Court File No.: CV-20-00636875-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 2607380 ONTARIO INC.

Applicant

BOOK OF AUTHORITIES OF THE APPLICANT
(For the Comeback Motion)
(Returnable March 6, 2020)

March 5, 2020

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Ted Leroy Trucking [Century Services] Ltd., Re

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Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

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Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore

Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance

du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne

sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account. The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The

legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the

priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.
La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.
L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.
Le créancier a formé un pourvoi.
Arrêt: Le pourvoi a été accueilli.
Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.
Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.
L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la

débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi

d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and

reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA*

offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (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. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. 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. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and

131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon

the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it

to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor

company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions *(CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that

GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source

deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time

statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly

describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be

considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

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. 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. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization

against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but

rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial

legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11 [1] of the *CCAA* stated:

> **11**. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the

application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant)*. But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the

Interpretation Act, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act.* That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

(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 or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

(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 or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

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

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

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or

employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a

"provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan*

in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

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.

...

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 30 days,

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

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

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

(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.

(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.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

> (a) property held by the bankrupt in trust for any other person,
>
> (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. 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.

2 The amendments did not come into force until September 18, 2009.

TAB 2

2009 BCCA 319
British Columbia Court of Appeal

Forest & Marine Financial Corp., Re

2009 CarswellBC 1738, 2009 BCCA 319, [2009] 9 W.W.R. 567, [2009] B.C.W.L.D. 5281, [2009] B.C.W.L.D. 5284, 179 A.C.W.S. (3d) 602, 273 B.C.A.C. 271, 461 W.A.C. 271, 54 C.B.R. (5th) 201, 96 B.C.L.R. (4th) 77

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

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

AND IN THE MATTER OF FOREST & MARINE FINANCIAL CORPORATION (in its own capacity, in its capacity as general partner of FOREST & MARINE FINANCIAL LIMITED PARTNERSHIP and its capacity as manager of FOREST & MARINE INVESTMENT TRUST), FOREST & MARINE INVESTMENTS LTD., FOREST & MARINE CAPITAL LTD., FOREST & MARINE INSURANCE SERVICES LTD. and TREESEA HOLDINGS INC.

Asset Engineering LP (Appellant / Plaintiff) And Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., Treesea Holdings Inc. (Respondents / Defendants)

Forest & Marine Financial Corporation (in its own capacity, in its capacity as general partner of Forest & Marine Financial Limited Partnership and in its capacity as manager of Forest & Marine Investment Trust), Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd. and Treesea Holdings Inc. (Respondents / Petitioners) And Asset Engineering LP (Appellant / Respondent) And Wolrige Mahon Limited, Ad Hoc Committee of Investment Receipt Holders, Barry Kenna, Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Financial Institutions Commission and Superintendent of Financial Institutions, Her Majesty the Queen in Right of the Province of British Columbia (Respondents / Respondents)

Donald, Newbury, Chiasson JJ.A.

Heard: June 8, 2009
Judgment: July 7, 2009

Docket: Vancouver CA037097, CA037098

Proceedings: affirming *Forest & Marine Financial Corp., Re* (2009), 2009 CarswellBC 2361 ((B.C. S.C. [In Chambers]))

Counsel: R.A. Millar for Appellant, Asset Engineering LLP
A.H. Brown for Respondents, Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., Treesea Holdings Inc.

Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Appeal from stay determination — Partnership did not pay back loan in timely manner — Partnership claimed that although terms of loan allowed for enforcement of general security agreement at expiry of agreement, lender had promised more generous terms — Creditor acquired debt and attempted to call it in — Partnership was granted stay of proceedings under Companies' Creditors Arrangement Act — Creditor appealed — Appeal dismissed — No err by trial judge in granting stay — Limited partnership was not legal entity, and rather acted through general partner — Process was between general general partner and creditors, and unnecessary to include partnership or limited partners in order — Court has authority under R. 7 of Supreme Court Rules to grant stay of proceedings against partnership — Purpose of stay was not to improperly refinance loan, and preserving status quo while arrangement was sought was realistic alternative — Creditors reluctance to vote in favour of any plan was not sufficient reason to refuse stay.
Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Persons subject to bankruptcy law — Partnerships
Appeal from stay determination — Partnership did not pay back loan in timely manner — Partnership claimed that although terms of loan allowed for enforcement of general security agreement at expiry of agreement, lender had promised more generous terms — Creditor acquired debt and attempted to call it in — Partnership was granted stay of proceedings under Companies' Creditors Arrangement Act — Creditor appealed — Appeal dismissed — No err by trial judge in granting stay — Limited partnership was not legal entity, and rather acted through general partner — Process was between general general partner and creditors, and unnecessary to include partnership or limited partners in order — Court has authority under R. 7 of Supreme Court Rules to grant stay of proceedings against partnership — Purpose of stay was not to improperly refinance loan, and preserving status quo while arrangement was sought was realistic alternative — Creditors reluctance to vote in favour of any plan was not sufficient reason to refuse stay.

***Newbury J.A.*:**

1 We heard this appeal on June 8, 2009 and advised counsel that it was dismissed, with reasons to follow.

2 The appeal was taken by Asset Engineering LP ("AE"), a secured creditor of Forest & Marine Financial Limited Partnership, a limited partnership under the laws of British Columbia. Its general partner is Forest & Marine Financial Corp. (the "General Partner"). The Partnership is in the business of providing financing and investment services to companies engaged in the forest and marine industries in British Columbia and is part of a group of related investors and corporations referred to informally as the "F & M Group". The Partnership is the main operating entity of the Group, and (according to the petition) owns the operating assets of the Group, which consist largely of a loan portfolio and an office building in Nanaimo. The Partnership's main liabilities are the debt owing to AE - in the amount of some $13 million - and a series of "investment receipts" held by public investors in the total amount of some $10 million.

3 The order appealed from was granted by Mr. Justice Masuhara on May 1, 2009. This was a "comeback" order that extended his initial order, made March 26, granting a stay of proceedings to the petitioners pursuant to s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and to the Partnership pursuant to the court's inherent jurisdiction. (It will be noted that the petitioners include the General Partner but not the Partnership *per se*.) The initial order appointed Wolrige Mahon Ltd. as the monitor of the petitioners' property and the conduct of their business, and ordered that AE's consultant, Ernst & Young Inc., be given access to their property, books and records. The comeback order extended the initial order to July 31, 2009.

4 AE acquired its loan position from the original lender, "CIT", which had entered into an agreement with the Partnership, represented by the General Partner, to provide up to $50 million in financing in 2004. The agreement established a revolving loan facility that was subject to margin requirements dependant on the value of unimpaired loans owing to the Partnership. The obligation to repay was secured by a general security agreement ("GSA") over the Partnership's loans and accounts receivable, and a second mortgage on the Nanaimo building, and was guaranteed by other members of the Group, who granted collateral security for their guarantees.

5 Evidently, the Partnership soon went into default under some of the financial covenants in the financing agreement, and CIT and the Partnership entered into a series of forbearance agreements which were renewed, at considerable cost to the borrower, from time to time until September 2008. The final agreement expired on March 15, 2009. One of the terms of the agreements was that upon its expiration, CIT would be entitled to enforce its security immediately, without any further demand or notice, and that the Group would not oppose the appointment of a receiver. On the other hand, according to the affidavit of Mr. Hitchock, the president of the General Partner, CIT had assured the Group that once the loan was paid down to below $20 million, the lender would reduce the covenants to ones the Group "could live with." Mr. Hitchcock deposes that the Partnership paid

the loan down from $35 million to $13 million by early 2009 and paid AE approximately $2.8 million between the initial hearing and the comeback order.

6 Notwithstanding that the Partnership was in default in 2008, AE had begun to acquire "participation interests" in the credit facility from March of that year onwards. In March 2009, it acquired all of CIT's interest in the facility. A few days later, it demanded payment in full of the Partnership's indebtedness in the amount of $13,257,123.31 and delivered notices of its intention to enforce security as required under the *Bankruptcy and Insolvency Act*. When the General Partner advised AE that it would not adhere to a "blocked account" agreement, the lender advised that it intended to apply for the appointment of an interim receiver over the Partnership and the related guarantors - hence Supreme Court Docket S092160. The Group told AE that they opposed the liquidation of the Partnership's portfolio and that they would apply for *CCAA* protection - hence Supreme Court Docket S092244. The two proceedings were heard together, and although no order has been filed in the receivership action, counsel agreed in this court that we may assume the chambers judge intended to dismiss AE's application for the appointment of a receiver.

7 In his reasons of May 1, Matsuhara J. noted that a report prepared by Ernst & Young indicated a "net equity deficiency in its high and low case of $7.7 million and $16.6 million, respectively, indicating the difficult circumstances in which the Group finds itself." Ernst & Young estimated the net realizable value of the Group's assets at between $13.2 million and $22 million, while the monitor estimated net realizable values to be between $22 million and $28.5 million respectively, on a going concern basis. Thus as the chambers judge noted, even on the low estimate suggested by Ernst & Young, AE's loan position was fully secured. (Counsel for AE told this court that his client disputes the assumptions underlying Ernst & Young's report.) The chambers judge also noted that the monitor's cash-flow analysis anticipated AE would receive payments totalling $5.5 million towards its loan by the end of August, with $2.56 million of that amount being paid in May. Ernst & Young estimated that AE would receive $3.3 million, and both consultants projected that AE would continue to receive its "significant charges under the facility in excess of $21,000 per month." (Para. 18.)

8 The Court below had affidavit evidence of a "concerted effort" on the part of the Group to find refinancing to replace AE's position. Mr. Hitchcock deposed that an unnamed financial institution had carried out its due diligence in connection with a possible refinancing that would discharge AE's debt position completely. From what was said by counsel on the appeal hearing, the Group is still focussing on a possible refinancing that would either precede or take place at the same time as a simplification of the cumbersome corporate structure now in place. One suggestion was that the members of the Partnership would receive shares in the General Partner in return for their partnership interests, such that the Partnership would cease to exist. However, no specific "plan" in this regard was in evidence. One of the central arguments raised by counsel for AE in opposition to the stay is that the *CCAA* cannot be used simply to "buy time" for refinancing that will not involve a compromise or arrangement that would have to be voted on by creditors. In any

case, AE says it would not vote in favour of any compromise or arrangement, so that any such plan would be doomed to fail.

9 The first issue confronting the chambers judge, however, was the "jurisdictional" one of whether, in his words, a limited partnership qualifies for protection under the *CCAA*. The Act applies generally to debtor *companies*. In particular, s. 11 provides in material part:

> 11(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> 11(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (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 or proceeding with any other action, suit or proceeding against the company
> >
> > . [Emphasis added.]

The Act defines "company" as "... any company, corporation or legal person incorporated by or under an Act of Parliament or the legislature of a province, and any incorporated company having assets or doing business in Canada wherever incorporated ...".

10 The chambers judge agreed with the holding of Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) that a limited partnership is not a "qualifying entity" under the statute; *but* that it lay within the inherent jurisdiction of the court to 'sweep in' a partnership where the business of the corporate petitioners was closely connected to and intertwined with that of the partnership. On this point, Matsuhara J. stated:

> ... in the absence of a jurisdiction under the *CCAA*, it is agreed by counsel that the court can exercise its inherent jurisdiction. The question that arises is then under what circumstances and to what extent can it do so. The limits have been reviewed, particularly where a *CCAA* proceeding is in effect. In cases such as *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344and *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 C.A. which circumscribe the court's ability to rely upon inherent jurisdiction, it is obvious that these limits are even

greater when a focus is on a non-qualifying party. However, nonetheless, the courts have exercised that inherent jurisdiction in a *CCAA* setting, dealing with non-qualifying entities, and have imposed stays of proceedings against related non-qualifying entities. In *Calpine Canada Energy Ltd. (Re)*, 2006 ABQB 153 the court stated that it had inherent jurisdiction against a non-corporate entity where it was just and convenient to do so. This case relied upon an earlier case of *Lehndorff*, which I have already mentioned. The court, in extending the stay, stated that:

> It is clear that Calpine has a more than arguable case that a stay involving the Partnerships is necessary and appropriate. It is also likely, given the extremely complex corporate and debt structure of the Calpine group, the cross-border nature of these proceedings, and the evidence I have heard so far in the proceedings of the value of partnership assets, that irreparable harm may accrue to the Calpine group if the stay is not granted. The balance of convenience certainly favours a stay. I find that it is just, reasonable and appropriate in this case to exercise this court's inherent jurisdiction to stay proceedings against the Calpine partnerships. [At para. 12.]

11 The chambers judge then turned to consider the various factors relating to the exercise of his discretion in this case, concluding that:

> In terms of refinancing, though Asset Engineering points out the lack of production of specifics indicating the potential for this occurring, there is evidence of a concerted effort to find refinancing in the materials. As well, Mr. Hitchcock, on the last day, in an affidavit, identified a recognized financial institution that has performed its due diligence over the course of two days over the FM group in furtherance of a potential financing, which Mr. Hitchcock says would satisfy the debt to Asset Engineering completely. He attached an email that supports a serious initiative by that institution to examine Forest & Marine. Moreover, it is now clear from the commentary from counsel that refinancing is the primary focus of the FM group.
>
> Given that there is a broad constituency of interest at play; that at this point the financial analysis supports the view that Asset Engineering's position is secured; that further payments to reduce the outstanding indebtedness to Asset Engineering are projected - and in this regard I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders; that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA*

eligible entities from restricting; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order. [At paras. 21-2.]

As I have already mentioned, the stay was extended by the comeback order to July 31, and it is from that second order that AE appeals.

On Appeal

12 AE's grounds of appeal as stated in its factum are as follows:

> 1) "inherent jurisdiction" was not a proper basis upon which to found a stay of proceedings brought by AE against the [Partnership];
>
> 2) a stay of proceedings brought by AE against the [Partnership] is contrary to the principles set forth in this Court's judgment in *Cliffs*; and
>
> 3) a stay ought not to have been granted before permitting a vote by creditors on a process that would suspend AE's rights pending refinancing and where critical prerequisites to the formulation of a plan had to be fulfilled by the debtor companies.

The Inclusion of the Partnership in the Stay

13 I must confess that I found counsel's submissions on the first ground difficult to follow. Mr. Millar submitted that the Partnership itself, rather than the General Partner, is the "primary business actor" and was the borrower from CIT. In his analysis, the assets which secure AE's position are assets of the Partnership and since the Partnership is not entitled to invoke the *CCAA*, it was an improper use of the court's inherent jurisdiction to grant a stay in the Partnership's favour. When we pressed counsel as to why it would be necessary to refer to the Partnership at all in the order, he responded that limited partners themselves do not own partnership assets directly, since they are not entitled to the return of their capital contributions unless all the liabilities of the partnership have been paid: see s. 62 of the *Partnership Act*, R.S.B.C. 1996, c. 348. If the partners do not own the assets (at least directly), he suggested, then it is the Partnership itself that owns them. Underlying his submission was the proposition that a limited partnership is a legal entity - as shown, for example, by the fact that it was the Partnership that issued a prospectus in connection with investment receipts "of the Partnership" in May 2008. But although it is, in counsel's view, an entity, it is not an entity entitled to invoke the *CCAA*. Instead, Mr. Millar said, a partnership must seek an "insolvency remedy" in the *Bankruptcy & Insolvency Act*, s. 85(1) of which states that when a general partner becomes bankrupt, the property of the partnership vests in the trustee.

14 Mr. Brown, counsel for the petitioners, did not take issue with the fact that a limited partnership does not *per se* come within the definition of "company" in the *CCAA*. He argued, however, that the Partnership is *not* a legal entity, and that "its" assets are in fact the assets of the partners themselves, although usually they are held in the name of the General Partner, which must

manage the Partnership's business, and the partnership's debts must be paid before partners may share in its assets on a termination. He noted that the General Partner in this case executed the finance agreement with CIT and the forbearance and related agreements that are in evidence, on behalf of the Partnership. As well, he noted that the stay granted by Masuhara J. on March 26, 2009 prohibited the commencement or continuation of any action or proceeding against the petitioners or any of them, or affecting the Business or Property. The order defined "Property" to include all current and future assets, undertakings and properties of any kind in the possession and control of the petitioners, and "Business" to mean the business of the petitioners. The General Partner was one of the petitioners and thus, one assumes, the order applies to any assets it holds on behalf of the partners (or if Mr. Millar is correct, on behalf of the Partnership).

15 Counsel for AE was not able to refer us to any authority for the proposition that a limited partnership is a legal entity, as opposed to "the relationship which subsists between persons carrying on business", as stated at s. 2 of the *Partnership Act*. The authorities I have located clearly point away from the notion that a limited partnership is a legal entity. *Halsbury's Laws of England* (4th ed., 1994), for example, states that "A limited partnership, like an ordinary partnership, is not a legal entity." (Vol. 35, at 136). In R.C. Banks, *Lindley & Banks on Partnership* (18th ed., 2002), the author states that "A limited partnership is not a legal entity like a limited company or a limited liability partnership but a form of partnership with a number of special characteristics introduced by the Limited Partnerships Act, 1907." (At 847.) 'Non-personhood' is the reason why partnerships are useful for tax and corporate reasons: they permit investors, as partners, to claim losses, depreciation and other expenses of the partnership business without risking unlimited liability for partnership debts: see Lyle R. Hepburn, *Limited Partnerships* (2002) at 1-12 to 1-12.1; James P. Thomas and Elizabeth J. Johnson, *Understanding the Taxation of Partnerships* (5th ed., 2002) at para. 405.

16 In *Lehndorff General Partner Ltd., Re*, *supra*, Farley J. observed that the "case law supports the conclusion that a partnership, including a limited partnership, is not a separate legal entity." He quoted a passage suggesting that if the legislature had intended to create a new legal entity, it would have done so in the *Limited Partnerships Act* of Ontario, as Parliament had in s. 15 of the *Canada Business Corporations Act*. The latter statute provides that a corporation has the capacity and rights, powers and privileges of a natural person. (Para. 27.)

17 The question of whether a limited partnership is a legal entity was considered at length by the Ontario Court of Appeal in *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.* (1998), 167 D.L.R. (4th) 272 (Ont. C.A.), where a limited partnership sought to rely on a statutory right of prepayment under a mortgage purported to have been granted by the partnership. The trial judge held that since the partnership was not a legal entity capable of holding title to real property or transferring title under a mortgage, it was incapable of granting a mortgage. He interpreted the mortgage document in question, which had been entered into by the general partner on behalf of the limited partners, and concluded that since the general partner

was a corporation, it was precluded by s. 18(2) of the *Mortgages Act*, R.S.O. 1990, c. M. 40, from prepaying under s. 18(1). (Section 18(2) denied the special right of prepayment under s. 18(1) to any mortgage "given by a joint stock company or other corporation".) The Court of Appeal agreed in the result, concluding in part that:

> (1) A limited partnership, because it is not a legal entity, carries on its business through a general partner which has the power to hold and convey title to real property on behalf of the members of the limited partnership.
>
> (2) A general partner which is a corporation and which gives a mortgage is precluded by s. 18(2) from the operation of s. 18(1) and, therefore, cannot prepay a long-term closed mortgage.
>
> (3) A general partner which is an individual and which gives a mortgage is not subject to the s. 18(2) exemption, and, therefore, is entitled to prepay the mortgage. ... [At para. 49; emphasis added.]

18 In the course of reaching these conclusions, Borins J.A. for the Court observed that:

> Well respected authorities are uniform in the view that a limited partnership is not a legal entity. ... The concept that neither a general, nor a limited partnership, is a legal entity has been long accepted by Canadian and English law and, no doubt, is why a limited partnership is required by law to have a general partner through which it normally acts: *Limited Partnerships Act*, ss. 2(2), 8 and 13. As for a general partnership, s. 6 of the *Partnerships Act* describes through whom it may act. [At para. 26; emphasis added.]

He also quoted with approval the following passage from *Lehndorff*, *supra*, in which Farley J. had explained the features of a limited partnership and how its business is generally conducted:

> A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12 ... A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: See Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The

> entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.
>
> . . . . .
>
> It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle) ... The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process ... [At paras. 17, 20; emphasis added.]

19 Finally, the Court of Appeal noted at para. 33 of *Kucor* that title to real property owned by the partnership is generally registered in the name of the general partner rather than in the names of the partners themselves, who would thereby risk exposing themselves to unlimited liability. (See s. 64 of the *Partnership Act* of British Columbia.) Whether the general partner holds such property as a true "trustee" or in some lesser fiduciary capacity is another question: see, however, *Molchan v. Omega Oil & Gas Ltd.*, [1988] 1 S.C.R. 348 (S.C.C.), at 368, and *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 67 B.C.L.R. (2d) 1 (B.C. C.A.), a decision of this court, at para. 77, *per* Southin J.A.; cf. in *King v. On-Stream Natural Gas Management Inc.*, [1993] B.C.J. No. 1302 (B.C. S.C.), at para. 32, *per* Shaw J. That question need not be answered here, and I would expect that in most cases, it is addressed expressly in the partnership agreement. (The agreement in the case at bar was not in evidence.)

20 If (as I believe) Farley J. was correct in *Lehndorff* that the "process of debtor and creditor relationships" associated with the business of a limited partnership is between the general partner and the creditors, it was unnecessary in my view in *substantive* terms for the Partnership or the limited partners in this case to be included in the *CCAA* order in order to stay proceedings affecting the Partnership assets or business. A valid charge had been granted on those assets by the General Partner. It was unnecessary for AE to proceed against the limited partners. Had it done so, it would have been met with the fact that under s. 57 of the *Partnership Act*, they are not liable for the obligations of the Partnership above and beyond their capital contributions unless they have

participated in the management of the business. (There was no suggestion this has occurred in this case.) It would also have been unnecessary to proceed against the Partnership *per se*, since it is not a legal entity, and the partners are bound by the General Partner's actions on behalf of the Partnership (i.e., all the partners) in carrying on the business. Thus if the *CCAA* process had continued without the Partnership being named in the order, the effect would have been no different, in substantive terms, from what it is now.

21 But there is a *procedural* difficulty: as Mr. Brown notes, R. 7 of the *Supreme Court Rules* allows a partnership or "firm" to be sued in its own name. Rule 7(6) provides that where an order is made against a firm, "execution to enforce the order may issue against the property of the firm", and R. 7(7) provides that execution to enforce the order may issue against any person who admitted in a pleading or affidavit that he or she was a partner or who was adjudged to be a partner. Rule 7 is *procedural* (see *Surrey Credit Union v. Willson* (1989), 41 B.C.L.R. (2d) 43 (B.C. S.C. [In Chambers])), but the potential for a multiplicity of proceedings in apparent conflict with the *CCAA* order is obvious. Accordingly, to control *its own process*, the court below had an inherent discretion, confirmed by s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, to grant a stay in respect of proceedings against the Partnership. This is not the granting of a "freestanding remedy" under the *CCAA* (see *Lehndorff*, discussed below), nor an exercise of discretion under that Act to supplement perceived shortcomings in its application. Rather it is a purely procedural step to forestall a purely procedural problem.

22 Thus, for different reasons than those of the chambers judge, I concluded the first ground of appeal should be dismissed.

Should a Stay Have Been Granted?

23 I turn next to AE's second ground of appeal - that no order should have been made in this case, whether under the *CCAA* or otherwise, because the intention of the Group is to refinance AE's loan rather than propose a compromise or arrangement, and in any event, AE "has unequivocally declared that it will oppose any arrangement. There is no utility in a stay where compromise is either futile or doomed to failure." (See also *Marine Drive Properties Ltd., Re*, 2009 BCSC 145 (B.C. S.C.).) Mr. Millar relies strongly on this court's decision in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.), which he says signals a 'retrenchment' from past authorities that have taken a large and liberal view of the scope of the Act: see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at 92-3; *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.), at paras. 17-22; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para. 7; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.); and most recently, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.) at para. 43, (lve. to app. refused (S.C.C.)).

24 In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for *CCAA* protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to 'secure sufficient funds' to complete the stalled project. (Para. 34.) This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fairly straightforward and there will be little incentive for senior secured creditors to compromise their interests. (Para. 36.) Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a 'restructuring'. ... Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA's* fundamental purpose." That purpose had been described in *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the *status quo* for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [At 580.]

25 The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged. Similarly in this case, Mr. Millar submits that no compromise or arrangement is being proposed, and any compromise the Partnership might propose would be "doomed to failure."

26 In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The *CCAA* is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the *means* contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point,

however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

27 As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under s. 6 of the *CCAA*, I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner. When the Act is invoked, the court properly considers the interests of many stakeholders, not simply those of the creditor and debtor: see, e.g., *ATB Financial* , *supra*, at paras. 51-2; *Skeena Cellulose Inc., Re*, 2003 BCCA 344 (B.C. C.A.) at para. 39, quoting with approval from *Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.); *Marine Drive Properties Ltd., Re* , *supra*, at para. 14. In this case, there are many customers of the Partnership in the coastal marine and forest industries who would be affected if the Group were put into liquidation. The chambers judge noted that the provincial government has expressed interest. Mr. Hitchcock deposes that the employees of various borrowers from the Group, investment receiptholders, unitholders of the investment trust and customers stand to lose a great deal. He acknowledges that refinancing is the "focus" of the Group's efforts and continues:

> The Petitioners have acted diligently and in good faith to put the Petitioners in a position where they can prepare a plan of arrangement for presentation to their creditors. I believe that, given an extension to July 31, 2009 F&M will be able to formulate and prepare a plan of arrangement. During this time F&M intends to:
>
> a) make payments to reduce its indebtedness to Asset Engineering;
>
> b) receive the most recent assessments of the value of its loan portfolio so it can consider presenting some of its loan portfolio to possible purchasers or lenders;
>
> c) receive the expected appraisal on the building so it can consider which alternative(s) outlined above can be implemented;
>
> d) evaluate the current corporate/administrative structure to determine the most efficient structure going forward; and
>
> e) refinance the remaining balance of its loan owed to Asset Engineering.

Mr. Hitchcock also deposes in his March 25 affidavit that the petitioners intend to "prepare a plan of arrangement or compromise and present the same to the creditors".

28 The chambers judge considered all the evidence before him, noting that there was a "broad constituency of interests at play", that the financial analysis supported the view that AE's position was secured, and that further payments in reduction of the indebtedness to AE were projected. In his words:

> ... I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders, that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restructuring; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order. [At para. 22.]

29 I am not persuaded that he erred in law or applied a wrong principle in reaching this conclusion. Nor am I persuaded that as a matter of law, the chambers judge should not have granted a stay "without the immediate entitlement of a vote of creditors where the proposed plan involves the refinancing of a major secured creditor and where there is a critical and central, unfulfilled prerequisite to the proposed plan", as AE suggests in support of its third ground of appeal. As I understand AE's argument, the "prerequisite" being referred to is the alteration or simplification of the Group's corporate structure which the monitor suggested would be necessary before a plan of arrangement could be presented. Paraphrasing *Cliffs Over Maple Bay*, AE submits that its enforcement proceedings should not be stayed "so as to compel AE to await the outcome of an unduly complex and expensive procedure .... [t]his is a key 'element of the debtor company's overall plan of arrangement' and creditors should be entitled to vote in the circumstances."

30 I have already explained above that this case is very different from *Cliffs Over Maple Bay*. The Partnership is carrying on its business and hopes to simplify its corporate structure as part of or as a recondition to a refinancing. I know of no authority that suggests that such a restructuring cannot qualify as a "plan of arrangement" under the *CCAA*, or that a refinancing by itself cannot qualify - provided in each case a compromise or arrangement between debtor and creditors is contemplated. Masuhara J. was aware of the monitor's advice and concluded that it was appropriate to extend the stay. Although AE objects to the prospect that its "rights would be frozen for such an indeterminate proposition", the chambers judge was not obliged to put the prospect of a refinancing to a vote at a creditors' meeting at this early stage. As the petitioners noted in their factum, if such a vote were insisted upon at this time, it would defeat the purpose of the legislation - "to facilitate the making of a compromise or arrangement between an insolvent company and its creditors to the end that the company is able to continue in business, with regard to the interest of a broad constituency extending beyond any single creditor or class of creditors". The Group now has until July 31 to put forward a workable plan.

31 For these reasons, I joined in the dismissal of the appeal.

***Donald J.A.*:**

I agree.

***Chiasson J.A.*:**

I agree.

Appeal dismissed.

TAB 3

2011 BCSC 1775
British Columbia Supreme Court [In Chambers]

Pacific Shores Resort & Spa Ltd., Re

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

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

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

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

S.C. Fitzpatrick J.

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

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D. Toigo for Unsecured Loan Holders
K.S. Campbell for Water's Edge Rental Pool Creditors
C.D. Brousson for bcIMC Construction Fund Corp

Headnote

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

Petitioners obtained order for interim stay of proceedings under Companies' Creditors Arrangement Act (CCAA) — At comeback hearing two secured creditors opposed stay, but petitioners sought to extend it, increase administration charge, and obtain order authorizing debtor in possession (DIP) financing — One secured creditor brought cross-application to appoint receiver over its security — Although petitioners were insolvent, there were substantial assets that would be potential source of refinancing or sale, and there was no justification for secured creditors' lack of faith in management — Petitioners had bona fide intention to continue their operations within CCAA and to present plan, and it was likely plan would evolve through negotiation which might result in refinancing of debt and restructuring — DIP financing was necessary to

allow petitioners' operations to continue and enhance prospects of viable arrangement, benefits of DIP financing outweighed any potential prejudice to secured creditors, and monitor supported approving it — Petitioners established that they acted in good faith with due diligence; stay was extended; administration charge was increased; DIP financing was ordered — Cross-application to appoint receiver was dismissed since receivership would obliterate every financial interest save for first and possibly second secured lenders.

***S.C. Fitzpatrick J.*:**

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

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

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

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

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

Background Facts

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

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

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

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

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

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

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

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

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

11 There is a substantial amount of evidence detailing the assets of the Group and the outstanding debt against those assets. In respect of Parkside Resort, bcIMC has a first mortgage of $28.1 million, BCC Mortgage Investment Corporation has a second mortgage of $8.5 million, and bcIMC has a third mortgage of $20 million. There is also a fourth mortgage of $1.7 million. Finally, there

are various priority claims, such as property taxes, and a substantial amount of unsecured debt totalling $6.6 million. The total of the priority claims and secured debt alone is $58 million.

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

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

Arguments of the Secured Creditors

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

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

I will deal with each of these arguments in turn.

No equity in the assets

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

16 Much of the argument regarding the equity situation concerned the valuations relating to the Parkside Resort, which has secured debt of $58 million. The petitioners value the Parkside Resort at $63.7 million based on appraisals obtained by them in November 2010, which would indicate some value beyond the secured debt on that asset. There are also potential tax losses in Parkside Resort of $19 million.

17 bcIMC says that the appraisals are suspect because the appraiser in fact had an interest in the Parkside Resort at the time. In response, Mr. Sweett, the appraiser, has filed a certificate attesting

that he did not value his unit in the Resort and that he did the remainder of the appraisal given his familiarity with and expertise relating to the project before his purchase of that unit.

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

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

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

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

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

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

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

No faith in management

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

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

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

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

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

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

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

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

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

There is no plan

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

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

a) the sale of some redundant assets, which would reduce cash flow requirements;

b) the sale and lease back of certain assets to increase working capital;

c) restructuring the income stream from the PSOE and the Club;

d) the refinance of the debt with bcIMC regarding Parkside Resort, which would in part allow some proceeds of sale to provide working capital;

e) restructuring the secured debt with Fisgard;

f) continuing sales of fractional interests and commercial units;

g) renegotiating arrangements with existing interest groups regarding the management and operation of the vacation interests;

h) resuming the points business; and

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

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

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

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

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

Secured creditors will not vote in favour of any plan

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

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

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

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

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

44 bcIMC and Fisgard are well known and sophisticated lenders doing business in this jurisdiction. As was stated by the court in *Rio Nevada Energy Inc., Re* (2000), 283 A.R. 146

(Alta. Q.B.) at para. 25, this is some evidence that bcIMC and Fisgard will not act against their commercial interests and that they will reasonably consider proposals. This distinguishes the case of *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para. 12, (1999), 244 A.R. 93 (Alta. C.A.), where there was evidence that the lender had valid commercial reasons to vote against the proposal.

DIP Financing

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

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

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

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

> **Interim Financing**
>
> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge - in an amount that the court considers appropriate - in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **Priority - secured creditors**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **Priority - other orders**

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

Factors to be considered

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

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

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(*b*), if any.

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

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

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

c) it goes without saying that bcIMC does not support current management. However, a substantial number of other stakeholders do support the management team, including BCC, who has a significant financial stake in the matter given its second mortgage on Parkside

Resort. Fisgard does not support management either. However, I am of the view that this position should be discounted substantially given that it is fully secured on Pacific Shores Resort.

