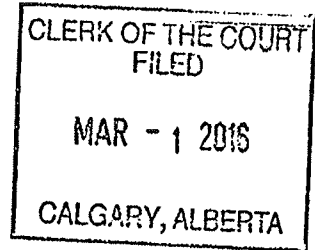


COURT FILE NUMBER: 1501-00955
COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: CALGARY



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

APPLICANTS: LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES, AND LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT INVESTMENTS LTD. (“DIL”)

DOCUMENT: **BRIEF OF THE RESPONDENTS ELVIRA KROEGER AND RANDALL KELLEN REGARDING THE MONITOR'S APPLICATION FOR A STAY OF THE BC CLASS PROCEEDING AND THE ALBERTA CLASS PROCEEDING**

ADDRESS FOR SERVICE AND CONTACT Sugden, McFee & Roos LLP
Barristers & Solicitors
INFORMATION OF PARTY #700 – 375 Water Street
FILING THIS DOCUMENT Vancouver, B.C. V6B 5C6

Telephone: 604-687-7700
Fax: 604-687-5596

File No. K-5820(1)

Attention: Errin A. Poyner

**SCHEDULED TO BE HEARD BEFORE THE HONOURABLE MADAM JUSTICE
ROMAINE AT 10:00 AM ON THURSDAY, MARCH 3, 2016**

I. INTRODUCTION

1. DIL Creditors Elvira Kroeger and Randy Kellen oppose the Monitor's application for a stay of the AB-BC Proceedings (as that term is defined at para. 2 of the Monitor's Brief).

II. FACTS

2. Mrs. Kroeger and Mr. Kellen are depositors to both the CEF and the DIL.

Affidavit of Elvira Kroeger sworn February 23, 2016
Affidavit of Randy Kellen filed May 21, 2015, para. 13

3. The Initial Order in these proceedings was made by Yamauchi J. on January 23, 2015. The Initial Order contains the following term as to a stay of proceedings "against or in respect of" the Applicants:

19. Until and including February 20, 2015, 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 Applicants 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 Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

4. On October 15, 2015, Ms. Errin Poyner wrote to counsel for both the DIL and District Creditors' Committees to express her views regarding the release provisions of the as-yet-undisclosed plans of arrangement of the Applicants. Ms. Poyner identified herself as having been:

retained by Mrs. Kroeger and Mr. Kellen to commence a class proceeding to pursue recovery on a class-wide basis on behalf of individuals residing in both British Columbia and Alberta in respect of losses suffered in relation to the ABC District's Church Extension Fund ("CEF"), and ABC District Investments Ltd ("DIL").

Affidavit of Courtney Clark sworn February 26, 2016 ("Clark Affidavit #2"), Ex. "A"

5. On October 21, 2015, Ms. Poyner wrote to counsel for the Monitor to inquire about certain issues arising in the Monitor's Reports. Again, Ms. Poyner identified herself as having been retained by Mrs. Kroeger and Mr. Kellen to commence a class proceeding to

pursue recovery on a class-wide basis on behalf of individuals residing in both British Columbia and Alberta in respect of losses suffered in relation to the CEF and DIL.

Clark Affidavit #2, Ex. "B"

6. All of the correspondence that Ms. Poyner subsequently exchanged with counsel for the Creditors' Committees and the Applicants was copied to counsel for the Monitor.

Affidavit of Courtney Clark sworn February 23, 2016 ("Clark Affidavit #1"),
Ex. "A" to "E"

7. As stated in paras. 13 and 14 of the Monitor's Brief, Ms. Poyner has had extensive consultations with the parties hereto, and their counsel. She also attended the DIL Creditors' Meeting. However, Ms. Poyner made no representations or commitments whatsoever to refrain from doing that which she had expressly advised the parties that she had been retained to do: to commence a class proceeding to pursue recovery on a class-wide basis on behalf of individuals residing in both British Columbia and Alberta in respect of losses suffered in relation to the CEF and DIL.
8. Further, at no time has Ms. Poyner sought to be retained by any Subcommittee contemplated under the terms of the Amended Amended DIL Plan to commence a Representative Action.

III. ISSUES

9. Ms. Kroeger and Mr. Kellen submit that the issue on this application is whether the Court has jurisdiction to stay the BC-AB Proceedings.

IV. ARGUMENT

A. Applicable Legislation

10. The *Companies Creditors' Arrangement Act*, RSC 1985, c-36 ("CCAA") provides:

Stays, etc. — initial application

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

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

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

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

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

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

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

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

(3) The court shall not make the order unless

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

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

Respondents' Tab 2

B. Applicable Principles of Law re Stays of Proceedings “in respect of” an Applicant

11. At para. 46 of its Brief, the Monitor cites *Re Great Basin Gold Ltd.*, 2015 BCSC 1199, for the proposition that the words “in respect of” are to be given broad interpretation.

12. In that case, the Court considered whether an action commenced the debtor’s officers and directors violated the terms of a receivership order imposing a stay of proceedings “against or in respect of” the debtor or its property.

Respondents' Tab 1

13. The Monitor does not, however, draw the disposition of the case to the Court’s attention. In *Re Great Basin*, the Court considered whether the words “in respect of” the debtor and its property (as contained in a Receivership Order) extended the stay to actions

commenced against the debtor's officers and directors in which they were alleged to be personally liable for the debtor's conduct. Despite the broad meaning of "in respect of," the Court held (at para. 55) that "while many of the factual circumstances upon which those allegations are made involve [the debtor], that does not mean that the Action is "in respect of the debtor". The Court held that the stay did not apply to the action.

C. Applicable Principles of Law Regarding the Court's Inherent Jurisdiction to Issue a Stay of Proceedings

14. In addition to s.11 of the CCAA, the Court has an inherent jurisdiction to stay proceedings where it is just and convenient to do so, to control its process or prevent an abuse of its process.

15. However, that inherent jurisdiction must only be exercised where it is appropriate to do so to support the legitimate purposes of the CCAA. As noted in *Lehndorff* (at para. 10),

the power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection.

Monitor's Tab 3

16. The Court in *Lehndorff* approved the following analysis of Blair J. in *Campeau v. Olympia & York Developments Ltd.* (1992) O.J. No. 1946 at pp. 4-7:

The Power to Stay

The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the Courts of Justice Act, R.S.O. 1990, Chap. C. 43, which provides as follows:

s. 106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported), [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the Court is specifically granted the power to stay in a particular context, by virtue of statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

...

