to JTIM under the CCAA?

9 The CCAA applies to an insolvent company whose liabilities exceed \$5 million.

10 JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

11 JTIM's liabilities clearly exceed \$5 million. It faces a judgment for \$13.5 billion. According to Robert McMaster, JTIM's Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

Is it appropriate to grant the requested stay of proceedings?

12 The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company's operations for the benefit of the company and its creditors.

13 JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

14 JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 (Ont. S.C.J. [Commercial List]), Newbould J stated as follows at para. 21:

Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

15 I came to the same conclusion in *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429 (Ont. S.C.J. [Commercial List]), where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

- (a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;
- (b) extending the stay to the third party would help maintain stability and value during the CCAA process;
- (c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;
- (d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;
- (e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

16 Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

17 Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the [CCAA](#) to grant a stay of proceedings to the other defendants.

Should the Proposed Monitor be appointed as the Monitor?

18 I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to [s. 11.7 of the CCAA](#). Deloitte regularly acts as the Monitor in [CCAA](#) proceedings and it is not subject to any of the restrictions set out in [s. 11.7\(2\) of the CCAA](#).

Should the requested charges be granted?

Administrative Charge

19 JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of \$3 million.

20 The Court has jurisdiction to grant an administrative charge pursuant to [s. 11.52 of the CCAA](#). In *Canwest Publishing Inc./ Publications Canwest Inc., Re*, 2012 ONSC 633 (Ont. S.C.J. [Commercial List]), Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

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

21 Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

- (a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;
- (b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;
- (c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

(d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and

(e) the Proposed Monitor believes that the amount of the administration charge is reasonable

Directors' Charge

22 I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of \$4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

Tax Charge

23 JTIM is also seeking a third-ranking super-priority charge in the amount of \$127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

24 In *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

- (a) whether the goods and services were integral to the business of the applicants;
- (b) the debtors' need for the uninterrupted supply of the goods or services;
- (c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and
- (d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

25 JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

Should Blue Tree Advisors be appointed as CRO?

26 According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

27 I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

28 JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. [Section 137\(2\) of the Courts of Justice Act](#) gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

29 The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) (S.C.C.) because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a [CCAA](#) proceeding would treat as confidential.

Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?

30 At para. 75 of its Factum, JTIM submits as follows:

75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

31 In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

Conclusion

32 For the reasons set out above the Application is granted.

Application granted.