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

57 I do not wish to end without noting the obvious. There are a substantial number of stakeholders involved: the petitioners themselves and the related corporate entities, the secured

creditors, the unsecured creditors, the owner groups and strata corporations, the thousands of homeowners, and the hundreds of employees. Many of the hundreds of parties holding unsecured debt in Aviawest are retirees who have invested their life savings into the enterprise, although it is also apparent that many pensioners have also invested through bcIMC.

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

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

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

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

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

TAB 4

Court File No. CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 30TH
JUSTICE HAINEY	)	DAY OF NOVEMBER, 2018

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 FORME DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO

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

INITIAL ORDER

THIS APPLICATION, made by Forme Development Group Inc. and those other parties listed on Schedule "A" (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Yuan Hua Wang sworn November 5, 2018 and the Exhibits thereto (the "**Wang Affidavit**"), the affidavit of Katie Parent sworn November 6, 2018 and the Exhibit thereto (the "**Parent Affidavit**"), and on reading the consent of KSV Kofman Inc. ("**KSV**") to act as the Monitor (in such capacity, the "**Monitor**"), and upon reading the pre-filing report of KSV dated November 6, 2018 (the "**Report**"), in its capacity as Proposal Trustee and the proposed Monitor, the supplemental report of KSV dated November 7, 2018 (the "**Supplemental Report**"), the second supplemental report of KSV dated November 7, 2018 (the

"**Second Supplemental Report**"), and the third supplemental report of KSV dated November 29, 2018 (the "**Third Supplemental Report**"), and on hearing the submissions of counsel for the Applicants, the proposed Monitor and those other parties present, no one appearing for any other party although duly served as appears from the affidavits of service of Katie Parent sworn November 6, 2018, November 7, 2018 and November 29, 2018.

SERVICE

1. **THIS COURT ORDERS** that the time for service of each of the Notice of Application, the Application Record, the Parent Affidavit, the Report, the Supplemental Report, the Second Supplemental Report and the Third Supplemental Report is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

3. **THIS COURT ORDERS AND DECLARES** that the proposal proceedings (the "**Proposal Proceedings**") of each of 9500 Dufferin Development Inc. (Estate No. 31-2438977), 250 Danforth Development Inc. (Estate No. 31-2439433), 3310 Kingston Development Inc. (Estate No. 31-2439448) and 1296 Kennedy Development Inc. (Estate No. 31-2439440) (collectively the "**NOI Entities**") commenced under Part III of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), be taken up and continued under the CCAA and that the provisions of Part III of the BIA shall have no further application to the NOI Entities.

TITLE OF PROCEEDINGS

4. **THIS COURT ORDERS** that the title of proceedings in this matter be amended as follows:

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 FORME DEVELOPMENT GROUP INC., 3310 KINGSTON DEVELOPMENT INC., 1296 KENNEDY DEVELOPMENT INC., 1326 WILSON DEVELOPMENT INC., 376 DERRY DEVELOPMENT INC., 9500 DUFFERIN DEVELOPMENT INC., 4439 JOHN DEVELOPMENT INC., 5507 RIVER DEVELOPMENT INC. and 2358825 ONTARIO LTD.

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

PLAN OF ARRANGEMENT

5. **THIS COURT ORDERS** that, subject to paragraph 24 of this Order, the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (hereinafter referred to as the "**Plan**" or "**Plans**").

POSSESSION OF PROPERTY AND OPERATIONS

6. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (including, without limitation, those properties listed on Schedule "B" hereto, the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order. For greater certainty, the retention of TD Cornerstone Commercial Realty Inc. ("**TD**") is hereby approved substantially on the terms of the listing agreement appended to the Third Supplemental Report.

7. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; provided that no such amounts shall be paid to Mr. Wang (as defined below) or any known relative of Mr. Wang without further Order of this Court; and

(b) subject to paragraph 30 below, the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

9. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan and (iii) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected

after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

10. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicants and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. **THIS COURT ORDERS** that, subject to paragraph 24 of this Order, the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding, in the aggregate $200,000, in any one or more transactions; and

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate,

provided however, and without limiting the provisions of paragraphs 24 and 25, all disbursements shall require the advance consent of the Monitor, and all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

13. **THIS COURT ORDERS** that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further Order of this Court upon application by the Applicants on at least two (2) days notice to such landlord and any such secured creditors. If the Applicants disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

14. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises, provided that

nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

15. **THIS COURT ORDERS** that until and including December 28, 2018 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court. Notwithstanding the foregoing, no stay shall apply to Forme Development Group Inc. with respect to the enforcement of mortgages on properties not included in these CCAA proceedings.

16. **THIS COURT ORDERS** that during the Stay Period, except with the written consent of the Applicants and the Monitor, or with leave of this Court, no Proceedings shall be commenced or continued against or in respect of Yuan Hua Wang ("**Mr. Wang**") or any of his current and future assets, businesses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (collectively, the "**Wang Property**"), arising upon or as a result of any default under the terms of any document entered into in connection with any of Mr. Wang's guarantees of any of the commitments or loans of any of the Applicants (collectively, the "**Wang Default Events**"). Without limitation, the operation of any provision of a contract or agreement between Mr. Wang and any other Person (as hereinafter defined) that purports to effect or cause a termination or cessation of any rights of Mr. Wang, or to accelerate, terminate, discontinue, alter, interfere with, repudiate, cancel, suspend, amend or modify such contract or agreement, in each case as a result of one or more Wang Default Events, is hereby stayed and restrained during the Stay Period.

NO EXERCISE OF RIGHTS OR REMEDIES

17. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the

foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

18. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any Person against or in respect of Mr. Wang, or affecting the Wang Property, as a result of a Wang Default Event are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower Mr. Wang to carry on any business which Mr. Wang is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

19. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

20. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any other party as a result of a Wang Default Event, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

21. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

22. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

23. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such

obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

APPOINTMENT OF MONITOR

24. **THIS COURT ORDERS** that KSV Kofman Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and its shareholders, officers, directors, and Assistants shall not take any steps with respect to the Applicants, the Business or the Property save and except at the direction of the Monitor pursuant to paragraph 25 of this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

25. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) cause the Applicants, or any one or more of them, to exercise rights under and observe its obligations under this Order;

(b) cause the Applicants to perform such functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Applicants in dealing with the Property;

(c) monitor the Applicants' receipts and disbursements, and if necessary or convenient, in the Monitor's sole discretion, take control of the Applicants' receipts and disbursements;

(d) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(e) if applicable, reporting to the DIP Lender (as defined below) on a basis to be agreed with the DIP Lender;

(f) report to and advise mortgagees and other stakeholders of the Applicants as to the status of the sale process and, to the extent requested by mortgagees, convene a bi-weekly conference call with mortgagees, to report on the status of the Property;

(g) advise the Applicants in its preparation of the Applicants' cash flow statements;

(h) borrow funds in accordance with the terms of this Order;

(i) conduct and carry out a sale process or sales processes for all of the Applicants' Property in accordance with the sale process described in the Third Supplemental Report and retain or consult with the agents, consultants or other parties;

(j) propose or cause the Applicants to propose one or more Plans in respect of the Applicants or any one or more of them;

(k) provide any consents that are contemplated by this Order;

(l) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(m) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(n) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(o) perform such other duties as are required by this Order or by this Court from time to time.

26. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or the Property, or any part thereof and that nothing in this

Order, or anything done in pursuance of the Monitor's duties and powers under his Order, shall deem the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

27. **THIS COURT ORDERS** that without limiting the provisions herein, each employee of an Applicant shall remain an employee of that Applicant until such time as the applicable Applicant may terminate the employment of such employee. Nothing in this Order shall, in and of itself, cause the Monitor to be liable for any employee-related liabilities or duties, including, without limitation, wages, severance pay, termination pay, vacation pay and pension or benefit amounts, as applicable.

28. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants and the DIP Lender (if applicable) with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

29. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants' counsel, the Monitor and the Monitor's counsel shall be entitled to invoice on a monthly or other periodic basis in their discretion provided that such fees and disbursements shall be paid out of sale proceeds of the Property in accordance with the priority set out below.

31. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. **THIS COURT ORDERS** that, as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after the making of this Order in respect of these proceedings ("**Administration Fees**"), the Monitor, counsel to the Monitor and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all of the Applicants' Property on the following terms:

(a) the maximum amount of the Administration Charge per Property shall only be for security of the applicable Administration Fees that constitute Property Specific Costs (as defined below) for that particular Property and any pro rata portion of General Costs (as defined below) attributable to such Property in accordance with paragraph 34(b) below; and

(b) the Administration Charge shall automatically attach to any Property that is unencumbered or not fully secured.

33. **THIS COURT ORDERS** that the Administration Charge shall rank in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, claims of secured

creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, other than (a) any first mortgagee on a Property (in respect of the first mortgage registered on the Property only); (b) the DIP Lender's Charge (as defined below, and to the extent applicable); and (c) the second mortgagee on the Property owned by 2358825 Ontario Ltd. (1483 Birchmount Road).

FUNDING

34. **THIS COURT ORDERS** that these CCAA Proceedings shall be funded in the following manner:

(a) With respect to costs related to a specific Property (a "**Property Specific Cost**"),

(i) the first mortgagee on such Property will have the right (but not the obligation) to fund such amount as an advance under its mortgage at an interest rate accruing at a rate that is the higher of (i) the applicable rate under its mortgage; and (ii) 9.5% per annum, calculated in arrears;

(ii) if the first mortgagee does not fund such amount, the second mortgagee will have the right (but not the obligation) to fund such amount as an advance under its mortgage at an interest rate accruing at a rate that is the of the higher of (i) the applicable rate under its mortgage; and (ii) 9.5% per annum, calculated in arrears. The amount advanced will have a first-ranking super-priority charge over the applicable Property only. If necessary, this process will continue until all mortgagees on a Property have been given the opportunity to fund;

(iii) where no mortgagee funds such amount, the Monitor shall draw such amount on the Standby DIP (defined below);

(b) with respect to costs not specific to a particular Property ("**General Costs**") in an amount up to $400,000 in the aggregate, if there is not sufficient funding through the Applicant's cash on hand or cash immediately available generated by the sale of any Properties (after repayment of all known debts):

(i) each first mortgagee shall have the right (but not the obligation) to fund its pro-rated estimated share of such funding based on the principal amount of its first mortgage as an advance under its mortgage at an interest rate accruing at a rate that is the of the higher of (i) the applicable rate under its mortgage; and (ii) 9.5% per annum, calculated in arrears;

(ii) if the first mortgagee does not fund such amount, the second mortgagee will have the right (but not the obligation) to fund such amount as an advance under its mortgage at an interest rate accruing at a rate that is the of the higher of (i) the applicable rate under its mortgage; and (ii) 9.5% per annum, calculated in arrears. The amount advanced will have a first-ranking super-priority charge over the applicable Property only. If necessary, this process will continue until all mortgagees on a Property have been given the opportunity to fund;

(iii) where no mortgagee funds such amount, the Monitor shall draw such amount on the Standby DIP.

35. **THIS COURT ORDERS** that the Monitor shall be at liberty and it is hereby empowered to cause any Applicant to borrow by way of a revolving credit or otherwise (the "**Standby DIP**") from such lender as it may arrange in accordance with paragraph 34 (whether an existing mortgagee or otherwise, a "**DIP Lender**"), such monies from time to time as it may consider necessary or desirable to fund Project Specific Costs and General Costs in accordance with paragraph 34.

36. **THIS COURT ORDERS** that the Monitor is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "C" hereto (the "**DIP Certificates**") for any amount borrowed pursuant to paragraph 35 and, for greater certainty, each DIP Certificate shall indicate the Property to be charged and the amount to be charged pursuant to the DIP Certificate.

37. **THIS COURT ORDERS** that any DIP Lender shall be entitled to the benefit of and is hereby granted a fixed and specific charge on the Property identified in a DIP Certificate (the "**DIP Lender's Charge**") as security for the payment of the principal amount set out in any DIP Certificate, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, including, without limitation, the Administration Charge, provided however, that the amount of any DIP Lender's Charge shall attach only to the Property identified in a DIP Certificate with respect to that borrowing.

38. **THIS COURT ORDERS** that the monies from time to time borrowed pursuant to paragraph 35 and any and all DIP Certificates evidencing the same or any part thereof shall rank

on a *pari passu* basis per Property, unless otherwise agreed to by the holders of any prior issued DIP Certificates.

VALIDITY OF CHARGES CREATED BY THIS ORDER

39. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge and DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the beneficiaries of the applicable Charges or further Order of this Court.

41. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein or by the Proposal Proceedings and the declarations of insolvency made therein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance in connection thereof shall create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

(b) the payments made by the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

42. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

SALE PROCESS

43. **THIS COURT ORDERS** that the sale process (the "**Sale Process**"), as described in Section 3.0 of the Third Supplemental Report be and is hereby approved.

44. **THIS COURT ORDERS** that the Monitor and TD be and are hereby authorized and directed to perform their obligations under and in accordance with the Sale Process, and to take such further steps as they consider necessary or desirable in carrying out the Sale Process as described in the Third Supplemental Report, subject to prior approval of this Court being obtained before completion of any transactions under the Sale Process.

45. **THIS COURT ORDERS** that without limiting the terms of the Sale Process as set out in the Third Supplemental Report, to the extent that a mortgagee will not be paid in cash in full through bids received through the Sale Process, such mortgagee will be entitled to credit bid its indebtedness and purchase the Property over which it has a mortgage provided that such mortgagee pays any prior ranking indebtedness in full in cash (or such other arrangement to which a prior ranking creditor may in its sole discretion agree).

46. **THIS COURT ORDERS** that the Monitor, and its affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of performing its obligations under the Sale Process, except to the extent such losses, claims, damages or liabilities result from the gross negligence or willful misconduct of the Monitor in performing its obligations under the Sale Process (as determined by this Court).

47. **THIS COURT ORDERS** that in connection with the Sale Process and pursuant to clause 7(3)(c) of the *Personal Information and Electronic Documents Act (*Canada), the Monitor, the Applicants and TD are authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more transactions (each, a "**Transaction**"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Monitor, the Applicants or TD, as applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The transacting party with respect to any Property shall be entitled to continue to use the Personal Information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Monitor, the Applicants, or TD, as applicable, or ensure that all other personal information is destroyed.

48. **THIS COURT ORDERS** that to the extent there is equity available in any project of the Applicants (each of the projects is set out in Section 3.0(3) of the Report) after payment of all debts, fees and costs owing or incurred in respect of that project (in each case, the "**Project Equity**"), each mortgagee of that project will be entitled to receive in cash an amount equal to 10% of the principal amount of its mortgage prior to any payment to the project's shareholder (the "**Equity Kicker**"); provided that to the extent there is insufficient Project Equity to pay the Equity Kicker in full, each such mortgagee shall be entitled to its *pro-rata* share of the Equity Kicker based on the principal amount of its mortgage; and further provided that any mortgagee with a collateral mortgage will be entitled to collect its Equity Kicker in respect of any Property where it has a mortgage, provided that (i) in no event will such mortgagee receive in the aggregate an Equity Kicker that is greater than 10% of the principal amount of its mortgage owed by the primary mortgagor, and (ii) the advances it provided were used either for the property subject to the mortgage or for another property in the same project.

SERVICE AND NOTICE

49. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

50. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'http://www.ksvadvisory.com/insolvency-cases/forme-development-group/'.

51. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

52. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

53. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

54. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

55. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

56. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

57. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

Hainey J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

NOV 30 2018

PER / PAR: RW

Schedule "A" – List of Applicants

3310 Kingston Development Inc.

1296 Kennedy Development Inc.

1326 Wilson Development Inc.

376 Derry Development Inc.

5507 River Development Inc.

4439 John Development Inc.

9500 Dufferin Development Inc.

2358825 Ontario Ltd.

SCHEDULE "B" – LIST OF PROPERTIES

Block 55 - Dairy Dr., Toronto, ON (PIN 06449-0741) Block 53 - Bamblett Dr., Toronto, ON (PIN 06449-0739) Block 54 - Bamblett Dr., Toronto, ON (PIN 06449-0740)
3314 Kingston Rd., Toronto, ON
1296 Kennedy Rd., Toronto, ON
1326 Wilson Ave, Toronto, ON
1328 Wilson Ave, Toronto, ON
376 Derry Rd. W., Mississauga, ON
4439 John St., Niagara Falls, ON
4407 John St., Niagara Falls, ON
4413 John St., Niagara Falls, ON
4427 John St., Niagara Falls, ON
5507 River Rd. Niagara Falls, ON
5471 River Rd., Niagara Falls, ON
5491 River Rd., Niagara Falls, ON
9500 Dufferin St., Maple, ON
1483 Birchmount Rd., Toronto, ON

SCHEDULE "C" – FORM OF DIP CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

AFFECTED PROPERTY _____ (the "**Charged Property**")

1. THIS IS TO CERTIFY that KSV Kofman Inc., the monitor (the "**Monitor**") in the CCAA proceedings of Forme Development Group Inc. and certain of its affiliates (the "**Applicants**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the ___ day of _____, 2018 (the "**Initial Order**") made in an action having Court file number CV-18-608313-00CL, has received as such Monitor from the holder of this certificate (the "**DIP Lender**") the principal sum of $_____.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded monthly not in advance on the first day of each month after the date hereof at a notional rate of _____per annum equal.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Monitor pursuant to the Initial Order or to any further order of the Court, a charge upon the Charged Property which charge shall have the priority set out in the Initial Order.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate on the Charge Property shall be issued by the Monitor to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Monitor to deal with the Charged Property as authorized by the Initial Order and as authorized by any further or other order of the Court.

7. The Monitor does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

KSV KOFMAN INC., solely in its capacity as Monitor in the CCAA proceedings of Forme Development Group Inc. and the other parties therein, and not in its personal capacity

Per: _____

Name:

Title:

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 FORME DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO

Court File No. CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

INITIAL ORDER

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto, Ontario M5G 1V2
Fax: 416-597-6477

Mario Forte (LSUC#: 27293F)
Tel: 416.597.6477
Email: forte@gsnh.com

Jennifer Stam (LSUC#: 46735J)
Tel: 416.597.5017
Email: stam@gsnh.com

Lawyers for the Applicants

TAB 5

I hereby certify this to be a true copy of the original dated this 26 day of May 2010
for Clerk of the Court

Action No. 1001-07852

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND *THE JUDICATURE ACT*, R.S.A. 2000, c. J-2, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC., R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD., MEDICAN CONCRETE INC., 1090772 ALBERTA LTD., 1144233 ALBERTA LTD., 1344241 ALBERTA LTD., 9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS (CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE) DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY (SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR) DEVELOPMENTS LTD., MEDICAN (GRANDE PRAIRIE) HOLDINGS LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN (LETHBRIDGE – FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN (RED DEER – MICHENER HILL) DEVELOPMENTS LTD., MEDICAN (SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WESTBANK) DEVELOPMENT LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC. / LES ENTREPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD., MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD., RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD., SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD., SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD., SYLVAN LAKE MARINA DEVELOPMENTS LTD., THE ESTATES OF VALLEYDALE DEVELOPMENTS LTD., THE LEGEND (WINNIPEG) DEVELOPMENTS LTD., and WATERCREST (SYLVAN LAKE) DEVELOPMENTS LTD.

The Petitioners

BEFORE THE HONOURABLE MADAM JUSTICE K.M. HORNER IN CHAMBERS	)	At the Courts Centre in the City of Calgary, in the Province of Alberta, on Wednesday, the 26th day of May, 2010

INITIAL ORDER

UPON the application of the Petitioners (the "Applicants" or the "Medican Group"); **AND UPON HAVING READ** the Petition, the Affidavit of Wesley Reinheller, dated May 25,

2010 (the "Reinheller Affidavit"), and the Affidavit of Service of Kristal Bolton, dated May 26, 2010, to be filed; **AND UPON HAVING READ** the consent of RSM Richter Inc. to Act as Monitor; **AND UPON NOTING** that the parties set forth in Schedule "A" to the Petition filed in these proceedings have been provided notice of this application; **AND UPON HEARING** counsel for the Medican Group, and counsel for other parties present at this application; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and this application is properly returnable today.

APPLICATION

2. Each of the Applicants are affiliated debtor companies within the meaning of the CCAA in one of the divisions of the Medican Group, being Medican Construction or Medican Projects, both as defined in the Reinheller Affidavit, and the CCAA applies to each of the Applicants. The CCAA proceedings for each of Medican Construction and Medican Projects shall be joined and heard as one action, in this action. In addition, Cercle des Cantons Sec, a Quebec Limited Partnership with its general partner being one of the Applicants, Medican Enterprises Inc., is a necessary party, shall receive the benefit of the relief granted in this Order and is included in the terms the "Applicants" and the "Medican Group".

PLAN OF ARRANGEMENT

3. The Medican Group shall have the authority to negotiate, advance and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan") between, among others, the Medican Group and one or more classes of its secured and/or unsecured creditors as it deems appropriate.

POSSESSION OF PROPERTY AND OPERATIONS

4. The Medican Group shall:

(a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property");

(b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property; and

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. To the extent permitted by law, the Medican Group shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Medican Group in respect of these proceedings, at their standard rates and charges.

6. Except as otherwise provided to the contrary herein, the Medican Group shall be entitled but not required to pay all reasonable expenses incurred by the Medican Group in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account

of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Medican Group following the date of this Order.

7. The Medican Group shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan,

(iii) Quebec Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Medican Group in connection with the sale of goods and services by the Medican Group, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of

municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Medican Group.

8. Until such time as the Medican Group repudiates a real property lease in accordance with paragraph 10(d) of this Order, the Medican Group may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Medican Group from time to time for the period commencing from and including the date of this Order ("Rent"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Medican Group is hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Medican Group to any of its creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Medican Group shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets in accordance with section 36 of the CCAA;

(b) sell or lease residential units in the ordinary course of business or with the consent of the DIP Lender and the Monitor;

(c) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Medican Group and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(d) in accordance with paragraphs 11 and 12, vacate, abandon or quit any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days' notice in writing to the relevant landlord on such terms as may be agreed upon between the Medican Group and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan;

(e) in accordance with section 32 of the CCAA, repudiate such of its arrangements or agreements of any nature whatsoever, whether oral or written, as the Medican Group deems appropriate on such terms as may be agreed upon between the Medican Group and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan;

(f) pursue all avenues of refinancing and offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraphs (a) and (b), above); and

(g) settle claims with any of its customers, suppliers or other counterparties that are in dispute, where the amount of the compromise of such settlement does not exceed

$100,000, with the approval of the Monitor or, in excess of that amount, with the approval of the Court,

all of the foregoing to permit the Medican Group to proceed with an orderly restructuring of the Business (the "Restructuring").

11. The Medican Group shall provide each of the relevant landlords with notice of the Medican Group's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Medican Group's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Medican Group, or by further order of this Court upon application by the Medican Group on at least two (2) days' notice to such landlord and any such secured creditors. If the Medican Group repudiates the lease governing such leased premises in accordance with paragraph 10(d)of this order, it shall not be required to pay Rent under such lease pending resolution of any such dispute, and the repudiation of the lease shall be without prejudice to the Medican Group's claim to the fixtures in dispute.

12. If a lease is repudiated by the Medican Group in accordance with paragraph 10(d) of this order, then:

(a) during the notice period prior to the effective time of the repudiation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Medican Group and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the repudiation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Medican Group in respect of such lease or leased premises and such landlord shall be entitled to notify the

Medican Group of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

13. Notwithstanding the foregoing, the Medican Group shall be entitled but not required to pay, with the consent of the Monitor, all reasonable costs and expenses incurred prior to the date of this Order, where in the opinion of the Medican Group and the Monitor such payments (i) are necessary to preserve, the Property, Business and/or ongoing operations of the Medican Group, (ii) can be made on such terms and conditions as will provide a material benefit to the Medican Group and their stakeholders as a whole, but only in respect of:

(a) the Extendicare Contracts, as defined in the Reinheller Affidavit, and in connection with those payments, the suppliers are entitled to a charge in respect of those amounts owing in respect of any materials or services provided and such charge shall be limited to a charge as against the funds advanced by Extendicare, as defined in the Reinheller Affidavit;

(b) the Michener Project, as defined in the Reinheller Affidavit, and in connection with those payments, the suppliers are entitled to a charge in respect of those amounts owing in respect of any materials or services provided and such charge shall be limited to a charge as against the funds, if any, advanced by the Canadian Imperial Bank of Commerce; and

(c) the Sanderson Project, as defined in the Reinheller Affidavit and in connection with those payments, the suppliers are entitled to a charge in respect of those amounts owing in respect of any materials or services provided and such charge shall be limited to a charge as against the funds, if any, advanced by the Canadian Imperial Bank of Commerce.

The charges outlined in this section shall collectively referred to as the "Suppliers' Charge" and shall have the priority set out in paragraphs 38 and 40 herein.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. Until and including June 25, 2010, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Medican Group or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Medican Group or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Medican Group or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

(a) empower the Medican Group to carry on any business which the Medican Group is not lawfully entitled to carry on;

(b) exempt the Medican Group from compliance with statutory or regulatory provisions relating to health, safety or the environment;

(c) prevent the filing of any registration to preserve or perfect a security interest; or

(d) prevent the registration of a claim for lien.

16. Nothing in this Order shall prevent any party from taking an action against the Medican Group where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Medican Group and the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Medican Group, or seek to replace, challenge, or otherwise dispossess the Medican Group of any real estate project or contract in relation to the Business or the Property, except with the written consent of the Medican Group and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

    (b) oral or written agreements or arrangements with the Medican Group, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Medican Group;

    are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Medican Group or exercising any other remedy provided under such agreements or arrangements. The Medican Group shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods

or services received after the date of this Order are paid by the Medican Group in accordance with the payment practices of the Medican Group, or such other practices as may be agreed upon by the supplier or service provider and each of the Medican Group and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the date of this Order.

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

19. Notwithstanding anything else contained in this Order, no creditor of the Medican Group shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to the Medican Group.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Medican Group with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Medican Group whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Medican Group, if one is filed, is sanctioned by this Court or is refused by the creditors of the Medican Group or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. The Medican Group shall indemnify its directors and officers from all claims, costs, charges and expenses relating to the failure of the Medican Group, after the date hereof, to make payments of the nature referred to in subparagraphs 6(a), 7(a), 7(b) and 7(c)of this Order which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers of the Medican Group except to the extent that,

with respect to any officer or director, such officer or director has participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct.

22. The directors and officers of the Medican Group shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of $1,000,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 38 and 40 herein.

23. Notwithstanding any language in any applicable insurance policy to the contrary:

(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

(b) the Medican Group's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

APPOINTMENT OF MONITOR

24. RSM Richter Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the Medican Group's conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and that the Medican Group and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Medican Group pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

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

(a) monitor the Medican Group's receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Medican Group;

(c) assist the Medican Group, to the extent required by the Medican Group, in its dissemination to the DIP Lender and its counsel on a monthly basis of financial and other information as agreed to between the Medican Group and the DIP Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the DIP Lender;

(d) advise the Medican Group in its preparation of the Medican Group's cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis, but not less than monthly, or as otherwise agreed to by the DIP Lender;

(e) advise the Medican Group in its development of the Plan and any amendments to the Plan;

(f) advise the Medican Group, to the extent required by the Medican Group, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the books, records and management, employees and advisors of the Medican Group and to the Business and the Property to the extent required to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan;

(j) provide, if it deems appropriate, such consents as are contemplated herein;

(k) assist the Medican Group with respect to any insolvency proceedings commenced by or with respect to the Medican Group in any foreign jurisdiction (collectively, "Foreign Proceedings") and report to this Court, as it deems appropriate, on the Foreign Proceedings with respect to matters relating to the Medican Group;

(l) be at liberty to act as a foreign representative in any Foreign Proceedings in respect of any of the Medican Group including, without limitation, for recognition of these proceedings as "Foreign Main Proceedings", pursuant to Chapter 15 of the United States Bankruptcy Code, 11 U.S.C. §101 (the "US Bankruptcy Code") or similar legislation in any other jurisdiction;

(m) hold and administer funds in connection with arrangements made between the Medican Group, counterparties and the Monitor, or by Order of this Court; and

(n) perform such other duties as are required by this Order or by this Court from time to time.

26. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by

fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

27. The Monitor shall provide any creditor of the Medican Group, and the DIP Lender with information provided by the Medican Group in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Medican Group is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Medican Group may agree.

28. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

29. The Monitor, counsel to the Monitor and counsel to the Medican Group shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Medican Group as part of the costs of these proceedings. The Medican Group is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Medican Group on a bi-weekly basis and, in addition, the

Medican Group is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Medican Group, retainers in the respective amounts of $50,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

30. The Monitor and its legal counsel shall pass their accounts from time to time.

31. The Monitor, counsel to the Monitor, if any, and the Medican Group's counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $1,000,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 38 and 40 hereof.

DIP FINANCING

32. The Medican Group is hereby authorized and empowered to obtain and borrow under a credit facility from Paragon Capital Corporation Ltd. (the "DIP Lender") in order to finance the Medican Group's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $1,500,000 unless permitted by further order of this Court.

33. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Medican Group and the DIP Lender dated as of May 25, 2010 (the "Commitment Letter"), filed.

34. The Medican Group is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the Commitment Letter or as may be reasonably required by the DIP

Lender pursuant to the terms thereof, and the Medican Group is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

35. The DIP Lender shall be entitled to the benefits of and is hereby granted a charge (the "DIP Lender's Charge") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount owed to the DIP Lender under the Definitive Documents. The DIP Lender's Charge shall have the priority set out in paragraphs 38 and 40 hereof.

36. Notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon seven days notice to the Medican Group and the Monitor, may exercise any and all of its rights and remedies against the Medican Group or the Property under or pursuant to the Commitment Letter, Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Medican Group and set off and/or consolidate any amounts owing by the DIP Lender to the Medican Group against the obligations of the Medican Group to the DIP Lender under the Commitment Letter, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against any or all of the Medican Group and for the appointment of a trustee in bankruptcy of any or all of the Medican Group, and upon the occurrence of an event of default under the terms of the Definitive Documents,

the DIP Lender shall be entitled to seize and retain proceeds from the sale of the Property and the cash flow of the Medican Group to repay amounts owing to the DIP Lender in accordance with the Definitive Documents and the DIP Lender's Charge, but subject to the priorities as set out in paragraphs 38 and 40 of this Order; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Medican Group or the Property.

37. The DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Medican Group under the CCAA, or any proposal filed by the Medican Group under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES

38. The priorities of the Suppliers' Charge, the Directors' Charge, the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Suppliers' Charge (to the extent of the property charged in paragraph 13 hereof);

Second – DIP Lender's Charge;

Third – Administration Charge (to the maximum amount of $1,000,000); and

Fourth – Directors' Charge (to the maximum amount of $1,000,000).

39. The filing, registration or perfection of the Directors' Charge, the Administration Charge or the DIP Lender's Charge (collectively, the "Charges") and the Suppliers' Charge shall not be required, and the Charges and the Suppliers' Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges and the Suppliers' Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person except any security interest and charge granted by the Medican Group to the Canadian Imperial Bank of Commerce and the Toronto Dominion Bank.

41. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Medican Group shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges and the Suppliers' Charge, unless the Medican Group also obtains the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Directors' Charge and the Administration Charge.

42. The Charges, the Suppliers' Charge, the Commitment Letter and the Definitive Documents, shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges, the Suppliers' Charge, the Commitment Letter and the Definitive Documents (collectively, the "Chargees") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement

(collectively, an "Agreement") which binds the Medican Group, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges, nor the Suppliers' Charge, nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the Commitment Letter or the Definitive Documents, shall create or be deemed to constitute a new breach by the Medican Group of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, the Suppliers' Charge, or the Medican Group entering into the Commitment Letter, or execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Medican Group pursuant to this order, including the Commitment Letter or the Definitive Documents, and the granting of the Charges, and the Suppliers' Charge do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

ALLOCATION

43. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Charges amongst the various Applicants and the assets comprising the Property.

SERVICE AND NOTICE

44. The Monitor shall, within five business days of the date of entry of this Order, send a copy of this Order to its known creditors, other than employees and creditors to which the Medican Group owes less than $1000, at their addresses as they appear on the Medican Group's records, and shall promptly send a copy of this Order:

(a) to all Persons requesting notice; and

(b) to any other interested Person requesting a copy of this Order.