The Power to Stay in the Context of CCAA Proceedings:

By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the CCAA is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 at p. 113 (B.C.C.A.).

Gibbs J.A. continued with this comment:

To the extent that a general principle can be extracted from the new cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period (emphasis added).

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. (In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77).

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of

its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited et al. v. Rank et al.*, (1947) O.R. 775 (H.C.) that McRuer C.J.H.C. considered that the Judicature Act then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic et al. v. Township of Bosanquet* (1974) 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co.* (1982) 29 C.P.C. 60 (H.C.) at pp. 65-6.

Montgomery J. in *Canada Systems*, supra, at pp. 65-6 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach* (Executor of Estate of George William Willis), [1972] 1 All E.R. 430, [1972] 1 W.L.R. 326 (sub nom. *Lane v. Willis; Lane v. Beach*) (C.A.).

...

In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.*) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

"The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:

'(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.'

C. Application of the Law to the Monitor's Application for a Stay of the BC-AB Proceedings

a. The Court has no Statutory Jurisdiction to extend the Stay Imposed under the Initial Order

17. Section 11 of the CCAA clearly sets out the Court's jurisdiction to stay proceedings "against or in respect of" an applicant.
18. Sections 11.02(1)(a) and (2)(a) alone provide the court with jurisdiction to stay proceedings "in respect of" an applicant, either on an initial or a subsequent order. However, the sections clearly contemplate that a proceeding "in respect of" an applicant is one brought under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act.
19. The BC-AB Proceedings are not brought "in respect of" the Applicant pursuant to the Bankruptcy and Insolvency Act, or the Winding-up and Restructuring Act. The Court had no jurisdiction upon the making of the initial order to impose a stay of proceedings in favour of third parties, and has no jurisdiction to do so now.
20. Further, as set out in *Re Great Basin, supra*, an action which simply references factual circumstances involving the debtor, but in which no orders are sought against the debtor, is not a proceeding brought "in respect of" the debtor.
21. That principle applies directly to the BC-AB Proceedings. While the factual circumstances which underpin the Proceedings reference the Applicants, no orders are sought against them. Accordingly, the Proceedings are not "in respect of" the Applicant.

22. Further, none of the defendants named in the Proceedings have sought CCAA protection. They are therefore not entitled to the stay of proceedings granted in the Initial Order.

b. The Court Should Not Exercise its Inherent Jurisdiction to Stay the BC-AB Proceedings

23. At para. 16 of its Brief, the Monitor has enumerated several reasons why the BC-AB Proceedings are “detrimental to the ability of DIL Depositors and District Depositors to advance the Representative Action”.

24. However, the advancement of the Representative Action is not essential to the “restructuring” (really, liquidation) goals of the Plan. There is no relationship between the distributive provisions of the Plan and the Representative Action. The Monitor and the Applicant present the Representative Action provisions of the Plan as a “benefit” to the DIL Depositors (which Mrs. Kroeger and Mr. Kellen do not accept), but they have failed to demonstrate how the Representative Action falls within the legitimate purposes of the CCAA.

25. In response to para. 16(a) of the Monitor’s Brief, the BC-AB Proceedings do not cause confusion for the Named Defendants as to who has legitimate carriage of the claim against them. have been (or will be) served with pleadings. They are all represented by counsel, or are lawyers themselves. Unless and until further order of the Court, the BC-AB Proceedings are extant and the Named Defendants must answer them.

26. In response to para. 16(b) of the Monitor’s Brief, the Monitor’s concern that the advancement of the BC-AB Proceedings will impede the ability of Representative Counsel to advance a Representative Action (as contemplated by the Amended Amended DIL Plan) is premised upon three assumptions: (1) that the Court will sanction the Amended Amended DIL Plan; (2) that the District Creditors will vote in favour of the District Plan; and (3) that the Court will sanction the District Plan. The plaintiffs in the BC-AB Proceedings should not be deprived of access to the Courts on the basis of a series of assumptions that may never be borne out.

27. In response to paras. 16(c) and 18(c) of the Monitor’s Brief, any potential “confusion” amongst District Depositors arising from the commencement of the BC-AB Proceedings can be avoided by straightforward, non-partisan information contained in the information materials provided by the Monitor to the District Creditors in advance of the District Creditors’ vote. Such information should include:

- (a) A copy of the pleadings filed in the BC-AB Proceedings, together with a statement that the allegations of fact advanced therein have not yet been proven in court;
- (b) Full disclosure of:
 - i. The involvement of Mr. Taman and Bishop & McKenzie LLP in the affairs of the ABC District between 1993 and the present; and
 - ii. The role of Deloitte & Touche as auditor for the ABC District from at least 1990 to 1999; and
 - iii. The corporate relationship between Deloitte & Touche and Deloitte Restructuring Inc.;
- (c) Advice that in the event that the District Depositors do not approve the District Plan, or that the Court does not sanction the District Plan, there will be no Representative Action, and:
 - i. the BC-AB Proceedings will continue as against the Named Defendants and potentially other defendants who are currently protected by the stay of proceedings granted in the Initial Order;
 - ii. that they will be notified of the certification of the BC-AB Proceedings and given an opportunity to opt out of the Proceedings if they do not wish to participate;
 - iii. that if they opt out of the BC-AB Proceedings they will be free to advance their own actions against whomever they choose to recover the unpaid part of the claim;
 - iv. that legal fees for the BC-AB Proceedings will be paid on a contingency fee basis, and are subject to review by the Court, and that the DIL and District Depositors will not be asked to pay any money up front; and
 - v. one or more District Depositors may choose to seek leave of the Courts of B.C. and/or Alberta to advance derivative claims in name of the District, including claims against Deloitte & Touche.

28. Far from creating “confusion” amongst the District Depositors about the Representative Action, providing the Depositors with information about the BC-AB Proceedings creates choice. It is difficult for the District Depositors to understand that there is an alternative to the Representative Action unless they have an opportunity to read the pleadings filed in the BC-AB Proceedings.