45. The Medican Group and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Medican Group's creditors or other interested Persons at their respective addresses as last shown on the records of the Medican Group and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall post a copy of any or all such materials on its website at www.rsmrichter.com/restructuring pursuant to section 23(1) of the CCAA.

GENERAL

46. The Medican Group or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

47. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Medican Group, the Business or the Property.

48. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Medican Group, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Medican Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the

Monitor in any foreign proceeding, or to assist the Medican Group and the Monitor and their respective agents in carrying out the terms of this Order.

49. Each of the Medican Group and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

50. Any interested party (including the Medican Group and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

51. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Daylight Time on the date of this Order, save and in respect of a letter from the Toronto-Dominion Bank to R7 Investment Ltd., dated May 26, 2010, which shall not be stayed by this Order. KH

J.C.Q.B.A.

ENTERED this ____ day of
May, 2010.

CLERK OF THE COURT

Action No. 1001-07852

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND *THE JUDICATURE ACT*, R.S.A. 2000, c. J-2, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC., R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD., MEDICAN CONCRETE INC., 1090772 ALBERTA LTD., 1144233 ALBERTA LTD., 1344241 ALBERTA LTD., 9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS (CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE) DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY (SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR) DEVELOPMENTS LTD., MEDICAN (GRANDE PRAIRIE) HOLDINGS LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN (LETHBRIDGE – FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN (RED DEER – MICHENER HILL) DEVELOPMENTS LTD., MEDICAN (SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WESTBANK) DEVELOPMENT LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC. / LES ENTREPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD., MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD., RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD., SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD., SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD., SYLVAN LAKE MARINA DEVELOPMENTS LTD., THE ESTATES OF VALLEYDALE DEVELOPMENTS LTD., THE LEGEND (WINNIPEG) DEVELOPMENTS LTD., and WATERCREST (SYLVAN LAKE) DEVELOPMENTS LTD.

The Petitioners

INITIAL ORDER

FRASER MILNER CASGRAIN LLP
Barristers and Solicitors
15th Floor
Bankers Court
850 – 2nd Street S.W.
Calgary, AB T2P 0R8

Solicitor: David W. Mann/Scott Kurie
Telephone: (403) 268–7097/3084
Facsimile: (403) 268-3100
File: 526686-1

TAB 6

Action No.:_____
Deponent: Wesley Reinheller
Date Sworn: May 25, 2010

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND *THE JUDICATURE ACT*, R.S.A. 2000, c. J-2, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC., R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD., MEDICAN CONCRETE INC., 1090772 ALBERTA LTD., 1144233 ALBERTA LTD., 1344241 ALBERTA LTD., 9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS (CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE) DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY (SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR) DEVELOPMENTS LTD., MEDICAN (GRANDE PRAIRIE) HOLDINGS LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN (LETHBRIDGE – FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN (RED DEER – MICHENER HILL) DEVELOPMENTS LTD., MEDICAN (SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WESTBANK) DEVELOPMENT LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC. / LES ENTREPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD., MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD., RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD., SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD., SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD., SYLVAN LAKE MARINA DEVELOPMENTS LTD., THE ESTATES OF VALLEYDALE DEVELOPMENTS LTD., THE LEGEND (WINNIPEG) DEVELOPMENTS LTD., and WATERCREST (SYLVAN LAKE) DEVELOPMENTS LTD.

The Petitioners

AFFIDAVIT

I, Wesley Reinheller, of the City of Medicine Hat, in the Province of Alberta, **MAKE OATH AND SAY THAT**:

1. I am an Officer of certain of the Petitioners and I am authorized by all of the Petitioners to depose this Affidavit and do so on their behalf. I am, together with my wife Janice Reinheller, the controlling mind of all of the Petitioners and, as such, I have personal knowledge of the

matters herein deposed to, except where stated to be based on information and belief, in which case I do verily believe the same to be true.

RELIEF REQUESTED

2. I make this Affidavit in support of an application by all of the Petitioners (collectively, the "Applicants", or the "Medican Group") for an Order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended, (the "CCAA") granting certain relief, including the following:

(a) a declaration that the Applicants are entities to which the CCAA applies;

(b) a stay of all proceedings and remedies taken, or that might be taken, with respect to the Applicants, their respective property and undertaking, without leave of the Court or as otherwise permitted by law;

(c) authorizing the Applicants to carry on business in a manner consistent with the preservation of their property and maximization of value of their assets for stakeholders, including to make payments and enter into contracts as necessary to continue the normal course of operations (including the sale of inventory) and, where appropriate to do so, to complete construction of, and bring to market, the projects that are currently under development (as further described herein);

(d) appointing RSM Richter Inc. ("RSM Richter") as Monitor of the Applicants in these proceedings;

(e) permitting the Applicants to file with the Court a plan or plans of compromise or arrangement;

(f) approving a debtor-in-possession financing facility in the principal sum of $2.5 million secured by a charge against the property of the Medican Group;

(g) permitting the Medican Group to pay certain amounts to suppliers, and to charge certain property and assets with a suppliers' charge;

(h) certain other relief more specifically discussed below, including approving: (i) a mechanism to pay critical trades and suppliers; and (ii) the creation of a charge for professional fees including the fees of the Medican Group's counsel, RSM

Richter and its legal counsel, and (iii) the creation of a charge to secure indemnification obligations in favour of officers and directors of the Medican Group; and

(i) such other relief as this Honourable court may grant.

3. Each of the Applicants: (i) is a direct or indirect subsidiary of Wesley or Janice Reinheller; (ii) is variously incorporated in the jurisdictions Alberta, British Columbia, Quebec and Manitoba; (iii) has a bank account, or books and records, or other assets in Alberta; and (iv) reports to the Medican Group's head office being located at 1870A, 6th Avenue, S.W., Medicine Hat, Alberta T1A 7X5.

4. In certain circumstances with respect to certain projects that are described in more detail below, the Medican Group carries on business in limited partnerships. There is currently one such partnership, as follows:

(a) Cercle Des Cantons, S.E.C., a limited partnership whose general partner is Medican Enterprises Inc., an Alberta corporation, and whose limited partner is Medican Developments Inc.

(each limited partnership is sought to be included in this application and is hereinafter included in the term "Applicants" and "Medican Group").

OVERVIEW

Background

5. In 1974 I, together with three partners, formed the Medican business in Medicine Hat, Alberta. Originally, Medican operated as a concrete company in the Medicine Hat area. The concrete company proved successful because of its focused skills on extruded concrete. As the company became profitable, Medican expanded to include a housing development division to build condominiums and single family homes.

6. In time, I bought out my three partners and, with the help of my wife, Janice Reinheller, began to grow the Medican Group. By 2007, Medican was one of the largest developers in Alberta, with over 30 projects underway and net equity estimated to be over $90 million.

7. Currently, the Medican Group consists of two divisions: (i) a residential development enterprise (referred to herein as "Medican Projects") and (ii) a construction enterprise (referred to herein as "Medican Construction"). Medican Construction operates as a general contractor for a number of projects, including Medican Projects, and also owns a number of subsidiaries that provide various types of building trade services across Western Canada, including the original concrete business, through Medican Concrete Inc. (described in more detail below).

Brands of the Medican Projects

8. Medican Projects have built over 10,000 homes in Western Canada since 1974. Over this period of time Medican Projects have developed four distinct brands: Sierras, Recreation, Axxess and Legend condominium projects.

9. The Sierras brand involves luxury condominiums targeted to homeowners 40 years and over. The Sierras condominium communities are the flagship product line of the Medican Group.

10. The Recreation brand focuses on developing destination properties. Crossbow Point in Canmore was the Medican Group's first Recreation development and the luxury vacation properties have since expanded into developments in Quebec, British Columbia and Hawaii.

11. The Axxess brand focuses on condominium communities that would provide for affordable home ownership. First launched in Medicine Hat in 2004, the Medican Group is currently providing Axxess communities in Brooks, Grande Prairie, Edmonton, Sylvan Lake, Saskatoon, and Oshawa.

12. The Legend brand is the Medican Group's newest product, seeking to provide upscale condominium communities for families.

Corporate Philosophy

13. Medican Projects operates under the corporate philosophy that the purpose of residential real estate development is to build and develop communities. The Medican Group takes pride in its conscientious approach to building and maintaining flourishing communities. This approach includes: (i) care for the cities selected; (ii) care for the impact of the development on the existing community; (iii) excellence in the product delivered; and (iv) establishment and maintenance trust with its customers.

14. The Medican Group was recently rewarded for the product of its care and workmanship with 3 SAMM awards. This honour was bestowed on the Medican Group by its peers in the home building industry for "Best Multifamily Wood Frame", "Best Multifamily Community" and "Best Floor Plan".

15. In addition to providing quality homes for the people in the community, the Medican Group supports community initiatives and youth development programs, such as Eagle's Nest Ranch. Eagle's Nest Ranch is a non-profit non denominational children's camp dedicated to positively impacting the lives of our youth. Thousands of young people have benefited over 25 years of summer camp programs and year-round activities offered through the program.

16. Six years ago, Medican developed a neighborhood hub called "Central Neighbourhood Hub" in Medicine Hat with a 45,000 square foot building containing, among other things, an indoor skate board park, dance studio, boxing club, the "Prairie Gleaners", and 12 other non profit groups working out of it. Medican also serves those in the community facing crisis in unwanted pregnancy and sexual health through support of the Agnes Adam Lee Centre.

17. Medican believes in making a lasting positive impact in all of the communities in which it operates. In mid-March of this year, a massive fire destroyed a significant portion of the Canvas at Millrise condominium development, a condominium complex in Calgary developed by the Medican Group. Hundreds of people and their families were devastated by the loss of their homes. At the time of the fire it had been over a year since the condo board of Canvas at Millrise took over ownership and responsibility for the project. Nevertheless, Medican has been and remains actively involved in offering support to the families impacted by the fire through assisting with donation campaigns in support of those affected families. The Medican Group has recently been awarded the construction management contract to rebuild the damaged section of the project.

STRUCTURE

Corporate Structure

18. The Medican Group employs a complex corporate organizational structure. A diagram depicting the corporate organization of the Medican Group (depicting the Applicants shaded in green) is attached hereto and marked as **Exhibit "A"**.

19. Attached hereto and marked as **Exhibit "B"** are the results of a corporate search of each of the Applicants from the corporate registrar of the respective provincial jurisdiction in which the company is registered.

20. As outlined above, the Medican Group has developed into two divisions: Medican Construction and Medican Projects. Both Medican Construction and Medican Projects carry on business under the "Medican" name, use the same marketing and branding, utilize the same head office, accounting and other administrative services and carry on work with each other wherever it makes sense to do so. My wife ultimately owns the Medican Projects division and I, or trusts which I control, own the Medican Construction division. All of the Medican Group utilizes a single executive team that reports to me. The Medican Group is a fully integrated real estate development operation that uses a single cash management system and finances its many projects through a variety of credit facilities that are cross-collateralized with other projects of the Medican Group.

Medican Construction

21. Medican Construction is comprised of the following companies, each of which is an Applicant in these proceedings:

(a) R7 Investments Ltd. (holding company);

(b) 1090772 Alberta Ltd.

(c) Medican Construction Ltd.;

(d) Medican Concrete Inc.;

(e) Medican Equipment Ltd.;

(f) Medco Development Corp.;

(g) Medican Concrete Forming Ltd.;

(h) Medican General Contractors Ltd.; and

(i) Medican Framing Ltd.

(collectively, the "Construction Companies")

22. Medican Construction is an enterprise which operates as a contract builder, and as a direct provider of construction services, equipment and labour. R7 Investment Ltd. is the parent company of Medican Construction and it wholly owns each subsidiary listed above with the exception of Medican Concrete Inc., of which a third party, Mr. David Mudrack, owns a minority position.

23. Each individual subsidiary offers specific construction services. As an example, Medican Concrete Inc. is in the business of providing concrete services throughout Alberta. Medican Concrete Inc. specializes in building sidewalks, curbs and gutters and has been profitable since its inception and remains to this day a highly profitable business, with deep ties to the community of Medicine Hat.

24. R7 Investments Ltd. is owned either directly or indirectly by the Reinheller Family Trust A, Reinheller Family Trust B, Wes Reinheller Trust, and myself. The details of the trusts are as follows:

(a) Reinheller Family Trust A:

(i) Trustee: Wesley Reinheller.

(ii) Beneficiaries: Wesley Reinheller, Michael Reinheller and Melissa Davidson.

(b) Reinheller Family Trust B:

(i) Trustee: Wesley Reinheller.

(ii) Beneficiaries: Wesley Reinheller, Renee Rood and Ryan Reinheller.

(c) Wes Reinheller Trust:

(i) Trustee: 969022 Alberta Ltd.

(ii) Beneficiaries: Wesley Reinheller.

Medican Projects

25. Medican Projects operates two types of residential construction operations:

(a) Medican Projects develops residential real estate projects as the owner of the land and assets being developed (referred to as a "Development Project"); and

(b) Medican Projects develops real estate projects under 'cost-plus' contracts on behalf of third party owners of the lands upon which the project is situated (referred to as a "Cost-Plus Project").

26. For a Development Project, for each new project undertaken, an operating company is created to function as the owner of the land and assets, and as the primary borrower in respect of the financing for the particular project (referred to generally as a "Project Company"). The Project Company will retain a general contractor to arrange for, and supervise, the construction work required to build the projects. In most cases, the general contractor is Medican Construction Ltd. who, in turn, retains the sub-trades for the completion of the project.

27. The Project Companies are held either directly or indirectly under the umbrella company Medican Holdings Ltd., which, in turn, is owned solely by Janice Reinheller. The following of the Applicants are held directly (or if so indicated, indirectly) by Medican Holdings Ltd.:

(a) 1344241 Alberta Ltd.;

(b) 9150 – 3755 Quebec Ltd.;

(c) Axxess (Grande Prairie) Developments Ltd. (held indirectly through Medican Developments Inc.);

(d) Axxess (Sylvan Lake) Developments Ltd.;

(e) Canvas (Calgary) Developments Ltd.;

(f) Cercle de Cantons, S.E.C.;

(g) The Estates of Valleydale Developments Ltd. (held indirectly through Homes by Kingsland Ltd.);

(h) Homes by Kingsland Ltd.;

(i) Lake Country (Sitara) Developments Ltd.;

(j) Medican Developments Inc.;

(k) Medican Enterprises Inc.;

(l) Medican Developments (Medicine Hat Southwest) Inc.;

(m) Medican (Lethbridge – Fairmont Park) Developments Ltd.;

(n) Medican (Edmonton Terwillegar) Developments Ltd.;

(o) Medican General Contractors 2010 Ltd.;

(p) Medican (Kelowna Move) Developments Ltd.;

(q) Medican (Red Deer – Michener Hill) Developments Ltd.;

(r) Medican (Sylvan Lake) Developments Ltd.;

(s) Medican (Westbank) Developments Ltd.;

(t) Medican (Westbank) Land Ltd.;

(u) Riverstone (Medicine Hat) Developments Ltd.;

(v) Sanderson of Fish Creek (Calgary) Developments Ltd.;

(w) Sierras of Eaux Claires (Edmonton) Developments Ltd.;

(x) Sonata Ridge (Kelowna) Developments Ltd.

(y) Sylvan Lake Mariana Developments Ltd.; and

(z) The Legend (Winnipeg) Developments Ltd.

(aa) Watercrest (Sylvan Lake) Developments Ltd.

(bb) Elements (Grande Prairie) Developments Ltd.

The Development Projects of Medican

28. The Development Projects held by Medican Projects are at various stages of development ranging from holdings of bare land for planned projects, to lands that have been developed with

infrastructure, to fully completed projects with only the sale of finished units as inventory remaining to take place.

29. For ease of reference, the following is a list of the Development Projects (as defined in **Exhibit "C"**) that pertain to the Applicants in this proceedings:

(a) Axxess Terwillegar Project;

(b) Canvas at Millrise Project;

(c) Kaleido Project;

(d) Canyon Creek Project;

(e) Legend Project;

(f) Sanderson Project;

(g) Riverstone Project;

(h) Axxess Sylvan Lake Project;

(i) Michener Project;

(j) Cimmaron Project;

(k) Sitara Project;

(l) Bromont Project;

(m) Sonata Ridge Project;

(n) Sylvan Lake Dipert Project;

(o) Sylvan Lake Marina Project;

(p) Lexington Project;

(q) High River (Montrose Project);

(r) Edgewood Brooks Project;

(s) Watercrest Project; and

(t) Elements of Grande Prairie.

30. Attached hereto and marked as **Exhibit "C"** is a summary description of each of the Development Projects, including a description of the secured lending facilities associated with each project.

31. The Medican Group employs 25 commission sales associates who work on site at the developments. These employees market completed units and presales on future phase developments. The Medican Group employs 5 people through their head office that coordinate all sales and marketing including the commission sales people.

32. In addition, I am the sole shareholder of Medican (Grande Prairie) Holdings Ltd., an Alberta corporation, formerly used as the Project Company in respect of a project that was completed several years ago in Grande Prairie. Medican (Grande Prairie) Holdings Ltd. is the owner of several condominium units from which it derives rental income in the approximate amount of $20,000 per month.

33. I am also the owner of 1144233 Alberta Ltd., an Alberta corporation that owns a building located in Medicine Hat. This building is known as the 'Central Neighborhood Hub', is described above, and is worth approximately $1.2 million.

Material Agreements

The Extendicare Contracts

34. The Medican Group, through Medican General Contractors 2010 Ltd., has a series of construction management contracts in place with Extendicare (Canada) Inc. ("Extendicare") to develop, as Cost-Plus Projects returning 4% to the Medican Group, three assisted living facilities in Alberta, generally described as follows:

(a) a 180 unit care facility in Edmonton (the "Edmonton Extendicare Project"). The Edmonton Extendicare Project is budgeted to cost $35 million, and, in addition, Sierras of Eaux Claires (Edmonton) Developments Ltd. holds an interest in the lands associated with the Edmonton Extendicare Project;

(b) a 280 unit care facility in Red Deer (the "Red Deer Extendicare Project"). The Red Deer Extendicare Project is budgeted to cost $48 million and, in addition, Medican (Red Deer – Michener Hill) Developments Ltd. holds an interest in the lands associated with the Red Deer project; and

(c) a 140 unit care facility in Lethbridge (the "Lethbridge Extendicare Project"). The Lethbridge Extendicare Project is budgeted to cost $20 million and, in addition, Medican (Lethbridge – Fairmont Park) Developments Ltd. holds an interest in the lands associated with the Red Deer project.

(collectively, the "Extendicare Contracts").

35. The Medican Group currently maintains trust accounts for each of the three Extendicare projects whereby interim payments made by Extendicare are deposited and then disbursed to suppliers to the Extendicare projects pursuant to cheques jointly signed by the Medican Group and Extendicare. Balances remaining in the accounts after payments to suppliers represent profit to the Medican Group and currently form a material portion of the Applicants' monthly revenues.

The Haven Cost-Plus Project

36. The Medican Group has contracted with Haven of Rest ("Haven") to develop, as a Cost-Plus Project, a 40 unit adult condominium project in Medicine Hat (the "Haven Cost-Plus Project"). This is a Cost-Plus Project that will return to the Medican Group 5% of the cost of the project as net profit. The Haven Cost-Plus Project is budgeted to cost $8.5 million, thus returning to the Medican Group an estimated fee of $425,000.

The Okotoks Cost-Plus Project

37. The Medican Group has contracted with Brenda Stafford Foundation to develop, as a as Cost-Plus Project, a 149 unit assisted living project in Okotoks (the "Okotoks Cost-Plus Project"). This is a Cost-Plus Project that will return to the Medican Group 5% of the cost of the project as net profit. The Okotoks Cost-Plus Project is budgeted to cost $22 million, thus returning to the Medican Group an estimated fee of $1,100,000.

The Millrise Rebuild Project

38. The Medican Group has been awarded a construction management contract to re-build, as a Cost-Plus Project, the portion of the Millrise Project that was damaged in the recent fire (the "Millrise Rebuild Project").

39. The re-build of the Millrise Project is projected to cost an estimated $20 million, and will return to the Medican Group an estimated $1.4 million in fees.

40. All of the Cost-Plus Projects will, when commenced in the next sixty days have a materially positive impact on the cash flow available to the Medican Group.

41. Medican Concrete Ltd. has contracts that are projected to generate approximately $2,500,000 in 2010.

Purchase Contracts

42. The Medican Group is currently a party to approximately 60 contracts for the sale of residential condominium units to various individuals. In the aggregate, this represents approximately $18,000,000 in unit sales that are slated to be completed over the next sixty days. Deposits received by the Medican Group in respect of these unit sales amount to approximately $2,500,000, most of which have been either invested into the Medican Projects to which such purchases relate pursuant to arrangements with the applicable recognized warranty program or held in trust by solicitors in accordance with the provisions of the *Condominium Property Act* (Alberta) or other applicable legislation.

LIABILITIES

Secured Debt

43. The Medican Group currently owes an aggregate of approximately $110 million in secured debt. The secured debt is made up of 14 lenders who primarily provide the financing facilities for the Development Projects as outlined in Exhibit "C" hereto.

44. The following table provides a summary of the total estimated amount of secured debt owed to each lender of the Medican Group in respect of the various Development Projects:

Secured Lender	Estimated Amount of Secured Debt	Development Project(s) Secured
933208 Alberta Ltd.	$ 2,100,000	Michener Project
Bancorp Financial Corporation	$ 1,200,000	Cimmaron Project
Carry Investments	$ 4,845,125	Canyon Creek Project (Phases 2,3 &4); Riverstone Project; and Sonata Ridge Project.
CIBC	$ 15,000,000	Canvas at Millrise Project; Sanderson Project; Riverstone Project; Axxess Sylvan Lake Project; Michener Project; Sitara Project; Lexington Project; Hamptons Duo; and Axxess Grande Prairie.
Harbour Mortgage	$ 8,262,756	Sanderson Project Bromont Project; and Kelowna Move Sales Centre.
Instafund	$ 5,000,000	Sanderson Project.
Laurentian Bank	$ 3,765,667	Sonata Ridge Project.
Majoros	$ 3,000,000	Kaleido Project.
MCAP	$ 33,500,000	Axxess Terwillegar Project; Kaleido Project; Canyon Creek Project; and

Secured Lender	Estimated Amount of Secured Debt	Development Project(s) Secured
		Legend Project.
McDonald Group	$ 14,800,000	Axxess Terwillegar Project; Canvas at Millrise Project.
Monarch	$ 12,194,449	Axxess Terwillegar Project; Sanderson Project; Axxess Sylvan Lake Project; and Kaleido Project
Paragon Capital	$ 2,500,000	Michener Project.
TD Bank	$ 1,000,000	General security over the current assets of Medican Concrete Inc.
Deferred Lien Payables	$ 1,850,000	Legend Project.
Worthington Mortgage	$ 750,000	The Estates of Valleydale.
TOTAL SECURED DEBT	**$ 109,767,997**	

45. Many of the secured facilities are cross-collaterized with other Projects, and virtually all of them have been guaranteed by R7 Investments Ltd., Medican Holdings Ltd., Medican Developments Inc., Medican Construction Ltd., Medican Concrete Inc. and myself and my wife, personally.

Unsecured Debt

Trade Payables

46. As discussed above, Medican Construction contracts for most of the supply of goods and services for various Development Projects. As such, it incurs most of the trade debt, excepting only lien claims against specific Development Projects.

47. The Medican Group – primarily Medican Construction – currently has an aggregate trade debt estimated in excess of $25 million owing to well over 100 vendors.

Unsecured Loans

48. The Medican Group currently has an aggregate amount of approximately $31 million outstanding in unsecured loans. The unsecured loan debt is made up of a number of lenders, estimated as follows:

Lender	Amount
Holly Oak Homes	$5,736,563
Foundation Capital	$4,100,000
Brenda Strafford Foundation	$15,000,000
Other	$6,000,000
TOTAL	$30,836,563

Other Liabilities

49. The Medican Group is in arrears to Canada Revenue Agency ("CRA") in the aggregate amount of approximately $3.7 million for G.S.T. owing in respect unit sales on the Development Projects (the "GST Debt"). CRA has demanded payment from the Medican Group and has threatened to initiate enforcement proceedings on May 31, 2010 unless the Medican Group provides payment before that time. The Medican Group currently has no means to make any payments to CRA in respect of these arrears.

50. As discussed above, the Medican Group has potential liability to purchasers or the insurers of the purchasers' deposits in excess of $2 million if the Development Projects to which they relate are not completed by the Medican Group and deposits have to be refunded to the purchasers. The Medican Group has insured these deposits with insurers such as the National Home Warranty Deposit Protection Program, which in turn relies on guarantees from the Medican Group, and Janice and myself personally, in the event of a loss.

51. The Medican Group owes approximately $2.4 million in corporate tax as accumulated amongst its various Project Companies and the companies of the Medican Construction enterprise.

52. The Medican Group owes approximately $500,000 in municipal taxes accumulated on the lands of the various Development Projects.

FINANCIAL POSITION OF THE APPLICANTS

53. Attached hereto and marked as Exhibit "D", is a copy of the Medican Group's most recently completed unaudited combined financial statements as at March 31, 2009 (the "Financial Statements").

54. Attached hereto and marked as Exhibit "E", are the Medican Group's consolidated cash flows for the 13 week period commencing the week of May 24 2010 and ending the week including August 20, 2010 (the "Cash Flows"). The Cash Flows have been prepared by the Medican Group with the assistance of RSM Richter, the proposed monitor, and may be amended from time to time.

CASH MANAGEMENT AND INTER-COMPANY PAYMENTS

55. In the ordinary course of its business, the Medican Group is funded through the financings obtained on each Development Project. That particular project then pays its general contractor, which is usually Medican Construction, who then pays its suppliers. Surpluses remaining with Medican Construction are then applied against general administration and servicing interest payments. The lenders to each Development Project are repaid out of the proceeds generated from the sale of completed inventory arising out of the financed property.

56. Cash flow generated from the Extendicare Contracts in excess of monies payable to subtrades working on the Extendicare Contracts is generally paid to Medican Construction Ltd. and Medican Concrete Inc. for general corporate uses.

57. There are, generally, no restrictions in transferring funds between the Applicants. From time to time monies are moved through unsecured, non-interest intercompany loans in amounts assessed on an as-needed basis to meet obligations, but generally funds flow as outlined above. To assist the management of Medican Construction's cash flow, the most volatile of the Medican Group, Medican Construction has a $1 million operating line of credit with Toronto Dominion Bank through Medican Concrete Ltd. The operating line is secured against the current assets of Medican Concrete Ltd., and is currently fully drawn.

LIQUIDITY – DIP FINANCING

58. The Medican Group's funds are insufficient to continue its operations. As discussed above, the Applicants are in immediate need of funding to continue operating in the short term. The Medican Group is seeking debtor in possession ("DIP") financing in the amount of $2.5

million (limited to the amount required in the cash flow statements for first thirty days of restructuring) to allow it to begin and continue with these proceedings. The Medican Group has, with the assistance of RSM Richter, selected Paragon Capital Corporation Ltd. to provide the DIP funding, who provided the best terms to the Medican Group. A copy of the Commitment Letter is attached hereto and marked as Exhibit "F".

59. The $2.5 million DIP financing should be sufficient to fund the Medican Group's operations for the next thirty days. In conjunction with the Monitor, the Medican Group has reduced its cash projections to the bare minimum for the next 30 days. During this time frame, the Medican Group intends to continue with its major Projects (discussed in more detail below), stabilize its Cost-Plus Projects, and dialogue with our major secured creditors.

60. On the basis of the Medican Group's equity described in Exhibit "C", I do not believe that granting super-priority DIP funding in the amount required will prejudice the secured creditors.

OPERATIONS

Employees

61. The Medican Group currently employs 128 people, the majority of which are employed by Medican Construction Ltd.

62. The Medican Group pays approximately $575,000 in salary and wages to its employees each month. The Medican Group is required to make remittances in the approximate amount of $220,000 as a result of these wages. These remittances are made bi-weekly.

63. A significant number of the Medican Group's employees have been with the company over an extended period of years, and have built their lives and families around the Medican Group. The number of people directly affected by the operations of the Medican Group is increased significantly when all of the Medican Group's contract workers are taken into account.

64. It is our goal through these restructuring efforts to protect the interests of all the Medican Group's stakeholders – to ensure the continued and profitable existence of the Medican Group for the hundreds of families directly affected by our operation, to continue to have a positive impact on the communities in which we build, and to provide to our current lenders and investors the best return possible under the circumstances.

Management

65. As the Medican Group continued to expand and grow over the years, it was my wife's and my goal to reduce our role in respect of the management and operation of the company. Starting seven years ago, we slowly empowered certain employees with the responsibility of managing the day to day operations and some overall management of the company.

66. The Medican Group became managed primarily by the team of Cam Ens, Terrence Kowalchuk and Luke Day. As time went by we relied more and more on this management team to run the Medican Group.

67. More recently, as it became apparent that the Medican Group's financial performance was in decline, I have increased my involvement in the day-to-day management of the Medican Group. I am fully committed to the success of the Medican Group (indeed, all of Janice's and my net worth is tied to the fortune of the Medican Group) and its restructuring. Cam Ens and Terrence Kowalchuk are no longer employed by the Medican Group.

68. We are in the process of rebuilding the management team of the Medican Group. Currently this team consists of Jason Fleury, Matt Rood, Mike Reinheller, and myself. In addition, Mr. Tyrone Schnieder, operating through his independent consulting company, has agreed to assist in our restructuring. Mr. Tyrone Schneider has significant experience in business development and finance. It is contemplated that, should the relief we are requesting be granted, Mr. Schneider will, through his holding company, be engaged as an advisor to the Medican Group's legal advisor, and share in the benefit of the proposed Administration Charge with the Medican Group being solely liable for all fees incurred. Matt Rood, my son-in-law, has been retained to manage and oversee the orderly completion of the various Development Projects, and to continue the profitable operation of the Cost-Plus Projects.

69. It is my belief that the new management team is highly competent will restore the confidence of the Medican Group's stakeholders and return the Medican Group to its historical profitability.

EVENTS LEADING TO THE PRESENT APPLICATION

70. The Medican Group has encountered significant cost overruns associated with certain projects. This has been exacerbated by both the recent decline in the residential real estate

market (which had an adverse effect on the Applicants' sale of residential units) and the increased pricing of the financing on our Development Projects.

71. This rapid and material decline in the Medican Group's financial position has caused me to review what appears to be material cost over-runs associated with certain projects. In the course of that review I have discovered that the Medican Group's loss of liquidity has been more severe than I had been lead to believe and that things like GST remittances and basic payments to utilities and others, were long overdue. In this latter regard, one creditor has proceeded to judgment and, were it not for an emergency payment of approximately $150,000 on Friday, May 21, 2010, various utilities would have disconnected services to the Medican Group.

NOTICE AND URGENCY

72. On May 21, 2010, Monarch Land Ltd. ("Monarch") demanded repayment and served the Medican Group with a Notice of Default for the loans provided by Monarch in respect of Development Projects ("the Monarch Demands") as follows:

(a) Axxess Sylvan Lake Project - $3.1 million outstanding;

(b) Kaleido Project – $4.0 million outstanding;

(c) Axxess Terwillegar Project – $5.0 million outstanding; and

(d) Sanderson Project – $5.7 million outstanding.

73. The Monarch Demands demand repayment of the full amount of the balance outstanding on each the above loans within 10 days of May 21, 2010, failing which, Monarch intends to pursue its remedies to enforce on the mortgages and other security held by Monarch against the Medican Group.

74. Earlier today, the Medican Group received immediate demand for payment from Majoros in respect of amounts owed on the Kaleido Project (the "Majoros Demand").

75. The Medican Group has a liquidity crisis. It has insufficient funds to carry on beyond the end of May, 2010. In this regard, and as mentioned above, the Medican Group:

(a) is in arrears to the CRA in the aggregate amount of $6.1 million and is not in a position to make any payment to CRA notwithstanding CRA's position that it will begin to enforce its rights if payments are made to CRA beginning May 31, 2010;

(b) the Medican Group had to borrow $180,000 from its proposed DIP lender on an emergency basis this past Friday to meet the Medican Group's obligations for payroll and utilities;

(c) Medican Group will not be able to service interest payments on it current credit facilities in respect of the month of May, 2010; and

(d) Medican Group will not be able to comply with the Monarch Demands or the Majoros Demand.

MONITOR

76. RSM Richter has consented to the Medican Group's request that RSM Richter Inc. be appointed monitor (the "Monitor") of each of the Applicants.