29. However, even if the District Depositors vote to accept the District Plan, the Sugden and Garber Plaintiffs will oppose judicial sanction of that Plan, on the same grounds that they oppose sanction of the Amended Amended DIL Plan.

30. In response to para. 16(d) of the Monitor's Brief, like para. 16(b) the concern that the Named Defendants will expend time and money defending claims that may be stayed if the DIL and District Plans are sanctioned is, again, premised upon three assumptions: (1) that the Amended Amended DIL Plan will be sanctioned; (2) That the District Depositors will vote to accept the District Plan, and (3) the Court will sanction the District Plan. Those assumptions may not be borne out, and are an insufficient reason to stay the BC-AB Proceedings.
31. In response to para. 16(e) of the Monitor's Brief, there is a real prejudice arising from the delay that will be created as a result of a stay of the BC-AB Proceedings. The District and DIL Depositors are largely elderly people on fixed incomes. Their investments in the DIL and CEF represent their life savings and they depend on them for their financial support, including fees for assisted and complex care living facilities. They are not in a position to wait indefinitely for the return of their funds while the Monitor and the Applicants seek creditor approval and judicial sanction of a Representative Action that does not fall within the scope and purpose of the CCAA. The BC-AB Proceedings should be permitted to advance without delay.
32. In response to para. 16(f) of the Monitor's Brief, the only evidence as to whether any DIL Depositor has opted out of the Representative Action is contained in the Confidential Supplement to the Monitor's 15th Report, which has not been disclosed to Mrs. Kroeger and Mr. Kellen. In any event, evidence of any such opt-outs would only be evidence that the Depositors in question had opted out of the Representative Action (for any number of religious, secular, personal or financial reasons), and not that they did not wish to be part of a class certified under the BC or Alberta *Class Proceedings Act*. Similarly, evidence of any opt-ins to the Representative Action would only be evidence that the Depositors in question had opted in to the Representative Action in the absence of any other options.
33. At paras. 29 – 32 of its Brief, the Monitor cites a number of decisions (*Re Tamerlane Ventures Inc.*, *Re Cinram International Inc.*, *Re Sino-Forest Corp.*, *Re Prizm Income Fund*, *Re First Leaside Wealth Management Inc.*, *Re Target Canada Co.*) in which the Court exercised its jurisdiction to extend a stay of proceedings to the benefit of third parties. In each case, however, the Court found that the extension of the stay was necessary to support the initial stay granted to the applicant debtor and to allow the debtor's restructuring to proceed unimpeded.
34. Those circumstances do not exist here. DIL is not restructuring; rather, it is liquidating its assets for the benefit of the depositors and when that process is complete it will cease to operate. A stay of proceedings against third parties does not support that objective, and nor do the Representative Action provisions of the Plan. The Applicant has used this

CCAA proceeding to do that which it could not accomplish in a bankruptcy: to impose the Representative Action provisions upon the depositors for the benefit of third parties who have contributed nothing to the Plan and are not entitled to CCAA protection.

35. In response to para. 18(d) of the Monitor's Brief, the fact that the Sugden and Garber Plaintiffs represent a small percentage of DIL Depositors is not relevant to whether the Court should stay the BC-AB Proceedings. The core issue before the Court is whether the stay sought by the Monitor will support the restructuring (in reality, liquidation) goals of the Amended Amended DIL Plan and the legitimate purposes of the CCAA. It does not.
36. The Monitor purports to advise the Court that its position in favour of a stay of the BC-AB Proceedings "should not be lightly disregarded" (Monitor's Brief, para. 37). Indeed where, as here, the Monitor is in a conflict of interest, its views should be entirely disregarded. The Monitor has known that it was in a conflict since its Fourth Report was published on June 24, 2015. It should certainly have recognized when the Representative Action provisions of the DIL Plan were being drafted that Deloitte & Touche was a potential defendant to a derivative action undertaken in the name of DIL. It should have, at that time (if not sooner), stepped down from its position as Monitor. It failed to do so and now cannot comment with any degree of neutrality as to the merits of the Amended Amended DIL Plan.

Fifteenth Report of the Monitor, paras. 33-37

37. A stay of the BC-AB Proceedings is not essential to the success of the Plan; rather, it is essential to the goal of the Monitor and the Applicants to advance the Representative Action, and to gather and consolidate depositor support for the District Plan in advance of the District Creditors' Meeting. Those are not legitimate uses of the CCAA, and therefore are not an appropriate occasion for the exercise of the Court's inherent jurisdiction to impose a stay of proceedings. The Monitor's application for a stay of the BC-AB Proceedings must be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: February 29, 2016

"Erin A. Poyner"

Erin A. Poyner

Counsel for Elvira Kroeger and Randall Kellen

TABLE OF AUTHORITIES

A.	<i>Credit Suisse AG v. Great Basin Gold Ltd.</i> , 2015 BCSC 1199
----	---

OTHER MATERIAL

B.	<i>Companies' Creditors Arrangement Act</i> , R.S.C. 1985, c. C-25, ss.7-11
----	---

Case Name:

Credit Suisse AG v. Great Basin Gold Ltd.

Between
Credit Suisse AG, Petitioner, and
Great Basin Gold Ltd., Respondent

[2015] B.C.J. No. 1474

2015 BCSC 1199

2015 CarswellBC 1953

27 C.B.R. (6th) 32

Docket: S134749

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: June 9, 2015.

Judgment: July 10, 2015.

(76 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Effect on other proceedings -- Stays -- Application by creditors for declaration action was unaffected by stay of proceedings allowed -- Receivership order followed termination of creditor protection proceedings that had resulted in commencement of sale of company's gold mining assets -- Order included stay of proceedings in respect of company and its property -- Applicants sued company's directors and officers alleging misrepresentations in public documents and breaches of various duties -- Based on surrounding circumstances, wording of stay and nature of allegations, action was not in respect of company or property and was outside scope of stay -- Companies' Creditors Arrangement Act, s. 11.03(1).