BENEFITS OF PROPOSED RESTRUCTURING

77. The Medican Group's core business is sound. It is a long standing industry leader in residential real estate construction and development. Over the years, the Medican Group has forged successful long-standing relationships with its various lenders, trades and suppliers, all elements critical to success in the development industry. This is a valuable intangible asset that would be lost and unrecoverable to the Medican Group's stakeholders in the context of a receivership, liquidation, or bankruptcy scenario.

78. There is significant value in undeveloped portions of the Development Projects. The Medican Group's intention is to review with the Monitor and the affected secured lenders the viability of each Development Project. In this way, secured lenders will have transparency on their collateral, and the inherent value of the Development Projects can be realized in a deliberate fashion for the benefit of all of the Medican Group's stakeholders.

79. Most notably, the Medican Group expects to realize approximately $40,000,000 in net returns on the completion of the Sanderson and Michener projects. The proposed value the various stakeholders of the Medican Group could receive upon completion of these projects can only be realized by allowing the Medican Group time, through a stay of proceedings, to continue

its operations while restructuring its affairs. We have been in extensiven negotiations with CIBC to provide financing for these two projects. Term sheets, and related documentation, are virtually finalized. While the Medican Group is not prepared to complete the financing when a CCAA filing is imminent, I am hopeful that, should the current relief be granted such that CIBC's position is not adversely affected, we can continue our discussions with CIBC such that financing will be available shortly and the projects may continue.

80. Further, the Medican Group intends to continue providing services under its Cost-Plus Projects, including the profitable Extendicare Contracts. The Extendicare Contracts will provide the Medican Group with a steady stream of income during the restructuring process. This benefits the Medican Group and its creditors by providing a measure of predictability and certainty in respect of the Medican Group's ability to fund its ongoing operations until the equity in its highly profitable Development Projects can be completed.

81. The alternative is undesirable and benefits no one. If the Medican Group was not afforded an opportunity to restructure and it was left to collapse, I believe the ramifications would include:

(a) piece meal liquidation of the Medican Group, with its complex corporate structure and cross-collateralized credit facilities, would be inefficient and expensive;

(b) significant loss of value to stakeholders from the loss of the "build-out" value discussed above, and the loss of skilled craftsman, developers, and marketing initiatives that the Medican Group has developed over the past 35 years;

(c) significant loss of recovery and future job opportunities to the Medican Group's trade creditors and employees;

(d) lost support to the communities that the Medican Group has helped develop; and

(e) loss of residences and deposits to the Medican Group's customers.

82. The relief that is sought in this application is done to protect the Medican Group's business and operations, to allow the Medican Group to realize value from its Development Projects and to facilitate a restructuring of its credit facilities. I do not believe that any party will be materially prejudiced by the relief sought in this application.

RELIEF SOUGHT

Stay of proceedings

83. As discussed above, the Medican Group is highly concerned that, in light of its present debt structure and financial covenants, the exercise by any of its secured lenders of their security will result in a significant erosion of the value of the Applicants and the Development Projects, and will cause serious detriment to the Medican Group and all other stakeholders. Accordingly, a stay will afford the Applicants, in conjunction with the Monitor and affected secured lenders, an opportunity to review the viability of each Development Project and devise a strategy to maximize the value of each project.

84. Moreover, if a stay is not granted the Medican Group is at risk of operations being disrupted.

Administration charge

85. In connection with its appointment, it is contemplated that the Monitor would be granted a Court-ordered charge over the assets, property and undertaking of the Medican Group (the "Administration Charge") in respect of its fees and disbursements, as well as those of the Medican Group's legal counsel, incurred at the standard rates and charges of such parties, which Administration Charge shall be in an aggregate amount of $1 million.

86. I am informed by my counsel, and do verily believe, that cost of putting any particular project into receivership or some similar liquidation proceeding would be comparable to, or exceed, the Administration Charge attached to any particular Development Project. As such, it is my belief that the lenders will not be prejudiced by the proposed Administration Charge.

Director and Officer Indemnity

87. The Medican Group's obligations to fund its payroll, remit the necessary statutory withholdings, remit GST remittances, and ensure that all taxes are paid amounts to approximately $850,000 of exposure to directors per month.

88. The Medican Group requests a Court-ordered charge in the amount of $1,000,000 over the assets, property and undertaking of the Medican Group (the Directors' and Officers' Charge) to indemnify the directors and officers of the Medican Group in respect of any such liabilities they may incur in their capacity as directors and officers from and after the commencement of

these proceedings. The Medican Group has discussed the quantum of the proposed Directors' and Officers' Charge with the proposed Monitor, who has indicated that it has no objection to the quantum of the proposed Directors' and Officers' Charge.

DIP Financing

89. As discussed above, the Medican Group is currently in the midst of a liquidity crisis and is in immediate need of funding to continue operating in the short-term. The Medican Group is seeking DIP financing in the amount of $2,500,000 (limited to the amount required in the Cash Flow Statements for first thirty days of restructuring) to allow it to continue its operations during the first 30 days of these proceedings. It is contemplated that the DIP financing will have priority to all property of the Medican Group, save in respect of funds advanced by Extendicare under the Extendicare contracts and in respect of CIBC and the Toronto Dominion Bank.

90. In the absence of the Applicants being granted the DIP Financing charge as sought, the Medican Group will not be able to fund its ongoing operations over the next 30 days, and as a result, will likely collapse, resulting in the immediate and piece meal liquidation of the Applicants and the Development Projects. As previously discussed, the immediate and piece meal liquidation of the Applicants and the Development Projects would affect adversely all stakeholders of the Medican Group.

SUMMARY

91. I believe that the most feasible and viable option for the Medican Group to restructure and best serve all of its stakeholders is through a CCAA proceeding. The protection afforded by the CCAA will allow the Medican Group the opportunity it needs to assess the set back it has suffered, maximize the value of each Development Project and emerge from the proceeding as a stronger enterprise. It will grant the Medican Group the otherwise unattainable opportunity to generate short term financing and maximize value for the benefit of all stakeholders. If the requested CCAA protection is not granted, the Medican Group and its assets will be exposed to the possibility of immediate and piece meal liquidation that will cause a material deterioration in value to the estate.

92. I make this Affidavit in support of an application by the Applicants under the provisions of the CCAA for an order substantially in the form of the draft Order which is submitted with this application, declaring the Medican Group comprising corporations and partnerships to which

the CCAA applies, appointing RSM Richter as monitor, granting a stay of proceedings on the terms set out in the draft order, dispensing with service of this application, and granting such other relief as is set out in the draft form of order sought.

Sworn before me in the City of Calgary, in the Province of Alberta, the 25th day of May, 2010.

A Commissioner of Oaths in and for the Province of Alberta

Rebecca Lewis
Barrister & Solicitor

WESLEY REINHELLER

[Exhibits Removed]

TAB 7

2019 BCSC 1945
British Columbia Supreme Court

Computershare Trust Company of Canada v. Meadows Development Ltd.

2019 CarswellBC 3318, 2019 BCSC 1945, 312 A.C.W.S. (3d) 542, 73 C.B.R. (6th) 312

Computershare Trust Company of Canada (Petitioner) and Meadows Development Ltd., David John Borden also known as Jack Borden, Elaine Borden, Interior Equities Corp., and David W. Regehr Holdings Ltd. (Respondents)

Grauer J., In Chambers

Heard: September 13, 2019
Judgment: September 13, 2019
Docket: Vernon S54612

Counsel: M.L. Teetaert, for Petitioner
K. Burnham, for Respondents, Meadows Development Ltd., David John Borden, and Elaine Borden
S.D. Dvorak, for Respondent, Interior Equities Corp.

Subject: Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Just and convenient
Petitioner held first mortgage and general security agreement as security for indebtedness of respondent M Ltd. in amount of approximately $2,700,000 at time — Petitioner's security under mortgage consisted of lands and certain building ("lodge") — Since security was given, M Ltd. had developed additional buildings and facilities on adjacent lands that, together with lodge, now comprised retirement community — Respondent I Corp. was first mortgagee for this additional development and held second mortgage over lodge, securing total of approximately $17 million — M Ltd. defaulted on its debt obligations to petitioner — Petitioner obtained order nisi of foreclosure — Petitioner was unsuccessful in securing sale of lodge — Petitioner brought application for order appointing receiver of all of assets, undertakings and property of debtor — I Corp. opposed application — Application dismissed — Appointment of receiver was not just and convenient — Changes to property since security was granted, and effect of appointment of receiver upon parties, prospects of sale and security of I Corp., all weighed against appointment of receiver, particularly when viewed in context of risks to petitioner in relation to value of its security — Much of petitioner's concern could be addressed by order for disclosure.
Table of Authorities
Cases considered by *Grauer J., In Chambers*:
Bank of Montreal v. Gian's Business Centre Inc. (2016), 2016 BCSC 2348, 2016 CarswellBC 3547, 42 C.B.R. (6th) 290 (B.C. S.C.) — referred to
Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc. (2012), 2012 BCSC 437, 2012 CarswellBC 813, 24 C.P.C. (7th) 1, 93 C.B.R. (5th) 57 (B.C. S.C. [In Chambers]) — referred to

Edmonton (City) v. Alvarez & Marsal Canada Inc (2019), 2019 ABCA 109, 2019 CarswellAlta 511, 85 M.P.L.R. (5th) 1, 83 Alta. L.R. (6th) 34, [2019] 5 W.W.R. 38, 68 C.B.R. (6th) 165, 432 D.L.R. (4th) 724 (Alta. C.A.) — referred to
Integris Credit Union v. Mercedes-Benz Financial Services Canada Corp. (2016), 2016 BCCA 231, 2016 CarswellBC 1462, 37 C.B.R. (6th) 1, 85 B.C.L.R. (5th) 10, (sub nom. *Integris Credit Union v. All-Wood Fibre Ltd.)* 387 B.C.A.C. 196, (sub nom. *Integris Credit Union v. All-Wood Fibre Ltd.)* 668 W.A.C. 196, [2016] 10 W.W.R. 287 (B.C. C.A.) — considered
Maple Trade Finance Inc. v. CY Oriental Holdings Ltd. (2009), 2009 BCSC 1527, 2009 CarswellBC 2982, 60 C.B.R. (5th) 142 (B.C. S.C. [In Chambers]) — considered
Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — considered
Royal Bank of Canada v. Reid-Built Homes Ltd (2018), 2018 ABQB 124, 2018 CarswellAlta 305, 72 M.P.L.R. (5th) 55, 65 Alta. L.R. (6th) 230, 57 C.B.R. (6th) 1, [2018] 5 W.W.R. 565 (Alta. Q.B.) — considered
Terra Nova Management Ltd. v. Halcyon Health Spa Ltd. (2005), 2005 BCSC 1017, 2005 CarswellBC 1630, 13 C.B.R. (5th) 273 (B.C. S.C.) — considered
Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to

APPLICATION by petitioner for order appointing receiver of all of assets, undertakings and property of debtor.

***Grauer J., In Chambers* (orally):**

1 The petitioner, Computershare, holds a first mortgage and a General Security Agreement as security for the indebtedness of the respondent Meadows Development presently in the amount of approximately $2,700,000.

2 Computershare's security under the mortgage consists of lands and a building that I will call the Lodge. The building contains 57 assisted-living rental units.

3 Since the security was given in 2006, Meadows developed additional buildings and facilities on adjacent lands that, together with the Lodge, now comprise a retirement community consisting of various cottages, terraces and other residences. The respondent Interior Equities is the first mortgagee for this additional development and holds a second mortgage over the Lodge, securing a total of approximately $17 million.

4 Meadows has defaulted on its debt obligations to Computershare. Computershare obtained an order nisi of foreclosure on March 13, 2018, which application had been adjourned on terms from February 6, 2018. Those terms included an agreement to make a payment of three months' arrears, and ongoing monthly payments. Meadows has failed to abide by those terms.

5 The redemption period expired on August 6, 2018, and on August 29, 2018, Master Wilson (as he then was) pronounced an order granting Computershare exclusive conduct of the sale of the Lodge together with solicitor-and-client costs both before and after pronouncement of the order nisi.

6 Computershare has been unsuccessful in securing a sale of the Lodge for reasons I will shortly discuss. It now seeks an order appointing a receiver of "all of the assets, undertakings and property of the debtor, including all proceeds which are the subject matter of this proceeding including the lands and premises of the debtor [comprising the Lodge]." Computershare seeks, in other words, the appointment of a receiver not only over the Lodge, but of other parts of the retirement community not secured by its mortgage and over which Interior Equities has priority.

7 Why does Computershare seek such an order? The Lodge is not a separate business. The retirement community of which it is a physical part is managed as a whole, and services are provided out of the Lodge throughout the community. There is no separate accounting for the Lodge, or at least none that has been made available to Computershare. This has made it very difficult to ascertain what expenses of the business are properly attributable to the Lodge and what net income is properly attributable to the Lodge. Without accurate information of this kind, prospective purchasers quickly lose interest because they cannot ascertain the potential profitability and, hence, the value of the property.

8 Moreover, there are a number of concerning circumstances that, from Computershare's perspective, require explanation. The vacancy rate at the Lodge has increased rather dramatically over the past two years. Until recently, payments of net income from the business have been made to Interior Equities with no share going to Computershare. It now appears that no such payments of net income are made to anyone, and Computershare has no idea why. It has been unable to obtain the information it required to answer these questions.

9 In the meantime, Meadows has been trying to effect a sale of the community as a whole. It seems self-evident that such a sale would be in the best interests of all. Nothing I have seen suggests that selling piecemeal will result in a greater return. The opposite is more likely.

10 Indeed, when this matter first came before me on July 30, 2019, in Kelowna, I adjourned the hearing and seized myself of the matter because a conditional contract for the sale of the business as a whole had been negotiated with the subjects to be removed shortly. As it turned out, they were not removed, and the closing was extended. That extension passed without completion and has not been renewed. In the result, all efforts to sell the community as a whole have failed, as have all efforts to sell the Lodge individually.

11 Computershare has been frustrated in its attempts to obtain from the respondent Borden the information it needs to be able to provide to potential purchasers of the Lodge. Mr. Borden has not, for instance, ever provided more than a "guesstimate" concerning the breakdown of income and expenses between the Lodge and the balance of the business. Computershare has requested the information Mr. Borden has provided to potential purchasers of the business as a whole, and has not received it.

12 Computershare maintains that its only viable option at this point is to install a receiver with expertise in the field of running a retirement community business. This is necessary, Computershare says, in order to make sense of what expenses are properly attributable to the Lodge, how much income is properly attributable to the Lodge, what has happened to the net income that ought to have been coming in every month, to determine why there are so many units vacant and what must be done to fill them, and to look at the services provided throughout the community and the salaries paid in order to assess the proper attribution of costs. Without such information, Computershare submits its prospects of selling the Lodge for anything close to its appraised value of $2,700,000 are non-existent. Indeed, the length of time the property has been exposed to the market suggests that the appraisal is optimistic.

13 A receiver, Computershare asserts, will ensure that the property is maintained and occupied to maximize its value and will develop the financial information necessary to support a sale at market value.

14 Interior Equities opposes the application. It maintains that the remedy Computershare seeks is excessive and unnecessary. Computershare seeks to appoint a receiver of all the assets, undertakings and properties of Meadows, not just the Lodge. This has the effect of displacing Interior Equities' priority over the property subject to its first mortgage to the extent of the receiver's charges in circumstances where Interior Equities does not agree to the appointment of the receiver, sees no benefit to it, and where it is not necessary to accomplish Computershare's goals. In Interior Equities' submission, those goals can be accomplished by an appropriately crafted order for the disclosure of financial information. In the meantime, Interior Equities would rather that Mr. Meadows continue to operate the business than a receiver.

15 Interior Equities concedes that the court has jurisdiction to appoint a receiver as requested by Computershare, but that its discretion in that regard is limited to three situations as discussed in *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corp.*, 2016 BCCA 231 (B.C. C.A.) at para. 40 as adopted in *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.*, 2005 BCSC 1017 (B.C. S.C.) at para. 30, from *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492 (Ont. C.A.) at 496. These exceptions are, first, where a receiver has been appointed at the request, or with the consent or approval, of the holders of the security; second, where a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors; and third, whether receiver has expended money for the necessary preservation or improvement of the property.

16 Interior Equities submits that none of these exceptions applies in this case. To impose a receiver in circumstances where the debt owed to Interior Equities is six times that owed to Computershare means that it is largely Interior Equities' security that becomes further impaired by the costs of the receiver, not Computershare's.

17 Computershare maintains that the second exception applies. In doing so, it effectively expands the basis upon which it sought the appointment of the receiver from obtaining the information necessary to effect the sale of the Lodge to undertaking the management of sale of the whole property. This aspect was always within the power sought, but not specifically relied upon before. Computershare relies upon the decision of Mr. Justice Graesser of the Alberta Court of Queens Bench in *Royal Bank of Canada v. Reid-Built Homes Ltd*, 2018 ABQB 124 (Alta. Q.B.) , affirmed 2019 ABCA 109 (Alta. C.A.).

18 In the submission of Meadows, the only real way out of this difficulty is to sell the business and property as a whole, which has so far proved difficult to accomplish. The prospects will certainly not be enhanced by the appointment of a receiver. The resistance to providing information before was, they say, due to pending negotiations and no longer exists. In other words, Meadows and its principals maintain that they are now willing to provide whatever disclosure Computershare requires. They should, of course, have done so long ago.

19 The parties do not disagree about the general test applicable to the appointment of receivers as set out in cases such as *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (B.C. S.C. [In Chambers]): see para. 25; *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); and *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348 (B.C. S.C.) . There is a different line of authority championed by Mr. Justice Burnyeat: see *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437 (B.C. S.C. [In Chambers]), but this is neither the time nor the place to resolve the difference between the two lines. In the unusual circumstances of this case, I am satisfied, and the parties do not dispute, that the proper approach is that taken by Madam Justice Fitzpatrick in the *Bank of Montreal* case at para. 23: to review the matter holistically and decide whether, on the whole of the circumstances, it is in fact just and convenient to appoint a receiver.

20 The question then becomes whether, in the circumstances we have here, such a review is further restricted by the principles enunciated in the *Integris Credit Union* case to the parameters of the three exceptions there discussed.

21 It seems to me that if the exceptions mentioned in *Integris Credit Union* do not apply, then that must weigh in balancing whether it is just and convenient to appoint a receiver. If an exception is applicable, the holistic approach should still be followed. In doing so I conclude that the appointment of a receiver, at least at this stage, is not just and convenient.

22 In my view, a review of the factors set out in *Maple Trade Finance* leads to this result. Although Computershare has the right to appoint a receiver, the changes to the property since the security was granted, and the effect of the appointment of a receiver upon the parties, the prospects of sale and the security of Interior Equities, all weigh against the appointment of a receiver, particularly when viewed in the context of the risks to Computershare in relation to the value of its security. While I understand Computershare's real frustration, I consider that much of its concern can be addressed, as was the case in *Maple Trade Finance* , by an order for disclosure with which Meadows has undertaken to comply. At this stage the appointment of a receiver with all of the expense that would follow would be well beyond what the circumstances justify. This is quite different from the sort of situation considered in the *Reid-Built Homes* litigation, where a receiver was appointed by consent between the Royal Bank of Canada and the debtor in relation to a home construction business.

23 Accordingly, the application for the appointment of a receiver is dismissed. I order the respondents David John Borden, Elaine Borden and Meadows Development to provide all documents reasonably requested by the petitioner or on behalf of the petitioner, including but not limited to:

1. bank statements;

2. accounts receivable ledgers;

3. accounts payable ledgers;

4. expense listings;

5. historical financial statements over the last two years;

6. income tax returns;

7. listings of residents and terms and details of residents;

8. employee records and details;

9. contracts with residents;

10. any regulatory documentation regarding licensing and operations.

24 As I understand it, the respondents are content with this list, and in particular the respondents Meadows and the Bordens consent to it. These documents are to cover, as I understand it, the last two years.

25 Time for production. 21 days?

26 MR. BURNHAM: That should do it, thank you.

27 THE COURT: Are you content with that?

28 MS. TEETAERT: Sure. Thank you, My Lord.

29 THE COURT: These documents are to be produced within 21 days. If after reviewing the documents Computershare concludes that they give rise to grounds for the appointment of a receiver, it may renew its application. It may also do so in the event that the documents are not produced as and when ordered.

30 Now, is there any reason not to award Computershare its solicitor-client costs?

[SUBMISSIONS RE COSTS]

31 THE COURT: The petitioner is entitled to its solicitor-client costs pursuant to the order of Master Bishop as against the respondents other than Interior Equities subject to such priority hearing as may be relevant. Interior Equities may have its costs of today as ordinary costs, not including any previous attendances and adjournments. I am grateful to counsel for your very helpful submissions.

32 MR. BURNHAM: Thank you, My Lord.

33 MS. TEETAERT: Thank you, My Lord.

Application dismissed.

TAB 8

2019 ONSC 7473
Ontario Superior Court of Justice [Commercial List]

Lydian International Limited (Re)

2019 CarswellOnt 21645, 2019 ONSC 7473, 314 A.C.W.S. (3d) 12

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 ARRANGMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED (Applicants)

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: December 23, 2019
Judgment: December 23, 2019
Docket: CV-19-00633392-00CL

Proceedings: additional reasons at *Lydian International Limited (Re)* (2020), 2020 CarswellOnt 200, 2020 ONSC 34, Geoffrey B. Morawetz C.J. Ont. S.C.J. (Ont. S.C.J. [Commercial List])

Counsel: Elizabeth Pillon, Sanja Sopic, Nicholas Avis, for Applicants
Pamela Huff, for Resource Capital Fund VI L.P.
Alan Merskey, for OSISKO Bermuda Limited
D.J. Miller, for proposed Monitor, Alvarez & Marsal Canada Inc.
David Bish, for ORION Capital Management
Bruce Darlington, for ING Bank N.V./ABS Svensk Exportkrerdit (publ)

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d "Come-back" clause
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — "Come-back" clause
Applicants were part of project of gold exploration and development business in Armenia — Applicants were experiencing liquidity issues due to blockades of project and other external factors — Applicants contended that they required immediate protection under federal Companies' Creditors Arrangement Act ("CCAA") for breathing room to pursue remedial steps on time-sensitive basis — Applicants brought application for creditor protection and other relief under CCAA — Application granted — Section 11.02(1) of CCAA had been recently amended — Maximum stay period permitted in initial application was reduced from 30 days to 10 days — Previous s. 11.02 of CCAA provided that after initial stay of up to 30 days, "comeback" hearing was scheduled, and parties could request that certain provisions addressed in initial order could be reconsidered — Practice of granting wide-sweeping relief at initial hearing had to be altered in light of recent amendments — Intent of amendments is to limit relief granted on first day — Ensuing 10-day period allows for stabilization of operations and negotiating window, followed by comeback hearing where request for expanded relief can be considered, on proper notice to all affected parties — This is consistent with objectives of amendments, which include requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players" — It may also result in more meaningful comeback hearings — Absent exceptional circumstances, relief to be granted in initial hearing "shall be limited to relief that is reasonably necessary for

the continued operations of the debtor company in the ordinary course of business during that period" — Period being no more than 10 days, and whenever possible, status quo should be maintained during that period — It was appropriate to grant order under s. 11.02 of CCAA in respect of applicants — Applicants were "debtor companies" under CCAA, were insolvent and had liabilities in excess of $5 million — Under circumstances, it was appropriate to grant order that extended stay to non-applicant parties — Applicants also granted charge on their assets in maximum amount of US $350,000 and charge over property in favour of their former and current directors in limited amount of $200,000.

Table of Authorities

Cases considered by *Geoffrey B. Morawetz C.J. Ont. S.C.J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (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

Clover Leaf Holdings Company, Re (2019), 2019 ONSC 6966, 2019 CarswellOnt 20001 (Ont. S.C.J. [Commercial List]) — considered

Jaguar Mining Inc., Re (2013), 2014 ONSC 494, 2013 CarswellOnt 18630, 12 C.B.R. (6th) 290 (Ont. S.C.J. [Commercial List]) — considered

Sino-Forest Corp., Re (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

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. 2(1) "company" — considered

s. 11.001 [en. 2019, c. 29, s. 136] — considered

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

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

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

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

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

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

Applicants brought application for creditor protection and other relief under *Companies' Creditors Arrangement Act*.

***Geoffrey B. Morawetz C.J. Ont. S.C.J.*:**

Introduction

1 Lydian International Limited ("Lydian International"), Lydian Canada Ventures Corporation ("Lydian Canada") and Lydian UK Corporation Limited ("Lydian UK", and collectively, the "Applicants") apply for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

2 The Applicants are part of a gold exploration and development business in south central Armenia (the "Amulsar Project"). The Amulsar Project is directly owned and operated by Lydian Armenia CJSC ("Lydian Armenia"), a wholly-owned subsidiary of the Applicants.

3 As set out in the affidavit of Edward A. Sellers sworn December 22, 2019 (the "Sellers Affidavit"), the Applicants have been experiencing and continue to experience liquidity issues due to blockades of the Amulsar Project and other external factors. The Sellers Affidavit details such activities and Mr. Sellers deposes that these activities have prevented Lydian Armenia and its employees, contractors and suppliers from accessing, constructing and ultimately operating the Amulsar Project.

4 Mr. Sellers states that the lack of progress at the Amulsar Project has prevented the Lydian Group (as that term is defined below) from generating any positive cash flow and has also triggered defaults on certain of the Lydian Group's obligations to its lenders which, if enforced, the Lydian Group would be unable to satisfy.

5 The Lydian Group has operated under forbearance agreements in respect of these defaults since October 2018, but the most recent forbearance agreement expired on December 20, 2019.

6 The Applicants contend that they now require immediate protection under the CCAA for the breathing room they require to pursue remedial steps on a time sensitive basis.

7 The Applicants intend to continue discussions with their lenders and other stakeholders, including the Government of Armenia ("GOA"). The Applicants also intend to continue evaluating potential financing and/or sale options, all with a view to achieving a viable path forward.

The Applicants

8 Lydian International is a corporation continued under the laws of the Bailiwick of Jersey, Channel Islands, from the Province of Alberta pursuant to the *Companies (Jersey) Law 1991*. Lydian International was originally incorporated under the *Business Corporations Act*, R.S.A. 2000, c. B-9 (Alberta) on February 14, 2006 as "Dawson Creek Capital Corp.", and subsequently became Lydian International on December 12, 2007.

9 Lydian International's registered office is located in Jersey. On June 12, 2019, Lydian International shareholders approved its continuance under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, but this continuance has yet to be implemented.

10 Lydian International has two types of securities listed on the Toronto Stock exchange: (1) ordinary shares and (2) warrants that expired in 2017.

11 Lydian Canada is a direct, wholly owned subsidiary of Lydian International. Lydian Canada is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (British Columbia) and has a registered head office in Toronto. Its registered and records office is located in British Columbia.

12 Lydian UK is a corporation incorporated in the United Kingdom and is a direct, wholly-owned subsidiary of Lydian Canada with a head office located in the United Kingdom. Lydian UK has no material assets in the UK.

13 Lydian International and Lydian UK have assets in Canada in the form of deposits with the Bank of Nova Scotia in Toronto.

14 The Applicants are part of a corporate group (the "Lydian Group") with a number of other subsidiaries ultimately owned by Lydian International. Other than the Applicants, certain of the Lydian Group's subsidiaries are Lydian U.S. Corporation ("Lydian

US"), Lydian International Holdings Limited ("Lydian Holdings"), Lydian Resources Armenia Limited ("Lydian Resources") and Lydian Armenia, a corporation incorporated under the laws of the Republic of Armenia. Together, Lydian U.S., Lydian Holdings, Lydian Resources and Lydian Armenia are the "Non-Applicant" parties.

15 The Applicants submit that due to the complete integration of the business and operations of the Lydian Group, an extension of the stay of proceedings over the Non-Applicant parties is appropriate.

16 The Applicants contend that the Lydian Group is highly integrated and its business and affairs are directed primarily out of Canada. Substantially all of its strategic business affairs, including key decision-making, are conducted in Toronto and Vancouver.

17 Further, all the Applicants and Non-Applicant Parties are borrowers or guarantors of the Lydian Group's secured indebtedness. The Lydian Group's loan agreements are governed primarily by the laws of Ontario.

18 Finally, the Lydian Group's forbearance and restructuring efforts have been directed out of Toronto.

19 The Lydian Group is focused on constructing the Amulsar Project, its wholly-owned development stage gold mine in Armenia. The Amulsar Project was funded by a combination of equity and debt capital and stream financing. The debt and stream financing arrangements are secured over substantially all the assets of Lydian Armenia and Lydian International in the shares of various groups of the Lydian Group.

20 The Applicants contend that time is of the essence given the Applicants' minimal cash position and negative cash flow.

Issues

21 The issues for consideration are whether:

(a) the Applicants meet the criteria for protection under the CCAA;

(b) the CCAA stay should be extended to the Non-Applicant Parties;

(c) the proposed monitor, Alvarez & Marsal Canada Inc. ("A&M") should be appointed as monitor;

(d) Ontario is the appropriate venue for this proceeding;

(e) this court should issue a letter of request of the Royal Court of Jersey;

(f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and

(g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

Law and Analysis

22 Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

23 Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to "ordinary course" relief.

24 Section 11.001 provides:

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

25 The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

26 In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

27 Following the granting of the initial order, a number of developments can occur, including:

(a) notification to all stakeholders of the CCAA application;

(b) stabilization of the operation of debtor companies;

(c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;

(d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;

(e) negotiations of DIP facilities and DIP Charges;

(f) negotiations of Administration Charges;

(g) negotiation of Key Employee Incentives Programs;

(h) negotiation of Key Employee Retention Programs;

(i) consultation with regulators;

(j) consultation with tax authorities;

(k) consideration as to whether representative counsel is required; and

(l) consultation and negotiation with key suppliers.

28 This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

29 Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a "comeback" hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

30 The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

31 In my view, this is consistent with the objectives of the amendments which include the requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players". It may also result in more meaningful comeback hearings.

32 It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

33 For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

34 I am satisfied that Lydian Canada meets the CCAA definition of "company" and is eligible for CCAA protection.

35 I have also considered whether the foreign incorporated companies are "companies" pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an "incorporated company" either "having assets or doing business in Canada".

36 In *Cinram International Inc., Re*, 2012 ONSC 3767, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]), I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of "company" under the CCAA.

37 In this case, both Lydian International and Lydian UK meet the definition of "company" because both corporations have assets in and do business in Canada.

38 In my view the Applicants are each "debtor companies" under the CCAA. The Applicants are insolvent and have liabilities in excess of $5 million. I am satisfied that the Applicants are eligible for CCAA protection.

39 The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corp., Re*, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]), at paras. 5, 18, and 31; *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]); and *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 49-50.

40 I am also satisfied that is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

41 With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada's registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

42 I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

Administration Charge

43 The Applicants seek a charge on their assets in the maximum amount of US $350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

44 Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

45 The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

46 In *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

(a) the size and complexity of 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.

47 It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

48 I am satisfied that the Administration Charge in the limited amount of US $350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

D & O Charge

49 The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of $200,000 (the "D & O Charge").

50 The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of $10 million in coverage.

51 The D & O Insurance is set to expire on December 31, 2019.

52 Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

53 In *Jaguar Mining Inc., Re*, 2014 ONSC 494, 12 C.B.R. (6th) 290 (Ont. S.C.J. [Commercial List]), I set out a number of factors to be considered in determining whether to grant a directors' and officers' charge:

(a) whether notice has been given to the secured creditors likely to be affected by the charge;

(b) whether the amount is appropriate;

(c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and

(d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

54 Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M

has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

Extension of the Stay of Proceedings

55 The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

56 The Applicants submit that I am authorized to grant a stay extension immediately after granting the initial order because section 11.02(2) of the CCAA does not provide a minimum waiting time before an applicant can seek a stay extension. The Applicants reference recent decisions where courts have scheduled hearings within two or three days after the granting of an initial order. Reference is made to *Clover Leaf Holdings Company, Re*, 2019 ONSC 6966 (Ont. S.C.J. [Commercial List]) and *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV-19-00632079-00CL. In *Clover Leaf*, the stay extension for 36 days and additional relief including authorization for DIP financing was granted three days after the initial order and in *Wayland*, the stay extension was granted two days after the initial order.

57 I acknowledge that, in this case, it may be challenging for the Applicants to return to court at or near the end of the 10-day initial stay period due to the year-end holidays. I also acknowledge that the offices of many of the parties involved in these proceedings may not be open during the holidays.

58 However, the statutory maximum 10-day stay as referenced in s. 11.02(1) expires on January 2, 2020 and the courts are open on that day.

59 As noted above, absent exceptional circumstances, I do not believe that it is desirable to entertain motions for supplementary relief in the period immediately following the granting of an initial order.

60 It could very well be that circumstances existed in both *Clover Leaf* and *Wayland* that justified the stay extension and the ancillary relief being granted shortly after the initial order.

61 However, in this case, I have not been persuaded on the evidence that it is necessary for the stay extension to be addressed prior to January 2, 2020 and I decline to do so.

Disposition

62 The initial order is granted with a Stay Period in effect until January 2, 2020. In view of the holiday schedules of many parties, the following procedures are put in place. The Applicants can file a motion returnable on January 2, 2020, requesting that the stay be extended to January 23, 2020. Any party that wishes to oppose the extension of the stay to January 23, 2020 is required to notify the Applicant, A & M and the Commercial List Office of their intention to do so no later than 2:00 p.m. on December 30, 2019. In the event that the requested stay extension is unopposed, there will be no need for counsel to attend on the return of the motion. I will consider the motion based on the materials filed.

63 If any objections are received by 2:00 p.m. on December 30, 2019, the hearing on January 2, 2020 will address the opposed extension request. Any further relief will be considered at the Comeback Motion on January 23, 2020.

Application granted.

TAB 9

Court File No. CV-19-00633392-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 23rd
	)	
CHIEF JUSTICE MORAWETZ	)	DAY OF JANUARY, 2020

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 LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

Applicants

AMENDED AND RESTATED INITIAL ORDER

(Amending Initial Order dated December 23, 2019)

THIS MOTION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order amending and restating the Initial Order (the "**Initial Order**") issued on December 23, 2019 (the "**Initial Filing Date**") and extending the stay of proceedings provided for therein was heard this day at 130 Queen Street West, Toronto, Ontario.

ON READING the affidavit of Edward A. Sellers sworn December 22, 2019 (the "**Sellers Initial Affidavit**"), the affidavit of Edward A. Sellers sworn January 20, 2020 (the "**Sellers Comeback Affidavit**"), and on hearing the submissions of counsel for the Applicants, counsel for Alvarez & Marsal Canada Inc. (the "**Monitor**"), and counsel for Caterpillar Financial Services (UK) Limited, with counsel for Orion Capital Management, counsel for Resource Capital Fund VI LP, counsel for Osisko Bermuda Limited and counsel for ING Bank N.V. / ABS Svensk Exportkrerdit (publ) in attendance and not opposing, and on being advised that those parties listed in the affidavits of service filed were given notice of this motion,

INITIAL ORDER AND INITIAL FILING DATE

1. **THIS COURT ORDERS** that the Initial Order, reflecting the Initial Filing Date, shall be amended and restated as provided for herein.

SERVICE

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

3. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies. Although not Applicants, Lydian Armenia CJSC, Lydian International Holdings Limited, Lydian Resources Armenia Limited and Lydian U.S. Corporation (the "**Non-Applicant Stay Parties**") shall enjoy certain of the benefits and the protections provided herein and as subject to the restrictions as hereinafter set out.

PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to use the central cash management system currently in place among the Applicants, the Non-Applicant Stay Parties and any other of the entities in the Lydian Group as described in the Sellers Initial Affidavit (the "**Cash Management System**") and that any present or future bank providing the Cash Management System to the Applicants or the Non-Applicant Stay Parties shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after the Initial Filing Date:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the Initial Filing Date, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after the Initial Filing Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of

insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the Initial Filing Date.

9. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the Initial Filing Date, or where such Sales Taxes were accrued or collected prior to the Initial Filing Date but not required to be remitted until on or after the Initial Filing Date, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the Initial Filing Date; (b) to grant no security interests, trust, liens, charges or encumbrances

upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA have the right to:

(a) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate; and

(b) continue negotiations with stakeholders in an effort to pursue restructuring options for the Applicants including without limitation all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of their business (the "**Restructuring**").

PROCEEDINGS AGAINST THE APPLICANTS, THE NON-APPLICANT STAY PARTIES OR THE PROPERTY

12. **THIS COURT ORDERS** that until and including March 2, 2020, or such later date as this Court may subsequently order (the "**Stay Period**"), no proceeding or enforcement process in or out of any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court.

13. **THIS COURT ORDERS** that during the Stay Period, no Proceeding shall be commenced or continued against or in respect of the Non-Applicant Stay Parties, or any of their current and future assets, businesses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (collectively, the "**Non-Applicants' Property**", and together with the Non-Applicants' businesses, the "**Non-Applicants' Property and Business**") including, without limitation, terminating, making any demand, accelerating, amending or declaring in default or taking any enforcement steps under any agreement or agreements with respect to which any of the Applicants are a party, borrower, principal obligor or guarantor.

NO EXERCISE OF RIGHTS OR REMEDIES

14. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any Person against or in respect of the Non-Applicant Stay Parties, or affecting the Non-Applicants' Property and Business are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower the Non-Applicant Stay Parties to carry on any business which the Non-Applicant Stay Parties are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence or permit in favour of or held by the Applicants or the Non-Applicant Stay Parties except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other

data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Initial Filing Date are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. **THIS COURT ORDERS** that, notwithstanding anything else in this Order or the Initial Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the Initial Filing Date, nor shall any Person be under any obligation on or after the Initial Filing Date to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order or the Initial Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the Initial Filing Date and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants

after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $263,280 (being US$200,000 as per the Bank of Canada's published exchange rate on December 20, 2019), as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 33 and 35 herein.

22. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

23. **THIS COURT ORDERS** that Alvarez & Marsal Canada Inc. is, as of the Initial Filing Date, appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, including to the extent deemed appropriate by the Monitor as it relates to the Non-Applicant Stay Parties who utilize the Cash Management System with the Applicants, in order to review and

consider the cash requirements and reasonableness of the cash flow forecast prepared by the Applicants, and the continued use of the Cash Management System;

(b) have full and complete access to the books, records, data, including data in electronic form, and other financial documents of the Non-Applicant Stay Parties to the extent that is necessary to adequately assess the Applicants' business and financial affairs and prospects for a restructuring or transaction of any kind, to report on cash flow forecasts prepared by the Applicants, or to perform its duties arising under this or any further Order of this Court and such Non-Applicant Stay Parties shall cause their respective employees, contractors, agents, advisors, directors and/or officers, as may be necessary, available to the Monitor for such purposes;

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(d) advise the Applicants in the preparation of the Applicants' cash flow statements, including as it relates to the availability of cash to the Applicants under the Cash Management System by the Non-Applicant Stay Parties;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, wherever situate, in order to assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(h) assist the Applicants in connection with any arbitration proceedings with the Government of Republic of Armenia ("**GOA**") that may be commenced by any

Applicant or Non-Applicant Stay Party that involves or affects any of the Applicants' Business or Property (an "**Arbitration**");

(i) perform such other duties as are required by this Order or by this Court from time to time; and

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order.

25. **THIS COURT ORDERS** that the Applicants shall make best reasonable efforts to the extent possible to cause the Non-Applicant Stay Parties (including their respective employees, contractors, agents, advisors, directors and/or officers) to cooperate fully with the Monitor in relation to its information requests and its powers and duties set forth herein, and for so long as the stay of proceedings in favour of the Non-Applicant Stay Parties shall remain in place.

26. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property of the Applicants, or any property of the Non-Applicant Stay Parties, and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

27. **THIS COURT ORDERS** that the Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any environmental legislation, unless it is actually in possession.

28. **THIS COURT ORDERS** that the Monitor shall provide any creditor of any of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

29. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order or the Initial Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order or the Initial Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, Canadian counsel to the Applicants and the Applicants' counsel in connection with the recognition proceedings in the United Kingdom and the Bailiwick of Jersey shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants.

31. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $460,740 (being US$350,000 as per the Bank of Canada's published exchange rate on December 20, 2019), as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of the Initial Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 33 and 35 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

33. **THIS COURT ORDERS** that the priorities of the Directors' Charge and the Administration Charge as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $460,740);

Second – Directors' Charge (to the maximum amount of $263,280).

34. **THIS COURT ORDERS** that the filing, registration or perfection of the Directors' Charge or the Administration Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

35. **THIS COURT ORDERS** that each of the Directors' Charge and the Administration Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

36. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge and the Administration Charge, unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

37. **THIS COURT ORDERS** that the Directors' Charge, and the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by the creation of the Charges; and

(c) the payments made by the Applicants pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

38. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

SERVICE AND NOTICE

39. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in the Globe & Mail a notice containing the information prescribed under the CCAA, (ii) within five days after the Initial Filing Date, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

40. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL <http://www.alvarezandmarsal.com/Lydian>.

41. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

42. **THIS COURT ORDERS** that the Applicants and the Monitor and their respective counsel are at liberty to serve or distribute this Order, and other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

GENERAL

43. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

44. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

45. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, Armenia, the Bailiwick of Jersey, the United Kingdom, or the United States to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an

officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

46. **THIS COURT DECLARES** that it shall issue a letter substantially in the form of the letter attached hereto as Schedule "A" to request the assistance of the Royal Court of Jersey in these proceedings.

47. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

48. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

49. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 9:30 a.m. Eastern Standard/Daylight Time on the date of this Order.

C.J.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JAN 31 2020

PER / PAR:

SCHEDULE "A"
(Letter of Request for the Royal Court of Jersey)

Court File No. CV-19-00633392-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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 LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

LETTER OF REQUEST
(COMITY APPLICATION)

To: **The Bailiff of the Royal Court of Jersey**
Royal Court Building, Royal Square
St Helier, Jersey
JE1 1JG

The Ontario Superior Court of Justice (Province of Ontario, Canada) ("**Ontario Court**"), respectfully requests the assistance of the Royal Court of Jersey to provide assistance to the Ontario Court as set out below and assures the Royal Court of Jersey reciprocal assistance in appropriate circumstances.

WHEREAS:

1. By an order dated the 23 December 2019 of the Ontario Court ("**CCAA Order**"), Lydian International Limited ("**Lydian International**"), Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (collectively, the "**Debtors**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (Canada) ("**CCAA**") on the grounds that they were unable to pay their debts. Certain other non-applicant entities were also granted a stay of proceedings[1] (the non-applicant entities together with the Debtors are the "**Lydian Group**"). A copy of the CCAA Order is attached hereto as Schedule "A".

---

[1] Lydian Armenia CJSC, Lydian International Holdings Limited, Lydian Resources Armenia Limited and Lydian U.S. Corporation.

2. The Ontario Court was advised that the Lydian Group is connected to Jersey by means of Lydian International, a corporation continued under the laws of Jersey from the Province of Alberta, Canada, pursuant to the *Companies (Jersey) Law 1991* (Lydian International was originally incorporated under the *Business Corporations Act* (Alberta)). Lydian International's registered office is located at Bourne House 1st Floor, Francis Street, St Helier, Jersey.

3. Pursuant to paragraphs 2 and 3 of the CCAA Order, the Debtors, including Lydian International, are companies to which the CCAA applies, shall enjoy certain of the benefits and the protections provided for in the CCAA Order, and shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**").

4. Pursuant to paragraph 21 of the CCAA Order, Alvarez & Marsal Canada Inc. was appointed as the monitor (the "**Monitor**"), an officer of the Ontario Court, to monitor the business and financial affairs of the Debtors pursuant to the CCAA.

5. Pursuant to the CCAA and the CCAA Order, the Monitor has broad powers including the authorization to have full and complete access to the Debtor's Property (as the term "Property" is defined in the CCAA Order), including the premises, books, records, data (including in electronic form) and other financial documents of the Debtors, to the extent that is necessary to adequately assess the Debtors' business and financial affairs or to perform its duties arising under the CCAA Order (see e.g. paragraph 22(d) of the CCAA Order).

6. Pursuant to paragraph 42 of the CCAA Order, the Debtors and the Monitor were authorized "to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of [the CCAA Order] and for assistance in carrying out the terms of [the CCAA Order]". The same paragraph further provides that "the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada."

NOW:

7. I, the Honourable Geoffrey B. Morawetz, Chief Justice of the Ontario Court, confirm that, as a matter of international comity, the courts of the provinces and territories of Canada will consider giving effect to orders made by the Royal Court of Jersey relating to the

bankruptcy of an individual or company (save for the purpose of enforcing the fiscal laws of Jersey).

8. It having been shown to the satisfaction of the Ontario Court that it is necessary for the purposes of justice and to assist the Debtors and the Monitor with the carrying out of the terms of the CCAA Order, and assist the Monitor in the performance of its duties, pursuant to the CCAA Order of the Ontario Court, I hereby request the assistance of the Royal Court of Jersey to act in aid of the Debtors and the Monitor in the conduct of the reorganization of the Debtors and in particular (without prejudice to the generality of the foregoing):

(a) by recognising the appointment of the Monitor with such appointment to be registered in the Rolls of the Royal Court of Jersey in respect of Lydian International;

(b) by recognising the rights and powers of the Debtors and Monitor in respect of the Property of Lydian International;

(c) by declaring that no action shall be taken or proceeded with against Lydian International except by leave of the Ontario Court and subject to such terms as the Ontario Court may impose; and

(d) by granting such further or other relief as it thinks fit in aid of the Debtors and the Monitor and the reorganization of Lydian International.

Dated: 23 December 2019

The Honourable Geoffrey B. Morawetz, Chief Justice of the Superior Court of Justice (Ontario)

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 LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

Court File No.: CV-19-00633392-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

Stikeman Elliott LLP
Barristers & Solicitors
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Toronto, Canada M5L 1B9

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Lawyers for the Applicants

TAB 10

Court File No. CV-19-00632052-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	THURSDAY, THE 12th
	)	
JUSTICE MCEWEN	)	DAY OF DECEMBER, 2019

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 **AGMEDICA BIOSCIENCE INC. 2472602 ONTARIO INC., 2642466 ONTARIO INC., 8895309 CANADA INC., WELLWORTH HEALTH CORP., 8050678 CANADA INC., 8326851 CANADA INC., TAVIVAT NATURALS INC., WORLDWIDE BEVERAGE INNOVATIONS INC., UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**
(each an **"Applicant"** and collectively, the **"Applicants"**)

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavits of Trevor Henry sworn on December 1, 2019 and December 6, 2019 and the Exhibits thereto, and on hearing the submissions of counsel for the Applicants, the Monitor, the DIP Lender, and all other parties listed on the Counsel Slip, no one appearing for any other person, although duly served as it appears from the Affidavit of Service of Owen Gaffney sworn December 9, 2019, and on reading the consent of Ernst & Young Inc. to act as the Monitor.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place or, with the consent of the Monitor, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank or credit union providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or

legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that any of the Applicants' existing depository and disbursement banks or credit unions (collectively, the "**Banks**") is authorized, with the consent of the Monitor, to debit the applicable Applicant's accounts in the ordinary course of business without the need for further order of this Court for: (i) all cheques drawn on the applicable Applicant's accounts which are cashed at such Bank's counters or exchanged for cashier's cheques by the payees thereof prior to the date of this Order; (ii) all cheques or other items deposited in one of the Applicants' accounts with such Bank prior to the date of this Order which have been dishonoured or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent an Applicant was responsible for such items prior to the date of this Order; and (iii) all undisputed pre-filing amounts outstanding as of the date hereof, if any, owing to any Bank as service charges for the maintenance of the Cash Management System.

7. **THIS COURT ORDERS** that any of the Banks may rely on the representations of the applicable Applicant with respect to whether any cheques or other payment order drawn or issued by the applicable Applicant prior to the date of this Order should be honoured pursuant to this or any other order of this Court, and such Bank shall not have any liability to any party for relying on such representations by the applicable Applicant as provided for herein.

8. **THIS COURT ORDERS** that (i) those certain existing deposit agreements between the Banks shall continue to govern the post-filing cash management relationship between the Applicants and the Banks, and that all of the provisions of such agreements, including, without limitation, the termination and fee provisions, shall remain in full force and effect, (ii) either any of the Applicants, with the consent of the Monitor, or the Banks may, without further Order of this Court, implement changes to the Cash Management Systems and procedures in the ordinary

course of business pursuant to the terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts, and (iii) all control agreements in existence prior to the date of the commencement of these proceedings shall apply, including, as applicable, with respect to any debtor-in-possession financing facilities to be approved by this Court.

9. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to, on or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

10. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course prior to, on or after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

Payments for expenses incurred prior to this order shall require the consent of the Monitor or leave of this Court.

11. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales or excise taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

12. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicants and the relevant landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

13. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

14. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $1,000,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate; and

(c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

15. **THIS COURT ORDERS** that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the relevant Applicant, or by further Order of this Court upon application by the Applicants on at least two (2) days notice to such landlord and any such secured creditors. If the Applicants disclaim the lease governing such leased premises in

accordance with Section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

16. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

17. **THIS COURT ORDERS** that until and including March 12, 2020, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

18. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations,

actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

19. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

20. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

21. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

22. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

23. **THIS COURT ORDERS** that the Applicants shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

24. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $900,000, as security for the indemnity provided in paragraph 23 of this Order. The Directors' Charge shall have the priority set out in paragraphs 41 and 43 herein.

25. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 23 of this Order.

APPOINTMENT OF MONITOR

26. **THIS COURT ORDERS** that Ernst & Young Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

27. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lender and its counsel, on a periodic basis to be agreed on with the DIP Lender, of financial and other information as agreed to between the Applicants and the DIP Lender which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis as agreed to by the DIP Lender;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

28. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

29. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of (i) any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"); or (ii) any of the Property, the administration and control of which is subject to the provisions of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including, without limitation, the *Cannabis Act*, the *Controlled Drugs and Substances Act*, the *Excise Tax Act*, the Ontario *Cannabis Control Act*, or other such

applicable federal or provincial legislation (the "**Cannabis Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation or Cannabis Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation or the Cannabis Legislation, unless it is actually in possession.

30. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants and the DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree

31. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

32. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis.

33. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

34. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, if any, and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 hereof.

DIP FINANCING

35. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from SF V Bridge III, LP (the "**DIP Lender**") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed the principal amount of $7,500,000 unless permitted by further Order of this Court.

36. **THIS COURT ORDERS THAT** such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicants and the DIP Lender dated as of December 10, 2019 (the "**Commitment Letter**"), filed.

37. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

38. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge to the maximum principal amount of $7,500,000 (the "**DIP Lender's Charge**") on the Property including, without limiting the foregoing, the real property identified in Schedule "A" hereto (the "**Real Property**"), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 hereof.

39. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon 10 days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Commitment Letter, Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the Commitment Letter, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy or licensed insolvency trustee, interim receiver, receiver or receiver and manager of the Applicants or the Property.

40. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

41. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – DIP Lender's Charge (to the maximum principal amount of $7,500,000); and

Third – Directors' Charge (to the maximum amount of $900,000).

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Directors' Charge, the Administration Charge, or the DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

45. **THIS COURT ORDERS** that the Directors' Charge, the Administration Charge, the Commitment Letter, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively,

an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Commitment Letter or the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

47. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the Commitment Letter, the Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court, on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender whether under this Order (as made prior to the Variation), under the Commitment Letter and the Definitive Documents, with respect to any advances made prior to the DIP Lender being given notice of the Variation and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made.

SERVICE AND NOTICE

48. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

49. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<http://www.ey.com/ca/agmedica>'.

50. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

51. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

52. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

53. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

54. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

55. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

56. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

57. **THIS COURT ORDERS** that upon the registration in the Land Titles Division of the Real Property of the DIP Lender's Charge in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act*, the Land Registrar is hereby directed to register the DIP Lender's Charge on title of the Real Property.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

DEC 13 2019

PER / PAR:

Schedule "A"
Real Property

(1) 510-566 Riverview Drive, Chatham-Kent, Ontario (PIN 005280224)
Legal Description: PT LT 19 CON 1 RALEIGH PT 2, 3 & 6, 24R7621; S/T & T/W 164642; S/T 340724, 576414; CHATHAM-KENT

(2) 650 Riverview Drive, Chatham-Kent, Ontario (PIN 005280218)
Legal Description: PT LT 19 CON 1 RALEIGH, DESIGNATED AS PTS 1 & 2 PL 24R5827 EXCEPT PT 5 PL 24R1370 & PTS 1 & 2 PL 24R10089 SUBJECT TO AN EASEMENT AS IN 277488 MUNICIPALITY CHATHAM-KENT

(3) 715 Richmond Street, Chatham-Kent, Ontario (PIN 005280006)
Legal Description: PT LT 20 CON 1 RALEIGH AS IN 628944 EXCEPT EASEMENT THEREIN; CHATHAM-KENT

(4) 830 Richmond Street, Chatham-Kent, Ontario (PIN 005270019)
Legal Description: PT LT 20 CON 1 EASTERN BOUNDARY RALEIGH AS IN 586356; CHATHAM-KENT

(5) 1095 Wilton Grove Road, London, Ontario (PIN 082030125)
Legal Description: PART LOT 13 AND PART NORTH ½ LOT 12 CONCESSION 3; DESIGNATED PART 2, 33R3843; LONDON/WESTMINSTER

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 **AGMEDICA BIOSCIENCE INC., 2472602 ONTARIO INC., 2642466 ONTARIO INC., 8895309 CANADA INC., WELLWORTH HEALTH CORP., 8050678 CANADA INC., 8326851 CANADA INC., TAVIVAT NATURALS INC., WORLDWIDE BEVERAGE INNOVATIONS INC., UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**

Court File No. CV-19-00632052-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AMENDED AND RESTATED INTIAL ORDER

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Lawyers for the Applicants

TAB 11

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

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

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

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

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

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI

would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

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

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

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

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

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

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

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

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

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

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

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

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

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

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

s. 137(2) — considered

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

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act* [1] ("CCAA") proceeding on October 6, 2009. [2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

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

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

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

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

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

Background Facts

(i) Financial Difficulties

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

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit

facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

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

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

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

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

(ii) Indebtedness under the Credit Facilities

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

> (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable. [3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest. [4]
>
> (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.
>
> (c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit

agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

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

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

(iii) LP Entities' Response to Financial Difficulties

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

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

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

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

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

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

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

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

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

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

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

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

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

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

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated

therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

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

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

Proposed Monitor

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

Proposed Order

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

(a) Threshold Issues

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

(b) Limited Partnership

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

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

(c) Filing of the Secured Creditors' Plan

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

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

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

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

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

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

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

(D) DIP Financing

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

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

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

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

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

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

(e) Critical Suppliers

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

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

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is

satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.

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

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

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

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

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

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

(f) Administration Charge and Financial Advisor Charge

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

services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

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

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

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

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

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

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank

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

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

(h) Management Incentive Plan and Special Arrangements

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

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

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

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

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

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts*

of Justice Act [17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

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

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

Conclusion

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

Application granted.

Footnotes

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

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

TAB 12

CV-19-00632052-00CL

Court File No. 19-CV-

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MISTER	)	MONDAY, THE 2nd
	)	
JUSTICE HAINEY	)	DAY OF DECEMBER, 2019

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 **AGMEDICA BIOSCIENCE INC., 2472602 ONTARIO INC., 2642466 ONTARIO INC., 8895309 CANADA INC., WELLWORTH HEALTH CORP., 8050678 CANADA INC., 8326851 CANADA INC., TAVIVAT NATURALS INC., WORLDWIDE BEVERAGE INNOVATIONS INC., UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**
(each an "**Applicant**" and, collectively, the "**Applicants**")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Trevor Henry sworn Sunday, December 1, 2019 and the Exhibits thereto, and on being advised that Stone Quest Capital Corp., SF V Bridge III, LP, and Kathleen Glynn Philipp, the secured creditors of the Applicants, were given notice, and on hearing the submissions of counsel for the Applicants and the DIP Lender, and on reading the consent of Ernst & Young Inc. to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

POSSESSION OF PROPERTY AND OPERATIONS

3. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

4. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place or, with the consent of the Monitor, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank or credit union providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management

System, an unaffected creditor under any plan of arrangement or compromise filed by the Applicants under the CCAA with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. **THIS COURT ORDERS** that any of the Applicants' existing depository and disbursement banks or credit unions (collectively, the "**Banks**") are authorized, with the consent of the Monitor, to debit the applicable Applicant's accounts in the ordinary course of business without the need for further order of this Court for: (i) all cheques drawn on the applicable Applicant's accounts which are cashed at such Bank's counters or exchanged for cashier's cheques by the payees thereof prior to the date of this Order; (ii) all cheques or other items deposited in one of the Applicants' accounts with such Bank prior to the date of this Order which have been dishonoured or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent an Applicant was responsible for such items prior to the date of this Order; and (iii) all undisputed pre-filing amounts outstanding as of the date hereof, if any, owing to any Bank as service charges for the maintenance of the Cash Management System.

6. **THIS COURT ORDERS** that any of the Banks may rely on the representations of the applicable Applicant with respect to whether any cheques or other payment order drawn or issued by the applicable Applicant prior to the date of this Order should be honoured pursuant to this or any other order of this Court, and such Bank shall not have any liability to any party for relying on such representations by the applicable Applicant as provided for herein.

7. **THIS COURT ORDERS** that (i) those certain existing deposit agreements between the Banks shall continue to govern the post-filing cash management relationship between the Applicants and the Banks, and that all of the provisions of such agreements, including, without limitation, the termination and fee provisions, shall remain in full force and effect, (ii) either any of the Applicants, with the consent of the Monitor, or the Banks may, without further Order of this Court, implement changes to the Cash Management Systems and procedures in the ordinary course of business pursuant to the terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts, and (iii) all control agreements in existence prior to the date of the commencement of these proceedings shall apply, including, as applicable, with respect to any debtor-in-possession financing facilities to be approved by this Court.

8. **THIS COURT ORDERS** that, except as specifically permitted herein, and until the return of the comeback hearing, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any of the Applicants to any of their creditors as of this date unless critical to the preservation of the Business and consented to by the Monitor and consistent with the budget under the Commitment Letter (as defined below); (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

9. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by any of the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

10. **THIS COURT ORDERS** that until and including December 12, 2019, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

11. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA,

(iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

12. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

13. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

14. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

15. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of any of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

16. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

17. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $~~500,000~~ 250,000, as security for the indemnity provided in paragraph 16 of this Order. The Directors' Charge shall have the priority set out in paragraphs 34 and 36 herein.

18. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 16 of this Order.

APPOINTMENT OF MONITOR

19. **THIS COURT ORDERS** that Ernst & Young Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

20. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lender and its counsel of any financial and other information as agreed to between the Applicants and the DIP Lender which may be used in these proceedings including reporting on a periodic basis to be agreed to with the DIP Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis as agreed to with the DIP Lender;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(g) perform such other duties as are required by this Order or by this Court from time to time.

21. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

22. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of (i) any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"); or (ii) any of the Property, the administration and control of which is subject to the provisions of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including, without limitation, the *Cannabis Act*, the *Controlled Drugs and Substances Act*, the *Excise Tax Act*, the Ontario *Cannabis Control Act*, or other such applicable federal or provincial legislation (the "**Cannabis Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation or Cannabis Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation or the Cannabis Legislation, unless it is actually in possession.

23. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants and the DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

24. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

25. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs associated with these proceedings that are reasonably necessary for the continued operation of the Business in the ordinary course during the Stay Period. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis.

26. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, if any, and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 34 and 36 hereof.

DIP FINANCING

28. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from Hillmount Capital Inc. (the "**DIP Lender**") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed the principal amount of $1,000,000 unless permitted by further Order of this Court.

29. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicants and the DIP Lender dated as of November 27, 2019 (the "**Commitment Letter**"), filed.

30. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

31. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property including, without limiting the foregoing, the real property identified in Schedule "A" hereto (the "**Real Property**"), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 34 and 36 hereof.

32. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon 10 days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Commitment Letter, Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the Commitment Letter, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment or give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy or licensed insolvency trustee, interim receiver, receiver or receiver and manager of the Applicants or the Property.

33. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF THE CHARGES CREATED BY THIS ORDER

34. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $250,000);

Second – DIP Lender's Charge (to the maximum principal amount of $1,000,000); and

Third – Directors' Charge (to the maximum amount of ~~$500,000~~ 250,000).

35. **THIS COURT ORDERS** that the filing, registration or perfection of the Directors' Charge, the Administration Charge or the DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

36. **THIS COURT ORDERS** that each of the Directors' Charge, the Administration Charge and the DIP Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

37. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the DIP Lender's Charge, unless the Applicants also obtains the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

38. **THIS COURT ORDERS** that the Directors' Charge, the Administration Charge, the Commitment Letter, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the charges entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Commitment Letter or the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by any of the Applicants pursuant to this Order, the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

39. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the Commitment Letter, the Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court, on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender whether under this Order (as made prior to the Variation), under the Commitment Letter and the Definitive Documents, with respect to any advances made prior to the DIP Lender being given notice of the Variation and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made.

SERVICE AND NOTICE

41. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii)

within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

42. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<http://www.ey.com/ca/agmedica>'.

43. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

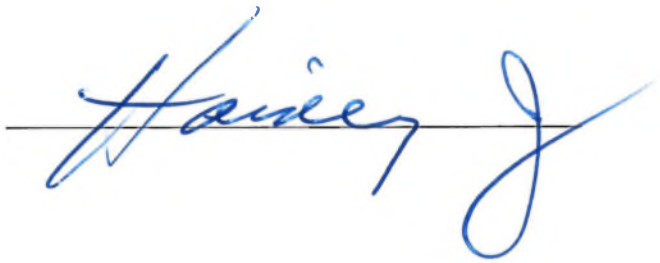
GENERAL

44. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of its powers and duties under this Order or in the interpretation or application of this Order.

45. **THIS COURT ORDERS** that the balance of the relief sought by the Applicants in the Notice of Application dated December 1, 2019, be and is hereby reserved to be heard by The Honourable Mr. Justice Hainey on December 12, 2019 or such other date as determined by this Court.

46. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

47. **THIS COURT ORDERS** that upon the registration in the Land Titles Division of the Real Property of the DIP Lender's Charge in the form prescribed in the *Land Titles Act* and/or the *and Registration Reform Act*, the Land Registrar is hereby directed to register the DIP Lender's Charge on title of the Real Property.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

DEC 0 2 2019

PER / PAR:

Schedule "A"
Real Property

(1) 566 Riverview Drive, Chatham-Kent, Ontario (PIN 005280115)
Legal Description: PT LT 19 CON 1 RALEIGH PT 2, 3 & 6, 24R7621; S/T & T/W 164642; S/T 340724, 576414; CHATHAM-KENT

(2) 650 Riverview Drive, Chatham-Kent, Ontario (PIN 005280218)
Legal Description: PT LT 19 CON 1 RALEIGH, DESIGNATED AS PTS 1 & 2 PL 24R5827 EXCEPT PT 5 PL 24R1370 & PTS 1 & 2 PL 24R10089 SUBJECT TO AN EASEMENT AS IN 277488 MUNICIPALITY CHATHAM-KENT

(3) 715 Richmond Street, Chatham-Kent, Ontario (PIN 005280006)
Legal Description: PT LT 20 CON 1 RALEIGH AS IN 628944 EXCEPT EASEMENT THEREIN; CHATHAM-KENT

(4) 830 Richmond Street, Chatham-Kent, Ontario (PIN 005270019)
Legal Description: PT LT 20 CON 1 EASTERN BOUNDARY RALEIGH AS IN 586356; CHATHAM-KENT

(5) 1095 Wilton Grove Road, London, Ontario (PIN 082030125)
Legal Description: PART LOT 13 AND PART NORTH ½ LOT 12 CONCESSION 3; DESIGNATED PART 2, 33R3843; LONDON/WESTMINSTER

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 **AGMEDICA BIOSCIENCE INC., 2472602 ONTARIO INC., 2642466 ONTARIO INC., 8895309 CANADA INC., WELLWORTH HEALTH CORP., 8050678 CANADA INC., 8326851 CANADA INC., TAVIVAT NATURALS INC., WORLDWIDE BEVERAGE INNOVATIONS INC., UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**

CV-19-00632052-00CL

Court File No. 19-CV-

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

INITIAL ORDER

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Lawyers for the Applicants

TAB 13

2019 ONSC 6966
Ontario Superior Court of Justice [Commercial List]

Clover Leaf Holdings Company, Re

2019 CarswellOnt 20001, 2019 ONSC 6966, 312 A.C.W.S. (3d) 691, 75 C.B.R. (6th) 124

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 CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY AND CONNORS BROS. SEAFOODS COMPANY

Hainey J.