Application by creditors, Linden Advisors, Crystalline Management and Wolverine Asset Management for declaration that their action was unaffected by a stay of proceedings. A receivership order granted following the termination of creditor protection proceedings in respect of Great Basin Gold included a stay of proceedings. The creditor protection proceedings had resulted in the commencement of the sale

of major gold-mining assets. The stay of proceedings in the receivership order was granted in respect of the property of Great Basin, which was defined as all of the assets, undertakings and properties acquired for, or used in relation to the business, including all proceeds thereof. The receivership included an indemnity provision in favour of Great Basin's directors and officers. The applicants commenced an action against Great Basin's directors and officers alleging misrepresentations and omissions in financial statements, prospectuses and press releases. They sought \$40 million in damages for breaches of common-law, statutory and fiduciary duties. The applicants sought a declaration that proper interpretation of the receivership order permitted continuation of their action without leave of the court.

HELD: Application allowed. All aspects of the matter, including the creditor protection circumstances predating the receivership order, the pleadings, the circumstances surrounding the proposed action, and the wording of the order itself, supported a conclusion that the receivership order did not stay the applicants' action against Great Basin's directors and officers. A stay in respect of the directors and officers was granted in the course of the creditor protection proceedings, and was specifically terminated prior to the receivership order. The change in the scope of the stay was reflected in the express language within the receivership order. A plain reading of the pleadings supported the view that the allegations were that the directors and officers were personally liable. The action was not in respect of Great Basin or its property, and therefore was not caught within the scope of the stay.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(1)

Business Corporations Act, SBC 2002, CHAPTER 57, s. 105,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.03(1)

Counsel:

Counsel for Linden Advisors LP, Crystalline Management Inc. and Wolverine Asset Management, LLC: S. Dvorak, R. Jacobs, J. Dietrich.

Counsel for Patrick Cooke, Estate of David M.S. Elliott, Octavia Matloa, Terrence Barry Coughlan, Harry Wayne Kirk, Joshua C. Ngoma, Walter T. Segsworth, Anu Dhir, Philip Kotze and Ronald Thiessen: M. Clemens, Q.C.

Counsel for Ferdinard Dippenaar, Lourens van Vuuren, Willem Beckmann, Philip N. Bentley, Bheki Khumalo and Dana Roets: J.K. McEwan, Q.C., J. Hughes.

Counsel for Credit Suisse AG: P. Rubin.

Reasons for Judgment

S.C. FITZPATRICK J.:--

Introduction

- 1 This application concerns the scope of a stay of proceedings ordered by the court arising from the granting of a receivership order as against the respondent, Great Basin Gold Ltd. ("Great Basin").
- 2 The issue is whether the proper interpretation of the stay provision is such that it includes a stay of proceedings in favour of the former directors and officers of Great Basin.
- 3 Linden Advisors LP, Crystalline Management Inc. and Wolverine Asset Management, LLC (collectively, the "Applicant Creditors"), had previously commenced an action against Great Basin's directors and officers and the issue of the stay has been recently raised. The Applicant Creditors now seek clarification concerning the proper interpretation of the receivership order, namely, whether the stay prevents them from continuing with their action, save with leave of the court.

Background Facts

The Insolvency Proceedings

- 4 On September 19, 2012, Great Basin applied for and was granted creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). Despite the filing having taken place in Vancouver, British Columbia, Great Basin's gold-mining operations, through its subsidiaries, were principally located elsewhere. Various properties were held around the world, but the principal assets were gold mines in Nevada and South Africa.
- 5 On the filing date, I granted an initial order, as is typically granted in CCAA proceedings (the "Initial Order"). I remained seized of the CCAA proceedings and would issue all of the court orders in those proceedings and in the later receivership proceedings as discussed in these reasons.
- 6 The Initial Order imposed a stay of proceedings against or in respect of Great Basin or affecting the "Business" and "Property" of Great Basin:
 15. Until and including October 19, 2012 or such later date as this Court may order (the "Stay Period"), no action, suit or proceeding in any court or tribunal (each, a "Proceeding") against or in respect of [Great Basin] or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of [Great Basin] and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of [Great Basin] or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.
- 7 "Property" was defined in the Initial Order as "current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof". Great Basin was ordered to continue to carry on its business in the ordinary course (defined as the "Business").
- 8 In addition, the Initial Order provided for a stay of proceedings as against the directors and officers of Great Basin in respect of pre-filing matters:
 22. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of [Great Basin] with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of

[Great Basin] 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 a such obligations, until a compromise or arrangement in respect of [Great Basin], if one is filed, is sanctioned by this Court or is refused by the creditors of [Great Basin] or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of [Great Basin] that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

9 By June 28, 2013, the *CCAA* proceedings had run their course with sales of the major gold-mining assets having been concluded or substantially underway. On that date, this Court granted an order terminating the *CCAA* proceedings at the request of Great Basin and with the support of its largest secured creditor, the petitioner Credit Suisse AG (the "Termination Order"). The Termination Order specifically provided that the stays of proceedings as set out above in paragraphs 15 and 22 of the Initial Order were terminated and set aside.

10 Concurrent with the termination of the *CCAA* proceedings, on June 28, 2013, Credit Suisse AG applied to the Court and was granted an order (the "Receivership Order"), appointing a receiver over the "Property" of Great Basin, who was defined as the "Debtor".

11 The definition of "Property" in the Receivership Order was different than that found in the Initial Order. The term was defined as "all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof." This definition of "Property" was consistent with the wording of the model receivership order published on the Court's website, and also consistent with the language found in s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which is the statutory authority for the appointment of the receiver.

12 The central issue on this application arises from the terms of the Receivership Order which imposed a stay of proceedings against or "in respect of" Great Basin and the Property, as defined:

12. No Proceedings against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of Proceeding except for service of the initiating documentation on the Debtor and the Receiver.