Heard: November 25, 2019
Judgment: December 4, 2019
Docket: CV-19-631523-00CL

Counsel: Kevin Zych, Sean Zweig, Mike Shakra, for Applicants
Marc Wasserman, Martino Calvaruso, for Monitor
Natasha MacParland, for FCF Co. Ltd.
Peter Rubin, for Wells Forgo
Jeremy Opolsky, for Lion Capital
Robert Chadwick, Christopher Armstrong, for Terms Lenders

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

Headnote

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

Applicants were Canadian affiliates of BBF, which was international seafood supplier based in United States — Applicants operated CL group of companies in Ontario, New Brunswick and Nova Scotia and had 650 employees — While CL business in Canada was cash flow positive and profitable, balance sheet of BBF, including applicants, had suffered extreme financial pressures primarily due to extensive litigation against BBF in United States — BBF filed voluntary petition for relief under chapter 11 of title 11 of United States Code and U.S. Bankruptcy Court granted certain First Day Orders in those proceedings — Applicants sought similar relief to stabilize and protect business in order to complete comprehensive and coordinated restructuring of CL in Canada and BBF in United States — Applicants obtained initial order pursuant to Companies' Creditors Arrangement Act for appointment of Monitor and staying all proceedings against applicants and Monitor until December 2, 2019 — Applicants brought application for amended and restated order to supplement limited relief obtained pursuant to initial order — Application granted — Stay of proceedings was extended to December 31, 2019 — Applicants had acted in good faith and with due diligence and required extra time to restore solvency — Proposed debtor-in-possession (DIP) financing was approved — Proposed DIP financing would preserve value and going concern operations of applicants' business, which was in best interests of applicants and stakeholders — Monitor supported proposed DIP financing and confirmed that applicants had sufficient liquidity to operate business in ordinary course — It was appropriate to amend initial order to allow for payment of pre-filing obligations — KERP and KEIP charge were approved — Terms and scope of KEIP were limited to what was

reasonably necessary — Intercompany charge, administrative charge and directors' charge were all granted to protect interests of creditors, secure professional fees and disbursements of Monitor and provide indemnification to directors.

Table of Authorities

Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 11.001 [en. 2019, c. 29, s. 136] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

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

s. 137(2) — considered

APPLICATION for amended and restated order to supplement limited relief obtained pursuant to initial order.

***Hainey J.*:**

Overview

1 On November 22, 2019, the applicants ("Clover Leaf"), obtained an initial order pursuant to the *Companies Creditors Arrangement Act* R.S.C. 1985, c. C-36 as amended ("*CCAA*") which appointed Alvarez & Marsal Canada Inc. as Monitor and stayed all proceedings against the applicants, their officers, directors and the Monitor until December 2, 2019.

2 On November 25, 2019 the applicants sought an amended and restated order to supplement the limited relief obtained pursuant to the initial order. I granted the order and indicated that I would provide a more detailed endorsement. This is my endorsement.

Facts

3 The applicants are the Canadian affiliates of Bumble Bee Foods, an international seafood supplier based in the United States ("Bumble Bee").

4 The applicants operate the Clover Leaf business in Ontario, New Brunswick and Nova Scotia. They have approximately 650 employees in Canada. The Clover Leaf business has long been associated with well-known brands of canned seafood products in Canada.

5 While the Clover Leaf business in Canada is cash flow positive and profitable, the balance sheet of the Bumble Bee group, including the applicants, has suffered extreme financial pressures primarily due to extensive litigation against Bumble Bee in the United States.

6 As a result, the Bumble Bee group has filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code ("Chapter 11 proceedings") and the U.S. Bankruptcy Court has granted certain First Day Orders in those proceedings.

7 The applicants are seeking similar relief in these proceedings to stabilize and protect their business in order to complete a comprehensive and coordinated restructuring of Clover Leaf in Canada and Bumble Bee in the United States. This will include an asset sale of each of their respective businesses ("Sale Transaction"). This outcome is the result of extensive consideration of various options and consultations with Bumble Bee's secured lenders in an attempt to restructure the business.

Applicants' Position

8 The applicants submit that this *CCAA* proceeding is in the best interests of their stakeholders and will result in their business being conveyed on a going concern basis with minimal disruption. The breathing room afforded by the *CCAA* and Chapter 11

proceedings, and the other relief sought, will allow the applicants to continue operations in the ordinary course, maintaining the stability of their business and operations, and preserving the value of their business while the Sale Transaction is implemented.

9 Although the applicants are party to a stalking horse asset purchase agreement, they are not seeking any relief in connection with it or the Sale Transaction at this stage. The applicants will return to court for that relief at a later date. They are, instead, only seeking the limited relief required at this time.

Issues

10 I must determine the following issues:

a) Is the relief sought on this application consistent with the amendments to the *CCAA* which came into effect on November 1, 2019?

b) Should I extend the stay of proceedings to December 31, 2019?

c) Should I approve the proposed DIP financing and grant the DIP charge?

d) Should I grant the administration charge and the directors' charge?

e) Should I approve the KEIP and the KEIP charge, and grant a sealing order?

f) Should I authorize the applicants to pay their ordinary course pre-filing debts? and

g) Should I grant the intercompany charge?

Analysis

The New CCAA Amendments

11 In determining this application I must consider the amendments made to the *CCAA* that came into force on November 1, 2019.

12 Section 11.001 of the *CCAA* provides as follows:

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

13 The purpose of this new section of the *CCAA* is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process.

14 The applicants submit that the relief sought on this application is limited to what is reasonably necessary in the circumstances for the continued operation of their business. Further relief, including approval of the Sale Transactions and related bidding procedures, will not be sought until a later date on reasonable notice to a broader group of stakeholders.

15 I am satisfied that the relief sought on this motion is reasonably necessary for the continued operation of the applicants for the period covered by the order sought to allow them to take the next steps toward a smooth transition of their business to a new owner for the following reasons:

(a) Prior to initiating insolvency proceedings here and in the United States the applicants conducted a thorough assessment of their options and consulted with all their major creditors before arriving at the proposed Sale Transaction;

(b) The applicants' stakeholder such as employees, customers and suppliers who have not yet been consulted about these *CCAA* proceedings will not be prejudiced by the order sought. In fact, in my view, they will suffer prejudice if the order is not granted;

(c) The applicants have the support of their secured creditors who are expected to suffer a shortfall if the Sale Transaction closes;

(d) The applicants are not the cause of these insolvency proceedings; and

(e) The applicants are only seeking relief that is reasonably necessary to take the next steps toward a smooth transition to a new owner.

16 For these reasons, I have concluded that the relief sought is consistent with the new amendments to the *CCAA*.

17 I will now consider whether it is appropriate to grant certain of the specific terms of the amended and restated initial order.

Stay of Proceedings

18 The applicants seek to extend the stay of proceedings to December 31, 2019.

19 I am satisfied that the stay of proceedings should be extended as requested for the following reasons:

(a) The applicants have acted and are acting in good faith with due diligence;

(b) The stay of proceedings requested is appropriate to provide the applicants with breathing room while they seek to restore their solvency and emerge from these *CCAA* proceedings on a going-concern basis;

(c) Without continued protection under the *CCAA* and the support of their lenders the stability and value of the applicants' business will quickly deteriorate and will be unable to continue to operate as a going-concern;

(d) If existing or new proceedings are permitted to continue against the applicants, they will be destructive to the overall value of their business and jeopardize the proposed Sale Transaction; and

(e) The Monitor supports the requested extension of the stay of proceedings.

DIP Financing

20 The applicants submit that the proposed DIP financing should be approved for the following reasons:

(a) The proposed DIP financing is reasonably necessary for the continued operation of Clover Leaf in the ordinary course of business during the period covered by the order sought within the meaning of s. 11.2(5) of the *CCAA*. It is also consistent with the existing jurisprudence that DIP financing should be granted "to keep the lights on" and should be limited to terms that are reasonably necessary for the continued operation of the company; and

(b) The proposed DIP financing is reasonably necessary to allow the applicants to maintain liquidity and preserve the enterprise value of their business while the Sale Transaction is being pursued. The proposed DIP financing will be used to honour commitments to employees, customers and trade creditors.

21 I am satisfied for these reasons that the requirements of s. 11.2(5) of the *CCAA* are satisfied.

22 In this case, the applicants are not borrowers under the proposed DIP financing but they are proposed to be guarantors. The applicable jurisprudence has established the following factors which should be considered to determine the appropriateness of authorizing a Canadian debtor to guarantee a foreign affiliate's DIP financing:

(a) The need for additional financing by the Canadian debtor to support a going concern restructuring;

(b) The benefit of the breathing space afforded by *CCAA* protection;

(c) The lack of any financing alternatives to those proposed by the DIP lender;

(d) The practicality of establishing a stand-alone solution for the Canadian debtor;

(e) The contingent nature of the liability of the proposed guarantee and the likelihood that it will be called upon;

(f) Any potential prejudice to the creditors of the Canadian entity if the request is approved; and

(g) The benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied.

23 I have concluded that I should approve the proposed DIP financing and the proposed DIP charge for the following reasons:

(a) Because of its current financial circumstances, the Bumble Bee Group cannot obtain alternative financing outside of the Chapter 11 and *CCAA* proceedings;

(b) The applicants' liquidity is dependent on the secured lenders providing the proposed DIP financing;

(c) The proposed DIP financing is necessary to maintain the ongoing business and operations of the Bumble Bee Group, including the applicants;

(d) While the proposed DIP financing is being provided by the applicants' existing secured lenders rather than new third-party lenders, eleven third-party lenders were solicited with no viable proposal being received. In my view, this demonstrates that the proposed DIP financing represents the best available DIP financing option in the circumstances;

(e) The proposed DIP financing will preserve the value and going concern operations of the applicant's business, which is in the best interests of the applicants and their stakeholders;

(f) Because the DIP lenders are the existing secured lenders, they are familiar with the applicants' business and operations which will reduce administrative costs that would otherwise arise with a new-third party DIP lender;

(g) Protections have been included in the amended and restated initial order to minimize any prejudice to the applicants and their stakeholders;

(h) The amount of the proposed DIP Financing is appropriate having regard to the applicants' cash-flow statement; and

(i) The Monitor supports the proposed DIP financing and its report confirms that the applicants will have sufficient liquidity to operate their business in the ordinary course.

Payment of Pre-Filing Obligations

24 To preserve normal course business operations, the applicants seek authorization to continue to pay their suppliers of goods and services, honour rebate, discount and refund programs with their customers and pay employees in the ordinary course consistent with existing compensation arrangements.

25 The court has broad jurisdiction to permit the payment of pre-filing obligations in a *CCAA* proceeding. In granting authority to pay certain pre-filing obligations, courts have considered the following factors:

(a) Whether the goods and services are integral to the applicants' business;

(b) The applicants' need for the uninterrupted supply of the goods or services;

(c) The fact that no payments will be made without the consent of the Monitor;

(d) The Monitors' support and willingness to work with the applicants to ensure that payments in respect of pre-filing liabilities are appropriate;

(e) Whether the applicants have sufficient inventory of the goods on hand to meet their needs; and

(f) The effect on the debtors' ongoing operations and ability to restructure if they are unable to make pre-filing payments.

26 I am satisfied that it is critical to the operation of their business that the applicants preserve key relationships. Any disruption in the services proposed to be paid could jeopardize the value of their business and the viability of the Sale Transaction. The authority in the proposed amended and restated initial order to pay pre-filing obligations is appropriately tailored and responsive to the needs of the applicants and is specifically provided for in the applicants' cash flows and in the DIP budget. In particular, the payments are limited to those necessary to preserve critical relationships with employees, suppliers, and customers, to ensure the stability and continued operation of the applicants' business and will only be made with the consent of the Monitor. The relief sought is consistent with orders in other *CCAA* cases.

27 Further, in keeping with the requirements in s. 11.001 of the *CCAA* the contemplated payments are all reasonably necessary to the continued operation of the applicants' business so that there will be no disruption in services provided to the applicants and no deterioration in their relationships with their suppliers, customers and employees.

KEIP and KEIP Charge

28 I have also concluded that the KEIP and KEIP charge should be approved because of the following:

(a) The KEIP was developed in consultation with AlixPartners, Bennett Jones LLP and with the involvement of the Monitor. The Monitor is supportive of the KEIP. The secured creditors also support the KEIP charge;

(b) The KEIP is reasonably necessary to retain key employees who are necessary to guide the applicants through the *CCAA* proceedings and the Sale Transaction;

(c) The KEIP is incentive-based and will only be earned if certain conditions are met; and

(d) The amount of the KEIP, and corresponding KEIP charge, is reasonable in the circumstance.

29 In approving the KEIP and KEIP charge pursuant to s. 11 of the *CCAA* I have determined that the terms and scope of the KEIP have been limited to what is reasonably necessary at this time in accordance with s. 11.001 of the *CCAA*.

30 As the KEIP contains personal confidential information about the applicants' employees, including their salaries, I am granting a sealing order pursuant to s. 137(2) of the *Courts of Justice Act*, RSO 1990, c. C. 43. This will prevent the risk of disclosure of this personal and confidential information.

Intercompany Charge

31 I am also granting the requested Intercompany Charge to preserve the status quo between all entities within the Bumble Bee group to protect the interest of creditors against individual entities within the group. The Monitor supports the charge which ranks behind all the other court-ordered charges.

Administrative Charge

32 I am also granting an administration charge in the amount of $1.25 million to secure the professional fees and disbursements of the Monitor, its counsel and the applicants' counsel for the following reasons:

(a) The beneficiaries of the administration charge have, and will continue to, contribute to these *CCAA* proceedings and assist the applicants with their business;

(b) Each beneficiary of the administration charge is performing distinct functions and there is no duplication of roles;

(c) The quantum of the proposed charge is reasonable having regard to administration charges granted in other similar *CCAA* proceedings;

(d) The secured creditors support the administrative charge; and

(e) The Monitor supports the administrative charge.

Directors' Charge

33 Finally, I am granting a directors' charge in the amount of $2.3 million to secure the indemnity of the applicants' directors and officers for liabilities they may incur during these *CCAA* proceedings for the following reasons:

(a) The directors and officers may be subject to potential liabilities in connection with the *CCAA* proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

(b) The applicants' liability insurance policies provide insufficient coverage for their officers and directors;

(c) The directors' charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;

(d) The directors' charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the *CCAA* proceedings and does not cover willful misconduct or gross negligence;

(e) The applicants will require the active and committed involvement of its directors and officers, and their continued participation is necessary to complete the Sale Transaction;

(f) The amount of the directors' charge has been calculated based on the estimated potential exposure of the directors and officers and is appropriate given the size, nature and employment levels of the applicants; and

(g) The calculation of the directors' charge has been reviewed with the Monitor and the Monitor supports it.

Conclusion

34 For these reasons the amended and restated initial order is granted.

35 I thank counsel for their helpful submissions.

Application granted.

TAB 14

Court File No.: CV-19-00632079-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 2nd
	)	
JUSTICE HAINEY	)	DAY OF DECEMBER, 2019

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 WAYLAND GROUP CORP., MARICANN INC. AND NANOLEAF TECHNOLOGIES INC.

(collectively, the "**Applicants**" and each an "**Applicant**")

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavits of Matthew McLeod sworn December 2, 2019 (the "**First Affidavit**") and December 4, 2019 and the Exhibits thereto, and on being advised that TSX Trust Company, in its capacity as trustee under the Secured Trust Indenture dated as of October 27, 2017, and Cryptologic Corp., as lender under the Amended and Restated Loan Agreement and LOI Amendment Agreement dated as of September 17, 2019, and the other secured creditors of the Applicants who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, PricewaterhouseCoopers Inc. ("**PwC**"), in its capacity as proposed monitor of the Applicants and the DIP Lender (as defined below), and on reading the consent of PwC to act as the monitor (the "**Monitor**"),

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

POSSESSION OF PROPERTY AND OPERATIONS

3. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as the Applicants deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

4. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

5. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of Business and consistent with existing compensation policies and arrangements, and all other payroll and benefits processing expenses;

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings at their standard rates and charges; and

(c) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Applicants prior to the date of this Order by third party suppliers up to a maximum aggregate amount of $100,000 if in the opinion of the Applicants the supplier is critical.

6. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by any of the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business of the Applicants.

RESTRUCTURING

8. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate; and

(b) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

each of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

9. **THIS COURT ORDERS** that until and including December 16, 2019, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor or their respective employees and representatives acting in such

capacities, or affecting the Business or the Property, except with the prior written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO PROCEEDINGS AGAINST THE NON-FILING AFFILIATES

10. **THIS COURT ORDERS** that during the Stay Period, no Proceeding shall be commenced or continued against or in respect of the Non-Filing Affiliates (as defined in the First Affidavit), or any of their current and future assets, businesses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (collectively, the "**Non-Filing Affiliates' Property**", and together with the Non-Filing Affiliates' businesses, the "**Non-Filing Affiliates' Property and Business**") including, without limitation, terminating, making any demand, accelerating, amending or declaring in default or taking any enforcement steps under any agreement or agreements with respect to which any of the Applicants are a party, borrower, principal obligor or guarantor, and no default or event of default shall have occurred or be deemed to have occurred under any such agreement or agreements, by reason of:

a) the insolvency of the Applicants;

b) any of the Applicants having made an application to this Court under the CCAA;

c) any of the Applicants being a party to these proceedings;

d) any of the Applicants taking any step related to these CCAA proceedings; or

e) any default or cross-default arising from the matters set out in subparagraphs (a), (b), (c) or (d) above, or arising from the Applicants breaching or failing to perform any contractual or other obligations (collectively, the "**Non-Filing Affiliates' Default Events**"),

except with the prior written consent of the Applicants and the Monitor, or with leave of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

11. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

12. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any Person against or in respect of the Non-Filing Affiliates, or affecting the Non-Filing Affiliates' Property and Business, as a result of a Non-Non-Filing Affiliates' Default Event, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower the Non-Filing Affiliates to carry on any business which the Non-Filing Affiliates are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

13. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence or permit in favour of or held by the Applicants, or the Non-Filing Affiliates (as a result of a Non-Filing Affiliates' Default Event), except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

14. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with any of the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, security and payroll services, insurance, transportation services, cultivation and harvesting services, product control and quality testing, utility or other services to the Business or any of the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by any of the Applicants, and that each of the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

15. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

16. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of any of the Applicants whereby the directors or officers are alleged under any law

to be liable in their capacity as directors or officers for the payment or performance of such obligations.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

17. **THIS COURT ORDERS** that each of the Applicants shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of each of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

18. **THIS COURT ORDERS** that the directors and officers of each of the Applicants shall be entitled to the benefit of and are hereby granted the following charges on the Property, which charges shall not exceed: (i) an aggregate amount of $200,000 (the "**Directors' Priority Charge**"); and (ii) an aggregate amount of $250,000 (the "**Directors' Subordinate Charge**"), respectively, and in each case, as security for the indemnity provided in paragraph 18 of this Order. The Directors' Priority Charge and the Directors' Subordinate Charge shall have the priority set out in paragraphs 36-38 herein.

19. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (i) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Priority Charge or the Directors' Subordinate Charge, and (ii) each of the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Priority Charge or the Directors' Subordinate Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 18.

APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that PwC is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by any of the Applicants pursuant to this Order, and shall co-operate fully with the

Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lender and its counsel in accordance with the Definitive Documents, financial and other information as agreed to between the Applicants and the DIP Lender which may be used in these proceedings including reporting in accordance with the Definitive Documents, or as otherwise agreed to by the DIP Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender in accordance with the Definitive Documents, or as otherwise agreed to by the DIP Lender;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, wherever located and to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(g) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property, including as the term "possession" is defined and used in the *Cannabis Act*, S.C. 2018, c.16, and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof and nothing in this Order shall be construed as resulting in the Monitor being an employer or successor employer within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that the Monitor shall provide any creditor of any of the Applicants and the DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information

disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

25. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

26. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to the date of this Order, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, and the Applicants' counsel on a weekly basis.

27. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

28. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $1,000,000 as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 36-38 herein.

DIP FINANCING

29. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from The House of Turlock, in its capacity as lender (the "**DIP Lender**") under the Commitment Letter (as defined below), in order to finance the

Applicants' working capital requirements and other general corporate purposes, provided that the principal borrowings under such credit facility shall not exceed $1,100,000 unless permitted by further Order of this Court.

30. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicants and the DIP Lender dated December 3, 2019 (the "**Commitment Letter**"), as filed.

31. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (together with the Commitment Letter, collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and each of the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

32. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property, which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 36-38 hereof.

33. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, upon four (4) ~~business~~ days notice to the Applicants and the Monitor, the DIP Lender may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the

Applicants and set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

34. **THIS COURT ORDERS AND DECLARES** that the DIP Lender, solely in respect of the obligations arising under the Definitive Documents, shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants or any Applicant under the CCAA, or any proposal filed by the Applicants or any Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

35. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that, if any of the provisions of this Order in connection with the Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender under this Order (as made prior to the Variation) or the Definitive Documents, with respect to any advances made prior to the DIP Lender being given notice of the Variation and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

36. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Directors' Priority Charge, the DIP Lender's Charge and the Directors' Subordinate Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $1,000,000);

Second – Directors' Priority Charge (to the maximum amount of $200,000);

Third – DIP Lender's Charge; and

Fourth – Directors' Subordinate Charge (to the maximum amount of $250,000).

37. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the Directors' Priority Charge, the DIP Lender's Charge or the Directors' Subordinate Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

38. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

39. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Charges, or further Order of this Court.

40. **THIS COURT ORDERS** that the Charges and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not

otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, or any of the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

41. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Applicant's interest in such real property leases.

SERVICE AND NOTICE

42. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner or by

electronic message to the e-mail addresses as last shown on the records of the Applicants, a notice to every known creditor who has a claim against any of the Applicants of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

43. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca//scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL - http://www.pwc.com/ca/wayland (the "**Website**").

44. **THIS COURT ORDERS** that the Applicants and the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

GENERAL

45. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of its powers and duties under this Order or in the interpretation or application of this Order.

46. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of any of the Applicants, the Business or the Property.

47. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

48. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that PwC is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

49. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

50. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

SUPERIOR COURT OF JUSTICE
ENTERED

DEC 05 2019 C.D.

COUR SUPÉRIEURE DE JUSTICE
ENTRÉ

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

Court File No: CV-19- 00632079-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WAYLAND GROUP CORP., MARICANN INC. AND NANOLEAF TECHNOLOGIES INC.

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

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Lawyers for the Applicants

TAB 15

2011 ONSC 2061
Ontario Superior Court of Justice

Priszm Income Fund, Re

2011 CarswellOnt 2258, 2011 ONSC 2061, [2011] O.J. No. 1491, 200 A.C.W.S. (3d) 626, 75 C.B.R. (5th) 213

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 Priszm Income Fund, Priszm Canadian Operating Trust, Priszm Inc. and Kit Finance Inc. (Applicants)

Morawetz J.

Heard: March 31, 2011
Judgment: March 31, 2011
Docket: CV-11-915900CL

Counsel: A.J. Taylor, M. Konyukhova for Priszm Entities
G. Finlayson — Conflict Counsel for the Priszm Entities
M. Wasserman for Proposed Monitor, FTI Consulting Canada Inc.
P. Shea for Prudential Insurance
P. Huff for Directors of Priszm
C. Cosgriffe for Yum! Restaurants International (Canada) LP
D. Ullmann for 2279549 Ontario 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.viii Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
P Fund, P Trust, P GP, P LP and K Inc. were collectively referred to as P Entities — P Entities owned and operated 428 quick service restaurants — P LP was franchisee of franchisor, Y LP — Business of P LP was to develop, acquire, make investments in and conduct business in connection with quick service restaurant business — P Entities ceased paying certain obligations to Y LP and could not meet their liabilities as they came due; it became insolvent — P Fund, P Trust, P GP, and K Inc., applicants, sought relief under Companies' Creditors Arrangements Act (CCAA) and also sought to have stay of proceedings of initial order under CCAA extended to P LP — Application granted — Applicants' submission that they were debtor companies to which CCAA applied was accepted — P Entities were in process of coordinating sale process for certain assets, and stay of proceedings was appropriate — While CCAA definition of eligible company does not expressly include partnerships, CCAA courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so — Courts have held that this relief is appropriate where operations of debtor companies are so intertwined with those of partnerships, that not extending stay would significantly impair effectiveness of stay in respect of debtor companies — It was appropriate to extend CCAA protection to P LP.
Table of Authorities
Cases considered by *Morawetz J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to
Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — followed
Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed
Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — followed
Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to
Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2 "insolvent person" — considered

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

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

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

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

s. 11.5(2) [en. 1997, c. 12, s. 124] — considered

APPLICATION by affiliated debtor companies for relief under Companies' Creditors Arrangements Act and to have stay of proceedings of initial order extended to limited partnership.

***Morawetz J.*:**

1 Priszm Income Fund ("Priszm Fund"), Priszm Canadian Operating Trust ("Priszm Trust"), Priszm Inc. ("Priszm GP") and KIT Finance Inc. ("KIT Finance") (collectively, the "Applicants") seek relief under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants also seek to have the stay of proceedings and other benefits of an initial order under the CCAA extended to Priszm Limited Partnership ("Priszm LP"). Priszm Fund, Priszm Trust, Priszm GP, Priszm LP and KIT Finance are collectively referred to as the "Priszm Entities".

Background

2 The Priszm Entities own and operate 428 KFC, Taco Bell and Pizza Hut restaurants in seven provinces across Canada. As a result of declining sales and the inability to secure additional or alternate financing, the Priszm Entities cannot meet their liabilities as they come due and are therefore insolvent.

3 The Priszm Entities seek a stay of proceedings under the CCAA to allow them to secure a going concern solution for the business including approximately 6,500 employees and numerous suppliers, landlords and other creditors and to maximize recovery for the Priszm Entities' stakeholders.

4 On the return of the motion, the only party that took issue with the proposed relief was Yum! Restaurants International (Canada) LP (the "Franchisor"). Counsel to the Franchisor indicated that the Franchisor was not opposing the form of order, but explicitly does not consent to the stated intention of the Priszm Entities not to pay franchise royalties to the Franchisor.

5 The background facts with respect to this application are set out in the Affidavit of Deborah J. Papernick, sworn March 31, 2011 (the "Papernick Affidavit"). Further details are also contained in a pre-filing report submitted by FTI Consulting Canada

Inc. ("FTI") in its capacity as proposed monitor. FTI has been acting as financial advisor to the Priszm Entities since December 13, 2010.

6 Priszm LP is a franchisee of the Franchisor and is Canada's largest independent quick service restaurant operator. Priszm LP is the largest operator of the KFC concept in Canada, accounting for approximately 60% of all KFC product sales in Canada. In addition, Priszm LP operates a number of multi-branded restaurants that combine a KFC restaurant with either a Taco Bell or a Pizza Hut restaurant.

7 As of March 25, 2011, the Priszm Entities operated 428 restaurants in seven provinces: British Columbia, Alberta, Manitoba, Ontario, Quebec, Nova Scotia and New Brunswick.

8 The business of Priszm LP is to develop, acquire, make investments in and conduct the business and ownership, operation and lease of assets and property in connection with the quick service restaurant business in Canada.

9 Priszm Fund is an income trust indirectly holding approximately 60% of Priszm LP's trust units.

10 Priszm Trust is an unincorporated, limited purpose trust wholly-owned by Priszm Fund created to acquire and hold 60% of the outstanding partnership units of Priszm LP, as well as approximately 60% of Priszm GP's units, for Priszm Fund.

11 Priszm GP is a corporation which acts as general partner of Priszm LP.

12 KIT Finance is a corporation created to act as borrower for the Prudential Loan, described below.

13 The principal and head offices of Priszm Fund, Priszm LP and Priszm GP are located in Vaughan, Ontario.

14 As at March 31, 2011, the Priszm Entities had short-term and long-term indebtedness totalling: $98.8 million pursuant to the following instruments:

> (a) Note purchase and private shelf agreement dated January 12, 2006 ("Note Purchase Agreement") between KIT Finance, Priszm GP and Prudential Investment Management ("Prudential") - $67.3 million;
>
> (b) Subordinated Debentures issued by Priszm Fund due June 30, 2012 - $30 million - $31.5 million.

15 The indebtedness under the Note Purchase Agreement (the "Prudential Loan") is guaranteed by and secured by substantially all of the assets of Priszm GP, KIT Finance and Priszm LP and by limited recourse guarantees and pledge agreements granted by Priszm Fund and Priszm Trust.

16 In addition, the Priszm Entities have approximately $39.1 million of accrued and unpaid liabilities.

17 As a result of slower than forecast sales, on September 5, 2010, Priszm Fund breached the Prudential Financial covenant and remains in non-compliance. As a result, the Prudential Loan became callable.

18 Priszm Fund has also failed to make an interest payment of $975,000 due on December 31, 2010 in respect to the Subordinated Debentures.

19 The Priszm Entities have also ceased paying certain obligations to the Franchisor as they come due.

Findings

20 I am satisfied that Priszm GP and KIT Finance are "companies" within the definition of the CCAA. I am also satisfied that Priszm Fund and Priszm Trust fall within the definition of "income trust" under the CCAA and are "companies" to which the CCAA applies.

21 I am also satisfied that the Priszm Entities are insolvent. In arriving at this determination, I have considered the definition of "insolvent" in the context of the CCAA as set out in *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]), leave to appeal refused, 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused 2004 CarswellOnt 5200 (S.C.C.). In *Stelco* , Farley J. applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying the definition of "insolvent person" within the meaning of s. 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") to include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

22 In this case, the Priszm Entities are unable to meet their obligations to creditors and have ceased paying certain obligations as they become due.

23 Further, the Priszm Entities are affiliated debtor companies with total claims against in excess of $100 million.

24 I accept the submission put forth by counsel to the Applicants to the effect that the Applicants are "debtor companies" to which the CCAA applies.

25 At the present time, the Priszm Entities are in the process of coordinating a sale process for certain assets. In these circumstances, I have been persuaded that a stay of proceedings is appropriate. In arriving at this determination, I have considered *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]).

26 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 *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]).

27 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.

28 Having reviewed the affidavit of Ms. Papernick, I have been persuaded that it is appropriate to extend CCAA protection to Priszm LP.

29 The Priszm Entities are also seeking an order: (a) declaring certain of their suppliers to be critical suppliers within the meaning of the CCAA; (b) requiring such suppliers to continue to supply on terms and conditions consistent with existing arrangements and past practice as amended by the initial order; (c) granting a charge over the Property as security for payment for goods and services supplied after the date of the Initial Order.

30 Section 11.4 of the CCAA provides the court jurisdiction to declare a person to be a critical supplier. The CCAA does not contain a definition of "critical supplier" but pursuant to 11.4(1), the court must be satisfied that the person sought to be declared a critical supplier "is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operations".

31 Counsel submits that the Priszm Entities' business is virtually entirely reliant on their ability to prepare, cook and sell their products and that given the perishable nature of their products, the Priszm Entities maintain very little inventory and rely on an uninterrupted flow of deliveries and continued availability of various products. In addition, the Priszm Entities are highly dependent on continued and timely provision of waste disposal and information technology services and various utilities.

32 With the assistance of the proposed monitor, the Priszm Entities have identified a number of suppliers which are critical to their ongoing operation and have organized these suppliers into five categories:

(a) chicken suppliers;

(b) other food and restaurant consumables;

(c) utility service providers;

(d) suppliers of waste disposal services;

(e) providers of appliance repair and information technology services.

33 A complete list of the suppliers considered critical by the Priszm Entities (the "Critical Suppliers") is attached at Schedule "A" to the proposed Initial Order.

34 Having reviewed the record, I have been satisfied that any interruption of supply by the Critical Suppliers could have an immediate material adverse impact on the Priszm Entities business, operations and cash flow such that it is, in my view, appropriate to declare the Critical Suppliers as "critical suppliers" pursuant to the CCAA.

35 Further, I accept the submission of counsel to the Priszm Entities that it is appropriate to grant a Critical Suppliers' Charge to rank behind the Administrative Charge.

36 The Priszm Entities also seek approval of the DIP Facility in the amount up to $3 million to be secured by the DIP Lenders' Charge.

37 Subsection 11.2(4) of the CCAA sets out the factors to be considered by the court in deciding whether to grant a DIP Financing Charge. These factors include:

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

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.

38 Counsel submits that the following factors support the granting of the DIP Lenders' Charge:

(a) the Priszm Entities expect to continue daily operations during the proceedings;

(b) management will be overseen by the monitor who will oversee spending under the DIP Financing;

(c) while it is not anticipated that the Priszm Entities will require any additional financing prior to June 30, 2011, actual funding requirements may vary;

(d) the ability to borrow funds from a court-approved DIP Facility will be crucial to retain the confidence of stakeholders;

(e) secured creditors have either been given notice of the DIP Lenders' Charge or are not affected by it;

(f) the DIP Lenders' Charge does not secure an obligation that existed before the granting of the Initial Order; and

(g) the proposed monitor is supportive of the DIP Facility and the DIP Lenders' Charge.