13 Under the Receivership Order, FTI Consulting Canada Inc. was appointed receiver and manager (the "Receiver").

14 The evidence at the June 28, 2013 hearing -- at which time the Termination Order and the Receivership Order were granted -- referred to the following relevant circumstances:

- a) the stay of proceedings under the Initial Order was set to expire on June 30, 2013;
- b) no extension of the *CCAA* proceedings was being sought by Great Basin as there was no prospect for a restructuring of Great Basin and there was no on-going business being conducted by Great Basin. As such, there was no need to continue the *CCAA* proceedings and incur the cost of doing so;
- c) the remaining directors and officers of Great Basin were set to resign on the earlier of June 30, 2013 or the date on which the *CCAA* proceedings were terminated. This was tied to the expiry of the then-existing insurance policy in place for the directors and officers of Great Basin; and
- d) it was considered necessary that a receiver be appointed to complete the remaining matters that were outstanding in the *CCAA* proceedings. Those matters included causing Great Basin's subsidiaries in other jurisdictions to finalize the sales of the principal gold-mining assets through insolvency proceedings in those jurisdictions. Specifically:
 - i. in May 2013, the Hollister gold mine in Nevada had been sold through insolvency proceedings commenced under chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. and it was anticipated that certain administrative matters needed to be finalized to conclude those proceedings; and
 - ii. the sales process of the Burnstone mine in South Africa was underway at the time pursuant to business rescue proceedings commenced in South Africa. Those sale proceedings had not been completed, and it was contemplated that a sale would require later transactions to be completed by Great Basin and certain Cayman Islands subsidiaries.

15 Paragraph 23 of the Initial Order provided that Great Basin indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers on account of legal defence costs after the commencement of the *CCAA* proceedings. As security for this obligation, the directors and officers were granted a "Directors' Charge" as against Great Basin's "Property" (as defined in the Initial Order) limited to \$500,000. The Director's Charge was granted priority behind the "Administration Charge" but ahead of the "DIP Lenders' Charge" for the interim financing.

16 Pursuant to paragraph 22 of the Termination Order, the Directors' Charge continued to attach to the "Property" as defined in the Initial Order. The priorities of the various court-ordered charges were further addressed in the Receivership Order, but the Directors' Charge remained second in priority only behind the Administration Charge.

Action Brought by the Applicant Creditors

17 On August 14, 2014, the Applicant Creditors commenced an action in this Court against the former directors and officers of Great Basin (the "Action"). In essence, the Applicant Creditors allege that various public disclosures, including financial statements, prospectuses and press releases made by Great Basin contained misrepresentations and omissions. The Applicant Creditors allege that the directors and officers breached their common-law, statutory and fiduciary duties and obligations owed to certain stakeholders of Great Basin, including the Applicant Creditors. They seek damages in the amount of \$40 million plus interest.

18 As counsel for the directors and officers point out, there is some emphasis in the Action on the disclosure in a November 2009 prospectus issued by Great Basin for certain unsecured convertible debentures in which the Applicant Creditors invested. There are also allegations concerning the public disclosure made before and after that offering.

19 In addition, on January 9, 2015, Credit Suisse AG commenced a claim against some directors and officers of Great Basin in the Second Judicial District Court of the State of Nevada. Similar to the action commenced by the Applicant Creditors, Credit Suisse AG alleges that the officers and directors misrepresented certain matters relating to Great Basin, which Credit Suisse AG relied upon in granting significant loans to Great Basin, both prior to and after the *CCAA* proceedings began. Credit Suisse AG also alleges that the officers and directors "recklessly mismanaged" Great Basin's subsidiaries.

20 In May 2015, counsel for the officers and directors advised counsel for the Applicant Creditors of their position that the Applicant Creditors had filed the Action in violation of the stay of proceedings granted per paragraph 12 of the Receivership Order. Among other things, the directors and officers asserted that, given the allegations about public disclosures made by Great Basin, and the indemnities that Great Basin gave to each of the officers and directors, the stay applied. Counsel for the officers and directors therefore took the position that the Receivership Order stayed the Action unless and until written consent was obtained from the Receiver or leave was obtained from this Court.

21 Initially, there was some issue about why the matter of the stay was only being raised some time following the commencement of the Action in August 2014. However, counsel for the officers and directors advised that the Receivership Order had only recently come to their attention in May 2015, which explanation I accept. In my view, nothing arises from any delay in bringing forward the issue as the matter can be addressed on its merits.

22 Certain of the defendants in the Action, being officers and directors appointed prior to the *CCAA* proceedings, intend to file response material denying any wrongdoing. Specifically, they contend that the acts that are the subject of the Action are "the acts of [Great Basin] and not the acts of the [officers and directors]". In addition, they propose to file a counterclaim alleging that the Action is in breach of the trust indenture by which the Applicant Creditors invested in Great Basin. That trust indenture provided that there would be no recourse against certain persons, including directors and officers.

23 Other defendants in the Action, being directors and officers appointed after the *CCAA* proceedings began, also intend to file response material. They also contend that the representations and conduct that are the subject of the Action were "representations made by or conduct of [Great Basin], not these Defendants personally". They also propose to file a counterclaim alleging that the Action is in breach of the trust indenture by which the Applicant Creditors invested in Great Basin.

The Issue

24 The Applicant Creditors dispute the interpretation of paragraph 12 of the Receivership Order

advanced by the directors and officers that they require leave of the court in order to proceed with the Action. Nevertheless, in order to clarify the matter, the Applicant Creditors now bring this application for a declaration that the stay of proceedings does not operate to stay the Action and that no leave is required.

25 The Receiver has indicated that it takes no position in respect of this application so, obviously, no consent to bring the Action is forthcoming to obviate the issue.

Discussion

26 The parties agree that the Receivership Order is to be interpreted in accordance with the approach as set out in *Yu v. Jordan*, 2012 BCCA 367:

[53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

27 All of the aspects leading to and including the granting of the Receivership Order -- the pleadings, relevant circumstances and language of the order itself -- are considerably interrelated in this case. In my view, all aspects support the conclusion that the Receivership Order did not stay the Action against the directors and officers.

(i) Pleadings

28 The pleadings that are relevant here include the backdrop of the *CCAA* proceedings, the terms of the Initial Order and, later still, the Receivership Order and the Termination Order.

29 In the *CCAA* context, imposing a stay of proceedings is generally seen as a critical component of the relief sought by the debtor company in preserving the *status quo* while a company attempts to restructure. The need for a stay of proceedings against creditors of the debtor company seems evident enough; however, it is also well-recognized that a stay of proceedings against third parties could, in some cases and, indeed, often does, equally assist in achieving the objectives of the *CCAA*.

30 In addition, the need to cast a large net in terms of protecting the debtor's ownership and management of its assets pending reorganization is generally seen as justifying the typical broad definition of "Property", as is found in the Initial Order.

31 Early cases tended to rely on inherent jurisdiction as the jurisdictional basis for a stay as against third parties. In that regard, the comments of Tysoe J. (as he then was) in *Re Woodward's Ltd.*, (1993) 79 B.C.L.R. (2d) 257 at 268 (S.C.) are instructive in that such a stay must be important to the reorganization process and the court must weigh the relative prejudice arising from the stay:

Hence, it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar*, [1992] B.C.J.

No. 1360 Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.

In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

[Emphasis added.]

32 Stays of proceedings in favour of former or current directors and officers of a debtor company in CCAA proceedings were and are common. Such a stay is seen as consistent in achieving the policy objective of furthering the debtor company's restructuring efforts. A stay of proceedings in favour of officers and directors affords some protection to those individuals, in that it acts as an inducement to remain involved in the restructuring, which is benefited by the directors' and officers' knowledge and expertise. Other benefits include avoiding the allocation of time and resources to defend such proceedings at the expense of and detriment to the restructuring itself.

33 In 2005, the CCAA was amended to provide the court with express statutory authority to stay proceedings against directors and officers with respect to pre-filing matters:

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

34 It can be seen that the provision in the Initial Order staying actions against the directors and officers (paragraph 22) substantially tracks the language of s. 11.03(1).

35 The rationale of the court in *Re Woodward's* continues to be applied in CCAA proceedings and, in particular, to the consideration as to whether stays in favour of officers and directors will be continued or lifted.

36 In *Re Nortel Networks Corp.*, (2009) 57 C.B.R. (5th) 232 at 239 (Ont. S.C.J.), Morawetz J.

upheld a stay of proceedings in favour of certain directors and employees of Nortel:

In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodwards Limited (Re)* (1993) 17 C.B.R. (3d) 236 (B.C.S.C.).)

37 Importantly, the court in *Re Nortel* emphasized that the stay was intended only as a postponement of the claims being brought or continued: *Nortel* at 239. The postponement aspect is consistent with s. 11.03(1) of the *CCAA* and paragraph 22 of the Initial Order, which contemplate the continuation of the stay until such time as a compromise or arrangement is either accepted or refused by the creditors and the court.

38 As Dewar J. stated in *Re Puratone Corp.*, 2013 MBQB 171, whether the stay will be lifted or continued is to be considered in the context of the nature and timing of the *CCAA* process before the court: para. 15. In that case, the court noted that the *CCAA* proceedings did not result in a restructuring but, rather, a liquidation of the assets with proceeds to be distributed. As such, the court, in considering relative prejudice, found that the balance of convenience favoured lifting the stay to allow the action against Puratone and the directors and officers to proceed "sooner rather than later": para. 38.

39 It is in this context that the Termination Order and Receivership Order must be considered. In a situation similar to that in *Re Puratone*, by June 2013, much of the policy objectives underlying the stay in favour of Great Basin's directors and officers in the Initial Order had been spent. The receivership presented a sea change of sorts in the sense that a pure liquidation of the remaining assets was the focus and, importantly, the remaining liquidation efforts were to be handled by the Receiver and not by the directors and officers of Great Basin. In that regard, the focus of the Receivership Order was to protect the activities of the Receiver and the assets under its administration. The stay of proceedings found in paragraph 12 of the Receivership Order accomplished that, in part, along with the stay of proceedings in paragraph 13, and the specific stay as against the Receiver in paragraph 11.

40 It is not unheard of that *CCAA* proceedings simply segue into receivership proceedings with little regard to or change in the relief granted in court orders in terms of the effect of those orders on third parties. However, a receivership is a fundamentally different type of proceeding and the objectives to be achieved in each type of proceeding must be considered in terms of how third parties are to be affected. That is not to say that a stay of proceedings against third parties will never be appropriate in a receivership; rather, the court must be cognizant, as was stated in *Re Woodward's*, that the stay power should be used cautiously, and there must be some cogent reason underlying the interference with the rights of those third parties in either a *CCAA* or receivership proceeding.

41 That brings me more specifically to the Termination Order which must be considered alongside the Receivership Order. What can be gleaned from both these orders, when considered in the context of the Initial Order, is that counsel did what was expected of them, in that they carefully considered what relief was appropriate going forward, with or without amendment, and what relief should be terminated. This was the substance of the hearing on June 28, 2013 when the two orders were granted.

42 It is significant that paragraph 15 of the Initial Order contained a broader stay protection for Great Basin than the stay in the Receivership Order since it provided for a stay "against or in respect of [Great Basin] or the Monitor, or affecting the Business or the Property" [emphasis added]. Even with this broader stay protection, the Initial Order contained a separate stay of proceedings against directors and officers at paragraph 22, which supports the interpretation that the broader stay did not provide this protection to the officers and directors.

43 In contrast, the Receivership Order included more limited stay protection for Great Basin's Property, which need only have been acquired for or used in relation to its business. It did not, as did the Initial Order, refer to the stay of proceeding in relation to any action that might affect Great Basin's "Business". This is understandable since it was expected that Great Basin would continue its "Business" in the CCAA proceedings: Initial Order at para. 4. This is also consistent with the evidence at the June 28, 2013 hearing that Great Basin had ceased to conduct any business by the time of the receivership.

44 Finally, it cannot be ignored that there was neither an application for nor an order for a separate stay of proceedings against the directors and officers in the Receivership Order as there was in the Initial Order. To the opposite effect, that provision was specifically terminated by the Termination Order. I agree with the Applicant Creditors that this change must be given some meaning. The directors and officers assert that they were not represented by counsel at the June 28, 2013 hearing. However, it must be inferred that they were well-aware of the protections afforded to them by reason of the CCAA proceedings (including the specific stay and the granting of the Directors' Charge), and that they either were or could have been, with some due diligence, aware of how matters were to be transitioned to the receivership.

45 At the very least, their knowledge of the expiry of the director and officer insurance policy, coupled with their resignations at the same time, would have highlighted to them that changes were afoot in terms of their participation in the proceedings and the protections that they had enjoyed to that time.

(ii) Language of the Receivership Order

46 It is clear enough that the Receivership Order does not include any express language imposing a stay of proceedings in favour of Great Basin's directors and officers. This is in contrast to paragraph 22 of the Initial Order.

47 Counsel for the directors and officers rely on the wording of paragraph 12 of the Receivership Order in arguing that there is a stay of proceedings "in respect of" both Great Basin and the Property, as defined. They contend that this wording is broad enough to include the Action now commenced by the Applicant Creditors.