39 Based on the foregoing, I am of the view that it is appropriate to approve the DIP Facility and grant the DIP Lenders' Charge.

40 The trustees and directors of the Priszm Entities have stated their intention to resign. In order to ensure ongoing corporate governance, the Priszm Entities seek an order appointing 2279549 Ontario Inc. as the CRO. They have also requested that the Chief Restructuring Officer be afforded the protections outlined in the draft Initial Order.

41 The Applicants are seeking an Administration Charge over the property in the amount of $1.5 million to secure the fees of the proposed monitor, its counsel, counsel to the Priszm Entities and the CRO. It is proposed that this charge will rank in priority to all other security interests in the Priszm assets, other than any "secured creditor", as defined in the CCAA, who has not received notice of the application for CCAA protection.

42 The authority to provide such a charge is set out in s. 11.5(2) of the CCAA.

43 The Priszm Entities submit that the following factors support the granting of the Administration Charge:

(a) the Priszm Entities operate an extensive business;

(b) the beneficiaries will provide essential legal and financial advice and leadership;

(c) there is no anticipated unwarranted duplication of roles;

(d) secured creditors likely to be affected by the charge were provided with notice and do not object to the Administration Charge; and

(e) the proposed monitor, in its pre-filing report, supports the Administration Charge.

44 I am satisfied that this is an appropriate case in which to grant the Administration Charge in the form requested.

45 I am also satisfied that it is appropriate to grant a Directors' Charge in the amount of $9.8 million to protect directors and officers and the CRO from certain potential liabilities. In arriving at this determination, I have considered the provisions of s. 11.5(1) of the CCAA which addresses the issue of directors' and officers' charges. I have also considered that the Priszm Entities maintain directors' and officers' liability insurance ("D&O Insurance"). The current policy provides a total of $31 million in coverage. It is expected that the D&O Insurance will provide coverage sufficient to protect the directors and officers and the draft Initial Order provides that the Directors' Charge shall only apply to the extent that the D&O Insurance is not adequate.

46 For the foregoing reasons, I am satisfied that it is appropriate to grant the CCAA Initial Order in the form requested.

47 Paragraph 14 of the form of order provides for a stay of proceedings up to and including April 29, 2011. Paragraph 59 provides for the standard comeback provision.

48 The Initial Order was signed 9:30 a.m. Eastern Daylight Time on March 31, 2011.

Application granted.

TAB 16

2017 ONSC 4944
Ontario Superior Court of Justice

Index Energy Mills Road Corporation (Re)

2017 CarswellOnt 13040, 2017 ONSC 4944, 283 A.C.W.S. (3d) 694, 51 C.B.R. (6th) 216

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 INDEX ENERGY MILLS ROAD CORPORATION

G.B. Morawetz R.S.J.

Heard: August 16, 2017
Judgment: August 23, 2017
Docket: CV-17-580840-00CL

Counsel: Shane Kukulowicz, for Index Energy Mills Road Corporation
Brian Empey, Melaney Wagner, for Grant Thornton Ltd., Proposed Monitor
Grant Moffat, for National Bank of Canada, as Agent for Syndicate of Lenders
David Bish, for DIP Lender (Index Equity US LLC), Index Equity Sweden AB and Index Residence AB

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.vi Maintenance of status quo
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Maintenance of status quo
Debtor was incorporated to own and operate electrical co-generation facility and encountered difficulties retrofitting its facility, which resulted in energy output being lower and costlier than expected — Debtor was in default on various obligations and in litigation with former contractor — Debtor believed its underlying business was strong, but it required restructuring to inject new funds into its operations — Debtor was in negotiations with proposed DIP lender and creditor to reach agreement on SISP — Debtor brought application for initial order under Companies' Creditors Arrangement Act (CCAA), with appointment of monitor, authorization to borrow $5,000,000 pursuant to DIP facility as interest financing, with maximum of $1.6 million advanced prior to comeback hearing, and sealing order — Application granted — Applicant was debtor company with over $5,000,000 in debts and was entitled to relief under CCAA — Debtor was insolvent and met threshold requirements under s. 10 of CCAA — It was necessary and appropriate to grant stay of proceedings to preserve status quo among stakeholders and allow SISP to unfold — It was necessary and appropriate to allow debtor to pay certain amounts, including pre-filing amounts to suppliers — Monitor requested by debtor consented to appointment and was appropriate — DIP lenders charge satisfied relevant criteria and was integral part of credit facility — Coverage for liability was extended to directors and officers since they did not have insurance — To protect integrity and fairness of process, sealing order was made.
Table of Authorities
Cases considered by *G.B. Morawetz R.S.J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

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

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.) — followed

Smurfit-Stone Container Canada Inc., Re (2009), 2009 CarswellOnt 391, 50 C.B.R. (5th) 71 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 10 — considered

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

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

s. 11.03 [en. 2005, c. 47, s. 128] — considered

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

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

APPLICATION by debtor corporation for initial order staying proceedings and permitting it to restructure.

***G.B. Morawetz R.S.J.*:**

Overview

1 This application is brought by Index Energy Mills Road Corporation ("Index Energy Ajax" or the "Applicant") for an order (the "Initial Order") pursuant to the Companies' Creditors Arrangement Act (the "CCAA").

2 In addition to requesting a stay of proceedings and authorization to carry on business in a manner consistent with the preservation of its property, the Applicant also requests that Grant Thornton Ltd. ("GTL") be appointed as monitor (the "Monitor"); authorization for the Applicant to borrow $5 million pursuant to a credit facility (the "DIP Facility") as interim financing from Index Equity US LLC ("Index US"), in such capacity, (the "DIP Lender") with a maximum amount of $1.6 million being advanced by the DIP Lender prior to the CCAA comeback hearing (the "Comeback Hearing"); and a sealing order with respect to certain confidential information described in the pre-filing report of the Monitor (the "Pre-Filing Report").

3 Index Energy Ajax owns and operates an electrical co-generation facility located in Ajax, Ontario that generates electricity by burning wood waste from the construction industry to produce steam to drive turbine generators (the "Biomass Facility").

4 Index Energy Ajax has encountered difficulties in retrofitting the Biomass Facility and energy output has been lower and operational costs higher than anticipated. Index Energy Ajax has also been engaged in litigation with its former engineering, procurement and construction contractor, HMI Construction Inc. ("HMI"), and has also been forced to deal with numerous liens arising from the construction associated with the Biomass Facility, including a lien claim of approximately $31.3 million registered by HMI (the "HMI Lien Claim"). The sum of $7,053,890 plus HST has been paid into court as an agreed upon holdback (the "Holdback Funds").

5 Index Energy Ajax is in default on various obligations to a syndicate of lenders comprised of National Bank of Canada, Canadian Western Bank, Laurentian Bank of Canada and Business Development Bank of Canada (collectively, the "Syndicate"). National Bank of Canada is the agent of the Syndicate (in that capacity, the "Agent"). The Syndicate has made demand for payment of amounts in excess of $45 million. Mr. Rickard Haraldsson, a Director of Index Energy Ajax has stated in his affidavit that Index Energy Ajax is insolvent.

6 The Applicant is of the view that its underlying business remains strong, but that it ultimately requires a restructuring to inject new funds into its operations to address the various deficiencies in the Biomass Facility. Accordingly, Index Energy Ajax states that it requires protection under the CCAA to allow it a period of time to develop and implement a sales and investment solicitation process ("SISP") and to access interim financing on a priority basis to preserve value for all stakeholders and ensure its viability as a going concern.

7 The Applicant has advised that it is currently in negotiations with Index US and the Syndicate to reach agreement on terms of a mutually acceptable SISP, which would include a stalking-horse bid, and to allow further advances under the DIP Facility beyond the initial permitted draw amount.

The Facts

8 The facts have been set out in detail in the affidavit of Rickard Haraldsson (the "Haraldsson Affidavit").

9 Index Energy Ajax was incorporated pursuant to the laws of Ontario on November 7, 2006. Its registered office is located at 170 Mills Road, Ajax, Ontario.

10 Index Energy Ajax is owned by three shareholders. Index Energy Sweden is the owner of 70% of the common shares, R. Andrews Investment Company, LLC ("R. Andrews") is the owner of 10% of the common shares and Jacqueline Kerr ("J. Kerr") is the owner of 20% of the common shares.

11 Index Energy Ajax was incorporated to retrofit the existing energy plant located in Ajax (the "Property") to become the Biomass Facility.

12 Index Energy Ajax entered into a feed-in-tariff with the Ontario Power Authority in 2010 (the "FIT Contract"). In order to retrofit the Biomass Facility, Index Energy Ajax entered into a construction contract with HMI in 2012 (the "EPC Contract"). Since 2015, there has been substantial litigation between Index Energy Ajax and HMI with regard to the HMI Lien Claim.

13 In March 2017 Index Energy Ajax paid an agreed holdback amount of $7,053,890 plus HST (the "Holdback Funds") into court and all subcontractor lien claims were vacated from title to the Property

Index Energy Ajax's Creditors

14 In 2013, Index Energy Ajax entered into a credit agreement (the "Syndicate Credit Agreement") with the Syndicate. Pursuant to the Syndicate Credit Agreement, the Syndicate agreed to provide a non-revolving construction facility in the maximum sum of $60 million and a non-revolving term facility once the retrofit was satisfactorily completed (collectively, the "Syndicate Facilities").

15 Index Energy Ajax has been in default of the Syndicate Agreement since at least May 2015.

16 On January 18, 2017, the Agent sent Index Energy Ajax a demand letter (the "Demand Letter") demanding full payment of all amounts owing to the Syndicate under the Syndicate Facilities, which at that date totaled $49,427,871.94, with interest.

17 Other creditors include Index Residence for an amount in excess of $102 million and trade creditors for an amount in excess of $4 million.

18 The proposed monitor has filed a pre-filing report which details the efforts Index Energy Ajax has taken, with the assistance of the Monitor, to solicit an appropriate DIP financier. After consulting with Index Sweden and Index Residence, one party was selected as a potential DIP lender, however, after protracted negotiations, the parties were not able to come to terms. As an alternative, Index US has agreed to act as DIP Lender with the consent of the Syndicate, on terms more favourable to Index Energy Ajax than those offered by this potential lender. Details are provided in the Pre-Filing Report at paragraphs 46-53 and in the Haraldsson Affidavit at paragraph 94.

19 The DIP Lender has agreed to provide Index Energy Ajax with a DIP Facility in order for Index Energy Ajax to meet its immediate funding requirements.

20 The DIP Facility, extended by the DIP Lender is the maximum amount of $5 million (the "Principal Amount") with a maximum amount of $1.6 million being advanced by the DIP Lender prior to the CCAA Comeback Hearing pursuant to the DIP Credit Agreement.

21 The DIP Facility requires that the DIP Lender receive a court ordered priority charge over the assets of Index Energy Ajax (the "DIP Lender's Charge") which Charge will attach to all of the Index Energy Ajax Property other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of Index Energy Ajax other than Caterpillar Financial Services Limited, who has a specific security interest over a construction loader (the "Loader").

The Law

22 The CCAA applies to a "debtor company" with total claims against it for more than $5 million. I am satisfied that Index Energy Ajax is such a "debtor company" and is entitled to relief under the CCAA.

23 I am also satisfied that Index Energy Ajax is insolvent. Index Energy Ajax's liabilities exceed the current value of its assets and Index Energy Ajax has insufficient funds to pay its debts and has ceased to meet its obligations as they become due.

24 I am also satisfied that Index Energy Ajax has met the other threshold requirements include the filing of cash-flow statements required by Section 10 of the CCAA. Further, since the chief place of business of Index Energy Ajax is Ajax, Ontario, this court has jurisdiction to hear this application.

25 I am also satisfied that it is both necessary and appropriate to grant a stay of proceedings to Index Energy Ajax. The stay is crucial as it preserves the status quo among the stakeholders while Index Energy Ajax stabilizes operations and considers its alternatives. Index Energy Ajax has indicated that it wishes to embark on a SISP and a stay is necessary to allow the time for the SISP to unfold.

26 Index Energy Ajax also seeks authorization to pay pre-filing expenses up to the amount of $450,000 if it is determined, in consultation with the Monitor, to be necessary for the continued operation of the business or preservation of the Property.

27 Index Energy Ajax takes the position that the continued availability of supplies is necessary to ensure a successful SISP and ultimate emergence of a restructured business in some form. Mr. Haraldsson states that a number of the suppliers to Index Energy Ajax are vital to its ongoing operations and it may be necessary for them to be paid all or a portion of the obligations arising prior to the date of the Initial Oder to ensure their survival and their continued ability to provide supplies to Index Energy Ajax.

28 Mr. Haraldsson states that the operation of the Biomass Facility, and the maximizing of value for the stakeholders would be materially prejudiced if the required suppliers ceased to carry on business and ceased to supply.

29 Accordingly, Index Energy Ajax seeks authority to pay such amounts as they are required, including amounts owing prior to the date of the Initial Order, to ensure continued supply and successful restructuring.

30 There is authority to authorize an applicant to pay certain amounts, including pre-filing amounts to suppliers where the applicant is not seeking a charge in respect of critical suppliers (see: *Cinram International Inc., Re*, 2012 ONSC 3767

(Ont. S.C.J. [Commercial List]), at para. 68 of Schedule "C", ("Cinram") and *Smurfit-Stone Container Canada Inc., Re* [2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List])], 2009 CanLII 2493 (at para. 21 ("Smufit-Stone")).

31 In granting this authority, the courts have considered a number of factors, including:

(a) whether the goods and services are integral to the business of the applicants;

(b) the applicants dependency on the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made with the consent of the monitor;

(d) the monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

(e) whether the applicant has sufficient inventory of the goods on hand to meet its needs; and

(f) the effect on the debtors' ongoing operations and ability to restructure if it were unable to make pre-filing payments to their critical suppliers.

32 In these circumstances, I have been persuaded that it is both necessary and appropriate to provide the requested authorization to Index Energy Ajax.

33 Pursuant to section 11.7 of the CCAA, the court is required to appoint a monitor. GTL has consented to its appointment as Monitor in this case and I am satisfied that it is appropriate to appoint GTL as Monitor.

34 The proposed Initial Order provides for the following charges, in the following priority:

(a) First - the Administration Charge (to the maximum amount of $1 million);

(b) Second — the DIP Lender's Charge; and

(c) Third — the Director's Charge (to the maximum amount of $250,000).

35 The Applicant proposes that the Administration Charge rank in priority to the DIP Lender's Charge. The Applicant proposes that the Charge attach to all of its Property, other than the Holdback Funds, to the extent they are valid claims to rank in priority to all secured and unsecured creditors of the Applicant, other than Caterpillar in relation to the Loader or the proceeds thereof.

36 With respect to the DIP Facility, Index Energy Ajax is seeking approval of a $5 million DIP Facility. The DIP Facility would be secured by a DIP Lender's Charge, which would attach to all of the Applicant's Property, other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of the Applicant, other than Caterpillar in relation to the Loader or the proceeds thereof and subject only to the Administration Charge.

37 As previously noted, the granting of the DIP Lender's Charge is condition precedent under the DIP Credit Agreement and I am satisfied that it is an integral part of the negotiating consideration of the DIP Facility.

38 The court has jurisdiction to grant a priority DIP financing charge pursuant to section 11.2 of the CCAA.

39 Subsection 11.2(4) of the CCAA sets out the factors to be considered by the court in determining whether to grant a priority DIP financing charge. The factors are not exhaustive and in *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) ("Canwest"), Pepall J. (as she then was) stressed the importance of meeting the following three criteria:

(a) whether notice has been given to secured creditors likely to be affected by the security of the charge;

(b) whether the amount to be granted under the DIP financing is appropriate and required having regard to the debtor's cash-flow statement; and

(c) whether the DIP charge secures an obligation that existed before the order was made (which it should not).

40 In this case, I have concluded that the proposed DIP Lender's Charge satisfies the relevant criteria and should be granted. In arriving at this conclusion, I have considered the following:

(i) The secured creditors who would be primed by the proposed DIP Lender's Charge, namely the Syndicate, Index Residence and HMI were given notice of the proposed DIP Lender's Charge. Caterpillar, the secured creditor who will not be primed, was not given notice;

(ii) The maximum amount of the DIP Facility is appropriate based on the anticipated cash requirements, as reflected in the cash-flow projections prepared with the assistance of GTL. The amount advanced under the DIP Facility is limited to $1.6 million until the Comeback Hearing, when more comprehensive service will have occurred;

(iii) Management of Index Energy Ajax's business and affairs will have the benefit of additional oversight and consultation provided by the Monitor;

(iv) It is conceivable that the DIP Facility will enhance the value expected to be available for all stakeholders.

41 The Proposed Initial Order, contemplates the indemnification of the Applicant's directors and officers, the creation of a Directors' Charge and a related stay of proceedings in respect of claims against the directors and officers. The statutory authority for the granting of this relief is found in sections 11.03 and 11.51 of the CCAA.

42 I am satisfied that it is appropriate to extend coverage to the directors and officers and that it is necessary to grant the requested Charge as Index Energy Ajax does not have any directors' and officers' insurance. This relief is accordingly granted.

43 The Pre-Filing Report contains certain appendices which the Applicant regards as sensitive commercial information relating to the process undertaken to obtain DIP financing and the optimization plan of the Applicant. The Applicant is of the view that if publically available, this information could have a material detrimental effect on the Applicant's restructuring. Having considered the guidance provided by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate, in order to protect the integrity and fairness of the process, to grant an order sealing the confidential appendices.

Summary

44 In the result, the Initial Order is granted in the form requested by Index Energy Ajax. The Comeback Hearing has been scheduled before me on Monday, September 11, 2017 at 8:30 a.m.

Application granted.

End of Document

TAB 17

2016 ONSC 6800
Ontario Superior Court of Justice [Commercial List]

Performance Sports Group Ltd., Re

2016 CarswellOnt 17492, 2016 ONSC 6800, 272 A.C.W.S. (3d) 470, 41 C.B.R. (6th) 245

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 PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC. (Applicants)

Newbould J.

Heard: October 31, 2016
Judgment: November 1, 2016
Docket: CV-16-11582-00CL

Counsel: Peter Howard, Kathryn Esaw, for Applicants
Robert I. Thornton, Rachel Bengino, for Proposed Monitor Ernst & Young Inc.
Bernard Boucher, John Tuzyk, for Sagard Capital Partners, L.P
David Bish, Adam Slavens, for Fairfax Financial Holdings Limited
Robert Staley, for Board of directors of Performance Sports Group Ltd.
Joseph Latham, Ryan Baulke, for Ad Hoc Committee of certain term lenders
Tony Reyes, Evan Cobb, for Bank of America, the ABL DIP lender

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Debtors, parent company and certain Canadian and U.S. subsidiaries, were involved in global sports equipment business — Debtors became insolvent and brought parallel insolvency proceedings in Canada and U.S. — Application by debtors for protection under Companies' Creditors Arrangement Act was granted with reasons to follow — Debtors sought to sell business as going concern and entered into asset purchase agreement with group of investors, which contemplated that businesses would continue as going concern — DIP loan facilities negotiated with debtors' current lenders should be approved, taking into account factors in s. 11.2(4) of Act — Without DIP financing, debtors lacked sufficient financing to continue operating business and pursue post-filing sales process — As s. 11.2(1) of Act provides that security for DIP facility may not secure obligation that existed before order authorizing security was made, provision was inserted in initial order expressly preventing use of advances under DIP facility to repay pre-filing obligations — Authorization granted to debtors to pay pre-filing amounts owing to certain suppliers, as interruption by critical suppliers could have immediate materially adverse impact and jeopardize ability to continue

as going concern — Debtors sought administrative charge to cover Monitor's fees; U.S. and Canadian counsel to Monitor, debtors, and directors of debtors; and to cover fees incurred before and after making of initial order — As debtor intended to bring motion on come-back hearing to permit all past outstanding amounts to be paid to Canadian employees, administrative charge of $7.5 million granted — As administration charge under s. 11.52(1) of Act can only be granted to cover work done in connection with proceeding under Act, it was not possible for such charge to protect fees of lawyers in other jurisdictions who might be engaged by debtor either in foreign insolvency proceedings or other litigation — Authorization granted to effect intercompany advances, secured by intercompany charge — Standard directors' charge for $7.5 million approved — Chief Restructuring Officer appointment approved.

Table of Authorities

Cases considered by *Newbould J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 3658, 56 C.B.R. (5th) 194 (Ont. S.C.J. [Commercial List]) — referred to

Walter Energy Canada Holdings, Inc., Re (2016), 2016 BCSC 107, 2016 CarswellBC 158, 23 C.C.P.B. (2nd) 201, 33 C.B.R. (6th) 60 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 11 — considered

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

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

s. 11.4 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2005, c. 47, s. 128] — considered

s. 11.52(1)(a) [en. 2005, c. 47, s. 128] — considered

s. 11.52(1)(b) [en. 2005, c. 47, s. 128] — considered

s. 11.52(1)(c) [en. 2005, c. 47, s. 128] — considered

REASONS for granting of debtors' application for protection under *Companies' Creditors Arrangement Act*.

***Newbould J.*:**

1 On October 31, 2016 Performance Sports Group Ltd. ("PSG") and the other Applicants (collectively, the "Applicants" or the "PSG Entities") applied for and were granted protection under the CCAA and an Initial Order was signed, for reasons to follow. These are my reasons.

2 PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the this proceeding.

3 The PSG Entities are leading designers, developers and manufacturers of high performance sports equipment and related apparel. Historically focused on hockey, the PSG Entities expanded their business to include equipment and apparel in the baseball/softball and lacrosse markets. The hockey business operates under the BAUER, MISSION and EASTON brands; the baseball/softball business operates under the EASTON and COMBAT brands, and the lacrosse business operates under the MAVERIK and CASCADE brands.

4 The hockey and baseball/softball markets are the PSG Entities' largest business focus, generating approximately 60% and 30% of the Applicants' sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities' total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

5 The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities. The Applicants have commenced parallel proceedings in the U.S. under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court for the District of Delaware.

Employees and benefits

6 As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

7 The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America Local 967 and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

8 Under the collective bargaining agreement with the unionized employees in Blainville, Quebec, Bauer Canada maintains a simplified defined contribution pension plan registered with Retraite Quebec. Under the plan, Bauer Canada matches employee contributions up to C$0.35/per hour worked by the employee up to a maximum of 80 hours bi-weekly.

9 Bauer Canada provides a supplemental pension plan (the "Canadian SERP") for nine former executives which is not a registered pension plan and does not accept new participants. There is no funding obligation under these plans. As at May 31, 2016, the Canadian SERP had an accrued benefit obligation of approximately C$4.53 million. The PSG Entities do not intend to continue paying the Canadian SERP obligations during the CCAA proceedings.

10 The PSG Entities provide a post-retirement life insurance plan to most Canadian employees. The life insurance plan is not funded and as at May 31, 2016 had an accrued benefit obligation of C$614,000. In February, 2016, the PSG Entities closed a distribution facility in Mississauga, Ontario. Approximately 51 employees belonging to the Glass, Molders, Pottery, Plastics and Allied Workers International Union were terminated in January and February 2016 because of the closure.

11 Due to the consolidation of the COMBAT operations with the EASTON operations, the PSG Entities terminated the employment of an additional 85 individuals between July and October, 2016, of whom approximately 77% were employees located in Canada and 23% were employees located in the U.S. The workforce reductions, primarily related to consolidation of the COMBAT operations, have resulted in the number of the PSG Entities' employees falling by approximately 15% since the end of fiscal 2016 and approximately 19% since the end of calendar 2015.

Assets and liabilities

12 As at September 30, 2016, the Applicants had assets with a book value of approximately $594 million and liabilities with a book value of approximately $608 million.

13 The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses. The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines. In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.

14 The major liabilities of the PSG Entities are obligations under:

(a) a term loan facility (the "Term Loan Facility"): PSG is the borrower with a syndicate of lenders (the "Term Lenders") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "Term Loan Agreement"). As at October 28, 2016, approximately $330.5 million plus $1.4 million accrued interest was outstanding under the Term Loan Facility.

(b) an Asset-based revolving facility (the "ABL Facility" and together with the Term Loan Facility, the "Facilities"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "ABL Lenders" and, together with the Term Lenders, the "Secured Lenders") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "ABL Agreement"). As at October 28, 2016, approximately $159 million was outstanding under the ABL Facility.

Problems leading to the CCAA filing

15 A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

a. Several key customers, retailers of sports equipment and apparel and sporting goods stores, abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable and reduced purchase orders.

b. A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines, being the Bauer Business and the Easton Business, has had an extremely negative effect on the PSG Entities' overall profitability.

c. The PSG Entities' financial results have been negatively affected by currency fluctuations.

d. The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.

e. The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

Anticipated stalking horse bid sales process

16 The Applicants, in response to the myriad of issues leading to the current liquidity crisis and in particular in response to their failure to timely file the reporting materials, engaged in a thorough review of the PSG Entities' strategic alternatives. The PSG Entities concluded that negotiating a going-concern sale of their businesses was the optimal course to maximize value, and structured a process by which do so.

17 As part of that process, the PSG Entities have entered into an asset purchase agreement (the "Stalking Horse Agreement") for the sale of substantially all of their assets to a group of investors led by Sagard Capital Partners, L.P., the holder of approximately 17% of the shares of PSG, and Fairfax Financial Holdings Limited for a purchase price of $575 million. The Stalking Horse Agreement contemplates that the Applicants will continue as a going concern under new ownership, their secured debt will be fully repaid and payment of trade creditors. It further contemplates the preservation of a significant number of jobs in Canada and the U.S. The bid contemplated under the Stalking Horse Agreement will, subject to Court approval, serve as the stalking horse bid in a CCAA/Chapter 11 sales process to take place over the next 60 days of the proceedings and which is expected to conclude early in 2017. Approval of the sales process will be sought on the come-back motion later in November.

Analysis

18 I am quite satisfied that each of the PSG Entities are debtor companies within the meaning of the CCAA and that they are insolvent with liabilities individually and as a whole over the threshold of $5 million.

19 There are two DIP loans for which approval is sought, being an ABL DIP and a Term Loan DIP, as follows:

> (a) A group comprised of members of the ABL Lenders ("ABL DIP Lenders"), will provide an operating loan facility of $200 million (the "ABL DIP Facility") pursuant to an ABL DIP Credit Agreement (the "ABL DIP Credit Agreement"). The advances are expected to be made progressively and on an as-needed basis. All receipts of the Applicants will be applied to progressively replace the existing indebtedness under the ABL Credit Agreement, which is in the amount of $160 million. Accordingly, the facility provided by the ABL DIP Lenders is estimated provide up an additional $25 million of liquidity as compared to what is currently provided under the ABL Facility.
>
> (b) The Sagard Group (the "Term Loan DIP Lenders" and together with the ABL DIP Lenders, the "DIP Lenders"), will provide a term loan facility (the "Term Loan DIP Facility" and together with the ABL DIP Facility, the "DIP Facilities") in the amount of $361.3 million pursuant to a Term Loan DIP Credit Agreement (the "Term Loan DIP Credit Agreement" and together with the ABL DIP Credit Agreement, the "DIP Agreements"). The advances are expected to be made progressively as the funds are needed. The Term Loan DIP Facility will be applied to refinance the existing indebtedness under the Term Loan Credit Agreement, in the amount of approximately $331.3 million, to finance operations and to pay expenditures pertaining to the restructuring process. Accordingly, the Term Loan DIP Facility will provide approximately $30 million in new liquidity to fund ongoing operating and capital expenses during the restructuring proceedings.

20 The DIP Facilities were negotiated after the Applicants retained Centerview Partners LLC to assist in putting the required interim financing in place. The Applicants, with the assistance of Centerview, determined that obtaining interim financing from a third party would be extremely challenging, unless such facility was provided either junior to the ABL Facility and Term Loan Facility, on an unsecured basis, or paired with a refinancing of the existing indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

21 I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP Facility. The Monitor [1] is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

22 Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

23 The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

> (a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;
>
> (b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;
>
> (c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;
>
> (d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 — all of whom are entitled to be paid for their services under U.S. bankruptcy law; and
>
> (e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

24 There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. See *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 43.

25 I am satisfied that an order should be made permitting the payments as requested. Any interruption of supply or service by the critical suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern. Certain of the critical suppliers may not be able to continue to operate if not paid for pre-filing goods and services. The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services. There is a substantial risk that certain of the critical suppliers, including foreign suppliers, will interrupt supply if the pre-filing arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns. Payment of amounts in excess of $10,000 will require Monitor approval.

26 The PSG Entities seek approval to continue the use of their current Transfer Pricing Model to operate their business in the ordinary course. The Transfer Pricing Model is intended to ensure that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business. The Applicants say that to ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model. No doubt section 11 of the CCAA gives the Court jurisdiction to make the order sought and to continue the business as it has been operated prior to the CCAA and in this case it is desirable in light of the intention to sell the business as a going concern. I approve the continued use of the Transfer Pricing Model. In doing so, I am not to be taken as making any judgment as to the validity of the Transfer Pricing Model, i.e. whether it would pass muster with the relevant taxing authorities.

27 The PSG Entities seek an administrative charge in the amount of $7.5 million, and it is supported by the Monitor. The charge is to cover the fees and disbursements of the Monitor, U.S. and Canadian counsel to the Monitor, U.S. and Canadian counsel to the Applicants and counsel to the directors of the Applicants, and as defined in the APL DIP Agreement, and is to cover the fees and disbursements incurred both before and after the making of the Initial Order.

28 I realize that the model order provides for an administration charge to protect fees and disbursements incurred both before and after the order is made by of the Monitor, counsel to the Monitor and the Applicant's counsel. In this case, I raised a concern that past fees for a broad number of lawyers, including defence class action counsel in the U.S., could be paid from cash whereas it appeared from the material that there may be unpaid severance or other payments owing to employees in Canada that would not be paid.

29 Normally it is not an issue what an administration charge covers, with professionals taking care when advising companies in financial trouble and contemplating CCAA proceedings that they remain current with their billings. The CCAA does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, but the language would appear to imply that it is to cover only current fees and disbursement. Section 11.52(1) provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

30 Regarding (a), a Monitor is appointed in the Initial Order and its duties are performed during the CCAA proceeding, not before. Regarding (b), the language "for the purpose of proceedings under this Act" would appear to relate to proceedings, and not some other work such as a lawyer for the debtor defending litigation against the debtor. The same can be said regarding the language in (c) "effective participation in proceedings under this Act".

31 In response to my concerns about the Canadian employees being protected against past unpaid obligations, I was advised that it is the intention of the applicants to bring a motion on the come-back hearing to permit all past outstanding amounts to be paid to the Canadian employees. No counsel appearing for any of the other parties voiced any concern with that. In the circumstances I permitted the administration charge to be granted. If no such motion is brought on the come-back hearing or it is not granted, the administration charge should be revisited.

32 It appears clear, however, that an administration charge under section 11.52(1) can only be granted to cover work done in connection with a CCAA proceeding. Thus it is not possible for such a charge to protect fees of lawyers in other jurisdictions who may be engaged by the debtor either in foreign insolvency proceedings or other litigation. In the circumstances, the administration charge in this case shall not be used to cover the fees and disbursements of any of the applicants' lawyers in the U.S. chapter 11 proceedings or in any class action or other suit brought against any of the applicants. It may be that in the future, thought should be given as to whether it is appropriate at all to provide for an administration charge to cover pre-filing expenses.

33 The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of that money will be used to fund the deficit expected to be experienced by the US PSG Entities during the same period. At this time of year, due to hockey sales, the Canadian PSG Entities fund the US PSG Entities. The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.

34 Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 to make such order as the court considers appropriate. See *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) and *Fraser Papers Inc., Re* [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], 2009 CanLII 32698.

35 In this case, I also raised the issue about cash leaving Canada during the CCAA process while unpaid amounts owing to employees in Canada were outstanding. Apart from the comfort of the anticipated motion on the come-back hearing to pay these unpaid amounts, the Monitor is of the view that the intercompany charge is the best way to protect the Canadian creditors. The Monitor states that while it is difficult at this juncture to ascertain whether the intercompany charge is sufficient to protect the interest of each individual estate, considering that the Stalking Horse bid contemplates that there should be substantial funds available after the payment of the secured creditors' claims, the intercompany charge appears to offer some measure of protection to the individual estates. In view of the foregoing, the Proposed Monitor considers that the intercompany charge is reasonable in the circumstances. I approve the intercompany charge.

36 A standard directors' charge for $7.5 million is supported by the Monitor and it is approved, as is the request that Brian J. Fox of Alvarez & Marsal North America, LLC be appointed as the Chief Restructuring Officer of the PSG Entities. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO.