48 In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 at 751, Major J. discussed the Court's earlier consideration of the phrase "in respect of":

[A plain] reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some

connection between two related subject matters. [Emphasis added.]

49 The extent of the scope of that phrase was, however, tempered by the later comments of the Court in *Sarvanis v. Canada*, 2002 SCC 28:

[22] It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.

Further, the Court in *Sarvanis* discussed that the phrase "in respect of" must be considered by "looking to the context in which the words are found": see paras. 23-26.

50 What then is the connection between the terms of the Receivership Order, being Great Basin and its Property, and the Action?

51 Firstly, the directors and officers argue that the Action is "in respect of" Great Basin because the allegations concern the corporate actions of Great Basin, specifically as to the issuance of the 2009 prospectus by which the misrepresentations were said, at least in part, to have been made. As I have outlined above, the substance of the defences raised in the Action is that the directors and officers were acting in the course of their duties in those capacities and that, therefore, any misrepresentations are the misrepresentations of Great Basin and not of the directors and officers personally.

52 Specifically, the officers and directors contend that the officer and director defendants in the Action could easily be replaced by simply naming Great Basin as a defendant given the causes of action advanced. While that may be true, one might wonder about the utility of doing so since the Applicant Creditors obviously have a more direct cause of action against Great Basin given the creditor/debtor relationship that currently exists.

53 The reality is that Great Basin is not named as a defendant in the Action even though it could have been.

54 Further, I appreciate that the officers and directors have substantive defences to the Action. Those defences include that the directors and officers were only acting in the course of their duties and that they acted in a manner consistent with what the law requires. Negligence claims will be met with the contention that the business judgment rule applies; allegations of breach of fiduciary and statutory duties will be met with the contention that their duties are owed to Great Basin, not to the Applicant Creditors as creditors, or that the claims are statute-barred.

55 Even so, a plain reading of the pleadings in the Action supports the view that the allegation is that the directors and officers are *personally* liable for the actions or omissions by each of them. Accordingly, while many of the factual circumstances upon which those allegations are made involve Great Basin, that does not mean that the Action is "in respect of" Great Basin.

56 As the Applicant Creditors contend, if the language "in respect of" a corporate debtor is to be interpreted so broadly to encompass such claims against its directors and officers arising from their actions in that capacity, then a separate stay of proceedings against directors and officers (as was granted in the Initial Order) would never be required.

57 The argument of the directors and officers is also not assisted by the circumstances of the trust indenture issued by Great Basin that provided that there would be no recourse or personal liability against others, including directors and officers. Again, that document may form an important plank of the directors' and officers' defence against personal liability, but the fact that Great Basin issued that trust indenture does not mean that there is an inextricable connection between Great Basin and the Action.

58 Secondly, the directors and officers argue that their claim is "in respect of" Great Basin's Property, as defined in the Receivership Order. I would observe at the outset that the definition of Property in the Receivership Order is considerably narrower than that found in the Initial Order. As I will discuss below, that is an important factor in many aspects, including in interpreting the scope of the stay of proceedings imposed in both the *CCAA* and receivership proceedings.

59 The directors and officers also argue that this claim is "in respect of" Great Basin's Property arising from the circumstances of the indemnity agreement that Great Basin executed in favour of the directors and officers. However, if the Applicant Creditors are successful in the Action, they will recover judgment against the directors and officers personally, not against Great Basin to the extent that it may recover from its Property. At best, the indemnity agreement forms an independent contractual basis upon which the directors and officers might seek recovery from Great Basin. I agree that a third-party action by the directors and officers against Great Basin would obviously engage the stay of proceedings found in the Receivership Order. It seems clear enough why no such claim has been advanced, given that the directors and officers would in any event be unlikely to recover any judgment obtained given the substantial losses of even the secured creditors.

60 The directors and officers argue that the Action is "in respect of" Great Basin's Property since the Directors' Charge was continued over the Property by the terms of the Termination Order and the Receivership Order. This represents a more substantial connection between the Action and Great Basin's Property than the above arguments, but is answered by the same points raised in relation to the indemnity. Again, this is an independent claim that might be advanced by the directors and officers against Great Basin and the Property. The fact that the directors and officers might in the future advance claims against the Property secured by the Directors' Charge, does not change the characterization of the claims of the Applicant Creditors which are not against Great Basin's Property.

61 In these circumstances, I cannot discern any connection or relationship between the relief sought in the Action and Great Basin and the Property, as defined in the Receivership Order. A plain reading of the Receivership Order evidences that the stay of proceedings was intended to maintain order in the realization proceedings that were then to be conducted by the Receiver in liquidating the assets of Great Basin. No issues are raised in the Action that directly affect the process by which that liquidation is to be accomplished by the Receiver.

(iii) Applicable Circumstances

62 Much of what I have discussed above includes the particular circumstances that were in existence leading up to the June 2013 hearing when the relief sought was granted in the Receivership Order.

63 To summarize, the *CCAA* proceedings had ceased to serve any purpose in that no restructuring was on the horizon. The only activities being conducted at the end were the sales of the gold-mining assets, and it was argued before the court that the proper person to conduct those later activities was a receiver. In that vein, the directors and officers were set to depart the scene in that their services were no longer required.

64 Indeed, upon the court order appointing the Receiver, the powers of the directors and officers ceased: see *Business Corporations Act*, S.B.C. 2002, c. 57, s. 105.

65 In that sense, the rationale behind continuing the stay of proceedings in favour of the directors and officers evaporated. There remained no useful purpose in continuing the stay in their favour. The matter of prejudice was not particularly argued before the court on June 28, 2013. However, in the main, the court would have intuitively recognized that a third party having a claim against the directors and officers would be prejudiced by the continuation of the stay and no corresponding prejudice was asserted by the directors and officers in terms of discontinuing the stay.

66 To put it another way, no evidence was presented upon which the court could have exercised its discretion in terms of continuing the extraordinary remedy of preventing actions being brought against Great Basin's directors and officers in the changed circumstances at play in June 2013.