Order accordingly.

Footnotes

1 Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst & Young in this decision as the Monitor.

TAB 18

2011 NBQB 211
New Brunswick Court of Queen's Bench

Tepper Holdings Inc., Re

2011 CarswellNB 417, 2011 NBQB 211, 205 A.C.W.S. (3d) 624, 376 N.B.R. (2d) 64, 80 C.B.R. (5th) 339, 970 A.P.R. 64

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 the Applicants, Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd. and Agri-Tepper & Sons Ltd.

Lucie A. LaVigne J.

Heard: July 18, 2011
Oral reasons: July 18, 2011
Written reasons: July 22, 2011
Docket: E/M/4/2011

Counsel: R. Gary Faloon, Q.C., James L. Mockler for Applicants
Josh J.B. McElman, Rebecca M. Atkinson for Bank of Montreal
Stephen J. Hutchison for Monitor, Paul A. Stehelin of A.C. Poirier & Associates Inc.
Ronald J. LeBlanc, Q.C., Renée Cormier for National Bank of Canada

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.iv Length of stay
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.2 Initial application
XIX.2.h Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Applicant companies were in business of farming — Companies were involved in legal proceedings — Directing mind of companies was incarcerated in foreign country — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditors for three weeks — Monitor was appointed and recommended extension of stay and variation of order — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted — Stay was extended for 2.5 months — Initial order was varied — Extension order was appropriate — Requirements of s. 11(6) of CCAA were satisfied — Companies acted in good faith and with due diligence — Extension sought was not unduly long — Creditors would not be unduly prejudiced by stay — Companies were continuing as going concerns — There was no indication secured creditors' security was being dissipated — There was real prospect of successful restructuring — Companies required additional time to compile information, assess situation and file plan of arrangement — Extension of stay allowed companies to continue operations, fulfil obligation to customers, and employ people.

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

Applicant companies were in business of farming — Companies were involved in legal proceedings — Directing mind of companies was incarcerated in foreign country — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditors for three weeks — Monitor was appointed and recommended extension of stay and variation of order — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted — Stay was extended for 2.5 months — Initial order was varied — There was no standard length of time for extension of stay period — Monitor recommended 2.5 month extension — Monitor was neutral party — It was appropriate to extend stay period for 2.5 months — Companies needed stay to continue farming and harvest their crops for benefit of all stakeholders.

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

Variation of initial order — Applicant companies were in business of farming — Companies were involved in legal proceedings — Directing mind of companies was incarcerated in foreign country — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditors for three weeks — Monitor was appointed and recommended extension of stay and variation of order — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted — Stay was extended for 2.5 months — Initial order was varied — Administration charge was excessive and was reduced by half — Retainers for monitor and counsel were reduced, as amount set out in initial order was unreasonable and unnecessary — Debtor in possession (DIP) financing was limited to amount needed to meet short-term needs until harvest — Initial order was varied such that companies could not dispose of redundant assets during stay — Due to lack of evidence of sale or factors to allow sale, disposition of assets was not authorized during stay.

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

Debtor in possession financing — Applicant companies were in business of farming — Companies were involved in legal proceedings — Directing mind of companies was incarcerated in foreign country — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditors for three weeks — Monitor was appointed — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted — Stay was extended for 2.5 months — Initial order was varied to reduce amount of debtor in possession (DIP) financing to amount needed to meet short-term needs — No creditor was prejudiced by change as no DIP financing was in place — DIP financing was fair, reasonable and appropriate — DIP financing was necessary to assist companies in restructuring operations and coming up with plan of arrangement during stay, while continuing as going concern — Companies had reasonable prospect of plan of arrangement and viable basis for restructuring — Companies had urgent need for some interim financing.

Table of Authorities

Cases considered by *Lucie A. LaVigne J.*:

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — considered

Ravelston Corp., Re (2005), 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]) — referred to

Rio Nevada Energy Inc., Re (2000), 2000 CarswellAlta 1584, 283 A.R. 146 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — pursuant to

s. 11(6) — referred to

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

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

s. 11.51(3) [en. 2005, c. 47, s. 128] — considered

s. 13 — referred to

s. 14(2) — referred to

s. 36(3) — referred to

Farm Debt Mediation Act, S.C. 1997, c. 21

Generally — referred to

MOTION by applicant companies for extension of initial order staying creditors at comeback hearing; MOTION by creditor bank for termination of initial order, or for variation of initial order at comeback hearing.

***Lucie A. LaVigne J.*, (orally):**

I. Introduction

1 On June 27, 2011, this Court issued an *ex parte* Initial Order ("Initial Order") pursuant to section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*" or "*Act*") granting a Stay Period, until and including July 18, 2011, to the applicant companies, namely Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd., and Agri-Tepper & Sons Ltd. ("Companies"). Mr. Paul A. Stehelin of A.C. Poirier & Associates Inc. was appointed monitor ("Monitor"). The Initial Order provided that a comeback hearing would be held on July 18, 2011, to determine whether the Order should be supplemented or otherwise varied and the Stay Period extended or terminated.

2 The Companies filed a motion asking the Court to extend the Initial Order until October 18, 2011 ("Extension Motion").

3 The Bank of Montreal ("BMO") filed a motion seeking an order terminating the Initial Order. In the alternative, BMO suggests that the Stay Period not be extended beyond August 31, 2011, and it seeks a variation of several provisions of the Initial Order, namely the provisions dealing with the disposition of property by the Companies, the interim financing, the Administration Charge, the retainers, and the Director's Charge ("Variation Motion").

4 The Monitor filed with the Court his first report dated July 13, 2011 ("Report"). He recommends an extension of the Stay Period until September 30, 2011, but agrees that several provisions of the Initial Order should be varied.

5 All creditors were notified of these proceedings and other than the BMO, the only creditor who attended the hearing of the motions was the National Bank of Canada and it supports the position of BMO.

6 Pursuant to the July 18th hearing, the Court reserved its decision on the Extension Motion and the Variation Motion, but granted an Order extending the Stay Period until July 29, 2011, and varying other provisions of the Initial Order while considering these motions.

II. Background

7 The Companies are closely held companies engaged in the business of farming in northwestern New Brunswick in a small rural community called Drummond. The Companies are controlled by Hendrik Tepper and his father Berend Tepper. The Tepper family is from the Netherlands and the Teppers have been farming since the 1960's. In 1980, Berend Tepper relocated his family to Drummond and joined other Dutch farmers in northwestern New Brunswick. The Companies have grown an average of 1,400 acres of potatoes and 2,000 acres of grain per year. They own approximately 1,700 cleared acres of land, 400 to 500 acres of woodlot and pasture land, as well as machinery, equipment, and inventory. They have developed a good relationship with McCain Foods Limited. and have multiple contracts with them. They also sell to foreign markets such as Cuba, Lebanon, Turkey, and Russia.

8 From May 2010 to May 2011, the Companies employed 18 persons on average, reaching a maximum of 40 employees during harvesting season in the fall of 2010. The total salaries paid to the employees by the Companies during this period was approximately $495,000.

9 Berend Tepper had retired from managing the operations of the Companies approximately five years ago, and since then, his son Hendrik had been responsible for all aspects of the day-to-day management of the Companies and for resolving the problems of the Companies. The Companies are involved in proceedings, some provincial, some foreign, concerning, amongst others, the collection of receivables, the pursuance of insurance claims, and the enforcement of contracts. Hendrik Tepper was the person who handled these matters and therefore he has the personal knowledge needed to resolve a number of these disputes. He was the chief operations officer and primary salesman for the Companies. Without him it is very difficult to settle or otherwise resolve the outstanding litigation.

10 Unfortunately, Hendrik Tepper has been incarcerated in Lebanon since March 23, 2011 as a result of being arrested while attempting to clear Lebanese customs, under an Interpol warrant on behalf of the government of Algeria in relation to potatoes shipped to Algeria by one of the Companies in 2007. Algerian officials allege that Mr. Tepper was part of a scheme to falsify documents concerning the quality of the potatoes arriving in Algeria and they want him extradited to Algeria. This, of course, has caused a crisis in the Tepper family and has put tremendous pressure on the Companies. Efforts are continuing on a daily basis to return Hendrik Tepper home soon.

11 Berend Tepper has come out of retirement and is back to managing the Companies. The 2011 crop is in the ground, it is healthy and the Companies estimate that the realization at harvest will be about $2.2 million.

III. The Companies' Financial Situation

12 The Monitor, with the assistance of the Companies and their external accountants, has prepared an unaudited balance sheet of the Companies on a consolidated basis. The balance sheet gives us an overall view of the potential assets and potential liabilities of the Companies on an accounting basis. It shows assets of $7.7 million and liabilities of $11.2 million. It is not an estimate of realizable or fair market values for the assets. The Monitor has received preliminary estimates of values for the land, the equipment, and the machinery. These have not been placed in the public domain but they have been shared with BMO and the Monitor states that the values are significantly greater than the book value.

13 The Companies' largest creditor is BMO who is owed in excess of $8 million. It seems that discussions between BMO and the Companies had been open and frequent in the period leading up to the filing of the *CCAA* proceedings. Berend Tepper

and BMO have been working together closely since Hendrik Tepper's incarceration. BMO encouraged the Companies to plant potatoes this year even if Hendrik Tepper was absent.

14 On July 11, 2011, BMO and its advisor PriceWaterhouseCoopers, the Monitor, Berend Tepper, and the Companies' external accountant, Denis Ouellette, met to discuss various issues and share information. I was not left with the impression that BMO has lost confidence in the Companies' management.

15 BMO informed the Court that they have no immediate plan to enforce its security. They are understanding of the predicament that the Tepper family and the Companies are in. It supported the Companies' efforts thus far and was optimistic that they could get through these difficult times. It is now worried that if the *CCAA* process burdens the Companies with the extra debts and charges as requested by the Companies and provided for in the Initial Order, it will cause the demise of the Companies.

16 BMO alleges that the Companies cannot continue to operate in the long term because they have insufficient revenue to meet their obligations. It submits that if the relief sought is granted, BMO's security will be eroded and its ability to recover its losses will be further jeopardized.

17 Since the Initial Order, part of the 2010 crop has been sold for a total of $446,400. The cash flow statements show a cash requirement of approximately $166,000 by the end of July with a cash surplus of approximately $267,000 by the end of September 2011. This included estimates for administrative expenses of $260,000 to the end of September, but does not include interest on DIP financing.

18 The $2 million operating line of credit with BMO is fully advanced. BMO has offered to advance the DIP financing should this Court extend the Initial Order and provide for DIP financing.

19 Section 6 of the *CCAA* requires that for a plan to be successful, it must be approved by a majority in number representing two thirds in value of the creditors, or the class of creditors. BMO holds approximately 82 % of the secured claims and therefore the Companies cannot present a successful plan without BMO's support.

20 BMO has made it very clear that the possibility that they will approve any Plan of Compromise and Arrangement is close to nil unless such plan provides for the complete payment of BMO's advances.

IV. The Monitor

21 A Monitor is in place, which, as noted in *Rio Nevada Energy Inc., Re* (Alta. Q.B.), should provide comfort to the creditors that assets are not being dissipated and current operations are being supervised.

22 The Monitor in the present case recommends the extension of the stay until September 30, 2011 and is of the opinion that the Companies have been acting in good faith and with due diligence, and that an extension of the stay is appropriate.

23 At page 4 of his report, the Monitor states that: "...the Companies, their accountant, and counsel have provided the Monitor with their full cooperation and unrestricted access to the Companies' books and records and other information to permit the Monitor to fulfill its responsibilities".

24 At page 9, he adds:

> a) The companies have and continue to act in good faith and have been forthcoming with information, books, and records, and unrestricted access to their premises.
>
> b) The monitor is satisfied that the companies will be forthcoming to both the monitor and the companies' major creditor with respect to any significant events which might adversely affect the various stakeholders in the these proceedings.

c) Time is needed for the companies with the assistance of the monitor, their counsel, and the Court to try to deal with the foreign issues and contingent liabilities and to permit a plan to be presented which maximizes the recovery to all stakeholders.

d) An extension will permit an orderly sale of the existing inventory and the harvesting of the 2011 crops.

e) The cash flow statement reflects that the companies will be able to finance operations from cash flow with a requirement for debtor and possession financing in the approximate amount of $210,000 before servicing existing debt. The projections indicate that the DIP financing will be repaid by the end of September 2011.

V. First Issue: Should the Court Grant an Extension Order?

(1) Burden of Proof

25 The onus is on the Companies to justify the continued existence of the provisions of the Initial Order. The Initial Order was granted without notice to persons who may be affected and without any proper debate, therefore the Court will always be willing to adjust, amend, vary, or delete any term or terminate such an order if that is the appropriate thing to do: see *Ravelston Corp., Re*, 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]).

(2) Purpose of the CCAA

26 When determining whether a stay ought to be extended it is important to consider the overall purpose of the *CCAA*.

27 As was stated by Professor Janis Sarra in the first paragraph of her book entitled *Rescue! The Companies' Creditors Arrangement Act* (2007):

> [...] The statute's full title, *An Act to Facilitate Compromises and Arrangements between Companies and Their Creditors*, precisely describes its purpose; providing a court-supervised process to facilitate the negotiation of compromises and arrangements where companies are experiencing financial distress, in order to allow them to devise a survival strategy that is acceptable to their creditors.

28 Justice Blair of the Ontario Court of Appeal discussed the purpose of the *CCAA* in *Stelco Inc., Re* (Ont. C.A.), at paragraph 36, where he states:

> 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 creditor, shareholders, employees and other stakeholders.

29 In *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]), McFarlane J. at paragraph 27, quoted with approval the following statements made by the trial judge, Justice Brenner:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency, which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company.

(4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

30 In my view, the above quoted statement sums up the principles to consider in applications under the *CCAA*.

(3) Applicable Sections of the CCAA

31 Subsection 11.02(2) of the *CCAA* provides as follows:

(2) A court may, on an application in respect of a 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.

32 As stated, the burden of proof on an application to extend a stay rests on the debtor company.

33 To have a stay extended past the period of the initial stay, the company must meet the test set out in subsection 11.02(3) of the *CCAA*. It states that:

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.

34 When deciding whether to terminate or extend a stay, a court must balance the interests of all affected parties, including secured and unsecured creditors, preferred creditors, contractors and suppliers, employees, shareholders, and the public generally. I must consider the Companies and all the interests its demise would affect. I must consider the interests of the shareholders who risk losing their investments and the employees of this small community who risk losing their jobs.

(4) Farm Debt Mediation Program

35 BMO has stated that it will not support a plan under the *CCAA* proceedings. It doubts that the *CCAA* approach to the insolvency is the appropriate one in the circumstances. It has suggested and will support a restructuring of the Companies under the *Farm Debt Mediation Act*, S.C. 1997, c. 21 ("*FDMA*"), which provides free mediation services by the Federal Department of Agriculture and Agri-Food Canada, while the Companies can still have the benefit of a stay of proceedings and save on professional fees.

36 The Monitor feels that the *FDMA* process does not have all of the necessary tools. The Companies allege that the *FDMA* process does not lend itself to the present circumstances. It is argued that although a mediator is involved in this process with the objective of arriving at a settlement, there is no one to provide the type of professional service that the Monitor provides in guiding the debtor company through the *CCAA* process. The Companies chose to apply for a stay period under the *CCAA* hoping to gain the benefit of professional advice on how best to restructure this business. This professional advice is made possible under the *CCAA* with the interim financing and the Administrator's Charge in aid.

37 I have no evidence that the relief sought under the *CCAA* is more drastic to all constituencies than a process under the *FDMA* would be or that it is less beneficial.

(5) Ending the Protection for Two of the Companies

38 BMO has expressed concern as to whether the purpose of the *CCAA* in this matter is to fund litigation against some of the Companies. BMO suggests that the Court should at the very least consider terminating *CCAA* protection for two of the Companies that do not own any assets and are potential liabilities as there are lawsuits or claims pending against them. BMO argues that these companies will drag the others down because of the costs associated with the litigation. The Monitor is alive to these issues but is concerned that such a move at this time may be premature; he needs more time to investigate before deciding whether these companies should be allowed to continue. It should be easier to assure that undue time and costs are not spent on these litigations if those companies are left under the protection of the *CCAA* while the Monitor obtains the information to make a proper decision.

(6) Conclusion Concerning the Extension Order

39 The extension sought is not unduly long. As with the Initial Order, the extension of the stay would only be a temporary suspension of creditors' rights. There is no evidence that the assets are being liquidated. The Companies have continued their farming business and are continuing as going concerns.

40 There is no indication that the secured creditors' security is being dissipated. Notwithstanding BMO's assertion that it will not support a plan under the *CCAA* proceedings, there is hope that the Companies can restructure and refinance and come up with a plan that could eventually be accepted by BMO. They have been working closely thus far.

41 The extension is supported by the independent Monitor and the shareholders. I cannot conclude at this point in time, that the plan is doomed to fail or that the *CCAA* proceeding is being used to delay inevitable liquidation. I am satisfied that progress is being made, however on the evidence, I find that the Companies require additional time to compile information, assess their situation, and file their Plan of Arrangement.

42 The Companies made an application under the *CCAA* for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the *CCAA*. The legislative remedies within the *CCAA* for a stay must be understood to acknowledge the hope that the eventual, successful reorganization of a debtor company will benefit the different stakeholders and society in general: see *Stelco Inc., Re*.

43 The assets of the Companies have a greater value as part of an integrated system than individually.

44 The extension of the stay and the granting of certain charges will allow the Companies to continue operations and harvest its potato crops and fulfill their obligation to customers.

45 The Companies directly employ from seven to 40 people at different times throughout the year and thereby make a significant contribution to the local and regional economy.

46 The Companies have to find a way to restructure their indebtedness and the *CCAA* can be used to do this practically and effectively. The Companies need to be able to focus and concentrate its efforts on negotiating a compromise or arrangement.

47 It is essential that the Companies be afforded a respite from its creditors. The creditors must be held at bay while the Companies attempt to carry on as a going concern and to negotiate an acceptable restructuring arrangement with the creditors.

48 I do not share BMO's position that the Companies are doomed. I feel that there is a real prospect of a successful restructuring under the *CCAA*. This is an attempt at a legitimate reorganization. I do not feel that the continuance of the *CCAA* proceedings is simply delaying the inevitable.

49 I do not find that the position of the objecting creditors will be unduly prejudiced by the stay. The value of the harvest and therefore the Companies' overall value increases the closer we get to harvest time.

50 The Court finds that the requirements of subsection 11(6) of the *CCAA* have been satisfied. The extension of the stay is supported by the overriding purpose of the *CCAA*, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim.

51 The Court is satisfied that the circumstances are such that an extension order is appropriate. I am satisfied that the Companies have acted and continue to act in good faith and that they have acted and continue to act with due diligence.

52 I conclude that this is a proper case to exercise the Court's discretion to grant an extension order.

(7) Length of the Extension

53 BMO argues that given the nature of the operations, a stay until the end of August should be sufficient to allow the Companies to reorganize and come up with a viable plan, if possible. The Companies argue that the stay should be long enough to allow the Companies to go through the harvesting season without having to come back to Court. They are suggesting October 18th. The Monitor recommends September 30th.

54 There is no standard length of time provided in the *CCAA* for an extension of the Stay Period, and therefore it depends on the facts of the case. David Baird, Q.C., in his text, Baird's Practical Guide to the Companies' Creditors Arrangement Act (Toronto: Thompson Reuters, 2009) at page 155 summarizes the factors to be considered as follows:

> a) The extension period should be long enough to permit reasonable progress to be made in the preparation and negotiation of the plan of arrangement.
>
> b) The extension period should be short enough to keep the pressure on the debtor company and prevent complacency.
>
> c) Each application for an extension involves the expenditure of significant time on the part of the debtor company's management and advisors, which might be spent more productively in developing the plan, particularly when the management team is small.
>
> d) With respect to industrial and commercial concerns as distinguished from "bricks and mortar" corporations, it is important to maintain the goodwill attributable to employee experience and customer and supplier loyalty, which may erode very quickly with uncertainty.
>
> e) In British Columbia, the standard extension order is for something considerably longer than 30 to 60 days. While each business will have its own financing possibilities, generally large loans, significant equity injections or large sales required to rescue a corporation in debt for more than $5 million, will take time to develop to the point of agreement.

55 The Companies need to continue farming and bring their crops to harvest in the fall for the benefit of all the stakeholders. The purpose of the stay is to give them time to reorganize and do what needs to be done. They need to come up with a plan and try to sell it to their creditors. This takes time. I feel that August 31st is not realistic, and to require the Companies to come up with an acceptable plan by that date would be setting them up for failure.

56 The Monitor is an officer of the Court. He is to remain neutral in this process and if in a month's time he realizes that there is no way to put a viable plan together, then I expect him to forthwith advise the parties and the Court accordingly. In the circumstances, I am satisfied that it is appropriate to extend the Stay Period to September 30, 2011 at 11:59 p.m.

57 Hopefully, this is long enough to allow the parties to find a solution but short enough to prevent complacency so that the various creditors rights and remedies not be sacrificed any longer than necessary.

VI. Second Issue: Should any Other Provision of the Initial Order be Amended or Varied?

(1) The Administration Charge

58 The Court may order an Administration Charge for fees and expenses related to the *CCAA* process pursuant to section 11.52.

59 The appointment of a monitor is mandatory when the courts grant *CCAA* relief. If this *Act* is to have any effect, then there has to be some assurance and money available to pay the professionals that will be working on the restructuring, that is the Monitor, his counsel as well as the Companies' counsel. The *CCAA* proceeding is for the benefit of all stakeholders, including all creditors.

60 The goal of a *CCAA* Stay Period is to provide the Companies with access to the time and expertise needed to develop both a plan of arrangement and to restructure its businesses. This is not possible if those professionals, including the Monitor, are not paid proper fees.

61 The Initial Order provided for an Administration Charge not to exceed $500,000. The Companies are suggesting that it continues at that amount. BMO is suggesting $150,000 while the Monitor in his report felt that it could be reduced somewhere between $200,000 and $300,000. The original projections included payments of $130,000 for legal fees, $85,000 for the Monitor's fees, and $45,000 for accounting fees to the end of September. The Monitor has now had an opportunity to assess the time required and feels that the Monitor's fees and the accounting fees should be no more than $90,000 to the end of September provided no additional proceedings are initiated.

62 I find that an amount not exceeding $250,000 would be appropriate, fair, and reasonable for the Administration Charge.

(2) The Retainer

63 The Initial Order provided retainers for the Monitor, counsel to the Monitor, and counsel to the Companies of $200,000 collectively. These professionals are already protected under the Administration Charge. BMO suggests $30,000 each as a retainer for a total amount of $90,000. The Monitor agrees with this suggestion and would make accounts payable within 15 days instead of 30 days as it now stands.

64 On the evidence now before the Court, I find the $200,000 unreasonable and unnecessary. I find that a retainer of $30,000 each for a total amount of $90,000 is warranted and I so order with accounts made payable within 15 days.

(3) The DIP Lender's Charge

65 Subsection 11.2(1) of the *Act* deals with interim financing. DIP financing, as we know, alters the existing priorities in the sense of placing encumbrances ahead of those presently in existence, and it may therefore prejudice BMO's security. It follows that the DIP Lender's Charge should be fair, reasonable, and appropriate in the circumstances.

66 The Companies' expected cash flows without an order being made exceed existing credit facilities and presently available funds. If an order is not made, the Companies' viability as a going concern is doubtful.

67 The Initial Order provided for DIP financing to a maximum of $1 million. In retrospect, based on the Companies' cash flow statements, there was no need for such a large DIP financing. No creditor was prejudiced as no DIP financing is yet in

place. The Monitor recommends DIP financing to a maximum of $300,000 and sees no reason why BMO could not be the DIP Lender for this amount if it is so inclined.

68 It is understandable that BMO is not prepared to have their position affected by DIP financing. It suggests that the maximum amount needed is no more than $150,000. However, if the Court provides for a maximum amount of $300,000 in DIP financing, BMO is ready to advance this amount to the Companies. The Companies have obtained a proposal from another lender but is not opposed to BMO being the DIP Lender as long as the terms of the financing are comparable to what they have been able to secure elsewhere.

69 I am satisfied that the Companies need the special remedy of DIP financing, however I conclude that the amount presently provided for in the Initial Order is greater than what is required by the Companies having regard to their cash flow statements. The Companies' request is therefore excessive and inappropriate in the circumstances. I must balance the benefit of such financing with the potential prejudice to the existing secured creditors whose security is being eroded.

70 I am satisfied that the DIP financing is necessary to assist the Companies in restructuring their operations and coming up with a plan of arrangement during the stay. I am satisfied on the evidence before me that the Companies have a reasonable prospect of a plan of arrangement and a viable basis for restructuring, and an urgent need for some interim financing; however I will restrict the amount to what is necessary to meet the short-term needs until harvest, at which time revenues will be realized. I therefore authorize a DIP Lender's Charge in an amount not to exceed $300,000 with BMO as the DIP Lender.

71 I am satisfied that the quantum of the Administration Charge and the DIP Lender's Charge fall well within the range of what is usually ordered considering the magnitude and complexity of the Companies' operations, and the debts to be incorporated into a plan of arrangement.

(4) The Director's Charge

72 Section 11.51 of the *CCAA* deals with the indemnification of Directors and the Director's Charge. The Initial Order provided a Director's Charge not to exceed $500,000 and stipulated that this Charge would only apply if the Directors' did not have the benefit of coverage pursuant to an insurance policy. Subsection 11.52(3) of the *CCAA* prohibits the Court from making such an order if it is convinced that the Companies could obtain adequate indemnification insurance.

73 The Directors of the Companies are Berend and Hendrik Tepper. I realize that certain liabilities may be imposed upon the directors during the stay. The Companies are closely held family entities and BMO submits that the directors should be required to accept the risks that come with the position because they are the main decision makers. The directors have not applied for insurance coverage. There is no evidence to show that the companies cannot obtain adequate indemnification insurance for their directors or officers at a reasonable cost.

74 The Director's Charge will not be granted at this time. The Directors are to explore the possibility of getting insurance coverage and may reapply to the Court at a later time for this charge if absolutely necessary.

(5) The Disposition of Property

75 If the Companies want to sell or otherwise dispose of assets outside of the ordinary course of business, they must obtain authorization from the Court. The Initial Order provided that the Companies could dispose of redundant or non-material assets not exceeding $150,000 in any one transaction or $500,000 in the aggregate. They presently have two pieces of equipment that they would like to sell, namely a bailer and a combine. It is estimated that each is worth approximately $50,000. It would seem that there is a buyer for the bailer which has become redundant. It is expected that this sale could generate revenues of $50,000 and the Companies are suggesting that these proceeds be deposited in the general accounts and it would therefore increase the cash flow of that amount. BMO does not agree; it argues that the sale of these equipments will erode their security. The Monitor suggests that if a buyer is found for one or the other piece of equipment before the end of September, the Companies should be allowed to sell this equipment for which they no longer have any utility, subject to the consent of BMO and provided that the funds be kept in trust.

76 In deciding whether to grant an authorization to dispose of an asset, the Court must consider the factors set out in subsection 36(3) of the *CCAA*. It must consider:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

77 The Companies have not presented evidence of an actual "proposed sale or disposition" or evidence in relation to the factors including the "process", the "effects of the proposed sale or disposition on the creditors", the "market value" of the assets to be disposed, or "the extent to which the creditors were consulted".

78 In the circumstances, due to this lack of evidence, I will not authorize the disposition of assets during the stay.

(6) Variance and Allocation

79 BMO suggests that variances of more than 5 % in the cash flow not be permitted without further court approval. As we all know, any motion to the court is expensive and time consuming. One of the main objectives of the stay is to allow the Companies respite to focus their time, money and efforts on their reorganization.

80 BMO also requests that all fees, costs and expenses, at least those related to the Administration Charge, be allocated as per the different companies or tracked separately. Having heard the parties and the Monitor on this issue, I am satisfied that the better option is to leave the Monitor deal with these two issues.

VII. Conclusions and Disposition

81 The Stay Period is extended until September 30, 2011, at 11:59 p.m. or such other date or time as this Court may order.

82 The Initial Order is hereby varied and amended as follows:

- Subparagraph 9(a) of the Initial Order is amended by the deletion of the words "and to dispose of redundant or non-material assets not exceeding $150,000 in any one transaction or $500,000 in the aggregate".

- Paragraphs 16, 17 and 18 of the Initial Order are deleted in their entirety and all references to the "Director's Charge", as defined in paragraph 17 of the Initial Order, are deleted throughout the Initial Order.

- Retainers are reduced from $200,000 collectively to $90,000 collectively, being $30,000 each for the Monitor, the Monitor's counsel, and the Companies' counsel. Paragraph 25 will have to be amended to reflect this and the accounts are to be paid within fifteen (15) days of receipt.

- Paragraph 27 of the Initial Order is to be amended to reduce the Administration Charge from a maximum of $500,000 to a maximum of $250,000.

- Paragraphs 28 to 32 are to be amended to reduce the DIP Lender's Charge from a maximum of $1 million to a maximum of $300,000 and BMO will be the DIP Lender.

83 The Initial Order remains unamended other than as set out herein or as may be necessary to give effect to the terms of this Order.

84 The time period of 21 days provided in subsection 14(2) of the *CCAA* is hereby extended in relation to any appeal proceedings initiated by BMO of the Initial Order, pursuant to section 13 of the *CCAA* until July 27, 2011.

85 This order takes effect immediately and replaces the Interim Order issued in this matter on July 18, 2011.

86 With more time, new money and professional guidance the Companies have a reasonable prospect of a plan of arrangement and a viable basis for restructuring. The stay will facilitate the ongoing operation. The extension will give the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation.

87 The Companies need to continue farming and bring their crops to harvest for the benefit of all their stakeholders. The Companies' creditors will receive greater benefit from a plan of arrangement made at the end of the extended Stay Period than at this time.

88 The evidence before me is that Hendrik Tepper is the directing mind of the Companies' farming operations and brings considerable value to the Companies' operations. Hopefully, the ongoing efforts to return Mr. Tepper home will bear fruit soon.

Motions granted.

End of Document

TAB 19

Court File No.: 09-8240-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 22nd
	)	
JUSTICE HAINEY	)	DAY OF JUNE, 2017

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 EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.

ORDER

THIS MOTION, made by Tenere of Canada, Inc. (formerly Eddie Bauer of Canada, Inc.) and Yuma Customer Services Inc. (formerly Eddie Bauer Customer Services Inc.) (collectively, the "**Applicants**") for the relief set out in the Applicants' notice of motion returnable June 22, 2017, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Twenty-First Report of KSV Kofman Inc. dated June 15, 2017 (the "**Twenty-First Report**") in its capacity as monitor (the "**Monitor**") of the Applicants, the Affidavit of David Sieradzki sworn June 15, 2017 (the "**Sieradzki Affidavit**"), the Affidavit of Jay Swartz sworn June 13, 2017 (the "**Swartz Affidavit**") and the Affidavit of Paul Michell sworn June 12, 2017 (the "**Michell Affidavit**") and on hearing submissions of counsel for the Applicants and the Monitor, no one appearing for any other person on the service list although

duly served as appears from the Affidavit of Service of Jennifer Messier sworn June 15, 2017, filed.

1. **THIS COURT ORDERS** that the time for the service of the Applicants' Motion Record and the Twenty-First Report is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that the Stay Period referred to in the Initial Order of the Honourable R.S.J. Morawetz dated June 17, 2009, as amended and restated, is extended until December 31, 2017, or such later date as this Court may order.

3. **THIS COURT ORDERS** that the conduct and activities of the Monitor as set out and described in the Twenty-First Report be and are hereby approved.

4. **THIS COURT ORDERS** that the fees and disbursements of the Monitor for the period from June 1, 2009 to May 31, 2017, as detailed in the Twenty-First Report and the Sieradzki Affidavit, be and are hereby approved.

5. **THIS COURT ORDERS** that the fees and disbursements of Davies Ward Phillips & Vineberg LLP, as counsel to the Monitor for the period from June 1, 2009 to November 10, 2011, as detailed in the Swartz Affidavit, be and are hereby approved.

6. **THIS COURT ORDERS** that the fees and disbursements of Lax O'Sullivan Lisus Gottlieb LLP, as counsel to the Monitor for the period from November 11, 2011 to May 31, 2017, as detailed in the Michell Affidavit, be and are hereby approved.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUN 22 2017

PER / PAR:

Hainey J.

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 EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.

Court File No. 09-8240-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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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 2607380 ONTARIO INC.

Court File No.: CV-20-00636875-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANT
(RETURNABLE MARCH 6, 2020)

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