67 The directors and officers place considerable reliance on the reasoning and results found in *Sutherland v. Reeves*, 2014 BCCA 222. The court in that case had appointed a receiver, not to liquidate assets to pay debt, but to wind down the business and affairs of Tangerine, a limited partnership. Mr. Sutherland and Mr. Reeves, the main participants in the limited partnership, had substantial disputes concerning Tangerine's affairs. A stay of proceedings was imposed "in respect of" Tangerine and its property (as defined). Later still, Mr. Sutherland filed an action against Mr. Reeves alleging fraud in relation to the cancellation of shares in the general partner company and termination of a management services agreement. The Court of Appeal found that the interpretation of the stay of proceedings found in the receivership order should have prevented the filing of the later action.

68 While the analysis of the Court of Appeal is of some assistance on this application, I consider that the unique circumstances found in *Sutherland* do not support a similar result here in that they provided an entirely different context in which to interpret a very different receivership order.

69 Firstly, the definition of "Property" in the receivership order in *Sutherland* was stated by the court to be "undeniably broad" in that it referred to the "business, affairs, undertaking and assets" of Tangerine, which appears to have been operating as a business: para. 35. This expansive definition was clearly intended to encompass the entire business activities of Tangerine which had become dysfunctional by reason of the relationship of Mr. Sutherland and Mr. Reeves. The broader terms of "business" and "affairs" at issue in *Sutherland* are not found in the Receivership Order, consistent with the lack of business activity of Great Basin and the intention to simply liquidate assets to pay debt.

70 Secondly, it was evident that, although Mr. Sutherland had not named Tangerine as a defendant in his later action, his allegations were, in substance, about the infighting that had led to the receivership order in the first instance. Further, the relief sought included that relating to the shareholdings in Tangerine. The court found that Mr. Sutherland's action inherently involved the affairs and business of Tangerine, or was "in respect of" Tangerine: para. 36.

71 Thirdly, the Court also found that Mr. Sutherland was obviously trying to do indirectly what he had been prevented from doing directly. His later action was the same as had been previously pled even before the receivership order and, as such, the order was characterized to capture such allegations: para. 37.

72 What can be inferred from the decision in *Sutherland* is that the court was attempting to bring order to a complex corporate situation which was chaotic and hamstrung by fighting between the parties. Mr. Sutherland was attempting to thwart that objective and his action had the potential to

negatively affect the efforts of the receiver in dealing with the assets and business. In that sense, the objective behind the receivership order was more akin to the situation addressed by the Initial Order. Here, by the time of the Receivership Order, order had been achieved and the overall objective was to empower the Receiver, not the directors and officers, to continue the liquidation process.

73 What does resonate from the decision in *Sutherland*, but by way of distinction, is the court's conclusion that Mr. Sutherland's later action threatened to disturb the receivership process: para. 48. In contrast, there was no evidence at the time of the hearing on June 28, 2013 that the stay of proceedings in favour of the officers and directors was needed to protect the receivership process.

74 On a final note, the court in *Sutherland* noted that Mr. Sutherland was only being prevented from bringing his action until the end of the receivership process: para. 50. By that time, the salutary effect of the stay would have been achieved and there would have been no longer any need to prejudice Mr. Sutherland by its terms.

75 Similarly, here, the salutary effect of the stay in favour of Great Basin's directors and officers ended upon the granting of the Receivership Order.

Conclusion

76 I declare that the stay of proceedings in paragraph 12 of the Receivership Order does not apply to the Action for the above reasons. The Applicant Creditors are awarded their costs of the application as against the directors and officers on Scale B.

S.C. FITZPATRICK J.

Government
of CanadaGouvernement
du Canada

Canada

[Justice Laws Website \(http://laws-lois.justice.gc.ca\)](http://laws-lois.justice.gc.ca)

[Home](#) → [Laws Website Home](#) → [Consolidated Acts](#)

→ [R.S.C. \(Revised Statutes of Canada\), 1985, c. C-36 - Table of Contents](#)

→ [R.S.C. \(Revised Statutes of Canada\), 1985, c. C-36](#)

Companies' Creditors Arrangement Act (R.S.C. (Revised Statutes of Canada), 1985, c. C-36)

Full Document: [HTML \(FullText.html\)](#) | [XML \(/eng/XML/C-36.xml\)](#) [230 KB] | [PDF \(/PDF/C-36.pdf\)](#) [326 KB]

Act current to 2016-02-03 and last amended on 2015-02-26. [Previous Versions \(PITIndex.html\)](#)

Previous Page (page-2.html#docCont)	Table of Contents	Next Page (page-4.html#docCont)
---	-----------------------------------	---

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at a time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

R.S., c. C-25, s. 7.

Scope of Act

8 This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

R.S., c. C-25, s. 8.

PART II

Jurisdiction of Courts

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chamber during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

[Previous Version \(/eng/acts/C-36/section-10-20021231.html\)](/eng/acts/C-36/section-10-20021231.html)

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* (</eng/acts/B-3>) or the *Winding-up and Restructuring Act* (</eng/acts/W-11>), 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 if it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

[Previous Version \(/eng/acts/C-36/section-11-20021231.html\)](/eng/acts/C-36/section-11-20021231.html)

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

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

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act ([/eng/acts/B-3](#)) or the Winding-up and Restructuring Act ([/eng/acts/W-11](#));
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under the Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

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

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

Stays — directors

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

Exception

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

Persons deemed to be directors

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

2005, c. 47, s. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has effect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act ([/eng/acts/C-21](http://laws-lois.justice.gc.ca/eng/acts/C-21)) or the by-laws or rules of that Association.

2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

[Previous Version \(/eng/acts/C-36/section-11.07-20090918.html\)](/eng/acts/C-36/section-11.07-20090918.html)

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act (/eng/acts/B-1.01)*, the *Cooperative Credit Associations Act (/eng/acts/C-41.01)*, the *Insurance Companies Act (/eng/acts/I-11.8)* or the *Trust and Loan Companies Act (/eng/a/T-19.8)*;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them the *Canada Deposit Insurance Corporation Act (/eng/acts/C-3)*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her the *Winding-up and Restructuring Act (/eng/acts/W-11)*.

2005, c. 47, s. 128.

[Previous Page \(page-2.html#docCont\)](#)

[Next Page \(page-4.html#docCont\)](#)

7 ... 11.08

[Go to page](#)

Date modified:

2016-02-12