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| 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*, R.S.C. 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. |
| DOCUMENT | **SPECIAL CHAMBERS APPLICATION – COMMERCIAL LISTBRIEF OF THE RESPONDENTS TO THE APPLICATION** |
| | **June 18, 2015 at 10:00 a.m.** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | Bishop & McKenzie LLP<br>Barristers & Solicitors<br>1700, 530 – 8th Avenue SW<br>Calgary, Alberta. T2P 3S8<br><br>Attention: Francis N. J. Taman/Ksena J. Court<br><br>Telephone: 403 237-5550<br>Fax: 403 263-3423<br><br>File: 103,007-003 |

Clerk's Stamp

CLERK OF THE COURT
FILED
JUN 17 2015
CALGARY, ALBERTA

## I. FACTS

1. Lutheran Church – Canada, the Alberta – British Columbia District (the "District") is a corporation incorporated by a special act of the Legislature of Alberta.

The Affidavit of Kurt Robinson, sworn January 22, 2015 (the "Initial Affidavit") at para. 9

2. The District is organized into three internal ministries or departments. The Department of Stewardship and Financial Ministries was responsible for the operation of a fund referred to as Church Extension Fund ("CEF"). CEF has no separate existence. The CEF loans are accounted for as part of the District's assets. The loans received from CEF Depositors are accounted for as liabilities of the District.

Initial Affidavit at para. 17, 20 and Exhibit "D"

3. The District has a 12 member Board of Directors. At the time of the Initial Order, its management consisted of Don Schiemann, Daryl Becker, Kurt Robinson (seconded to EnCharis Community Housing and Services ("ECHS")), Glenn Schaeffer, Janice Ruf and Amy Thera.

Initial Affidavit at para. 14 and 92

4. ECHS is a separate corporation incorporated under Part IX of the *Companies Act (Alberta)*. It has an 8 member Board of Directors. At the time of the Initial Order, it was managed by Kurt Robinson and Marv Mutschler. Amy Thera acted as Senior Manager of Finance.

Initial Affidavit at para. 40, 92, 93 and 95

5. EnCharis Management and Support Services ("EMSS") is a separate corporation incorporated under Part IX of the *Companies Act (Alberta)*. It has an 8 member Board of Directors. At the time of the Initial Order, it was managed by Kurt Robinson, Diane Neish, Alanna Mathieson and Patrick Nelson. Amy Thera acted as Senior Manager of Finance.

Initial Affidavit at para. 49, 94 and 95

6. Lutheran Church – Canada, the Alberta – British Columbia District Investments Ltd. ("DIL") is a separate corporation incorporated under Part IX of the *Companies Act (Alberta)*. At the time of the Initial Order, it was managed by Kurt Robinson, Candace Rivet and Janice Ruf.

Initial Affidavit at para. 57 and 96

7. The District, DIL, EMSS and ECHS are referred to as the CCAA Protected Companies.

8. There is a single directors' and officers' liability insurance policy covering the CCAA Protected Companies (the "D&O Policy"). It has a limit of $5,000,000 per claim or policy period. Although not in evidence at this hearing, the affidavit in support of the next application by the Applicants in these CCAA proceedings will note that the D&O Policy has been extended to August 1, 2015. It may be further extended. If not, the CCAA Protected Companies have the right under the D&O Policy to purchase run-off insurance to cover an additional year to allow them to replace the existing D&O Policy, which would extend coverage under the D&O Policy with respect to any claims which arose prior to August 1, 2015.

Initial Affidavit at para. 126, 127 and Exhibit "T", Section III (A)

9. Justice K.D. Yamauchi heard the initial application of the CCAA Protected Companies on January 23, 2015. He granted an Order (the "Initial Order") which, *inter alia*, granted a stay

with respect to any proceedings against the former, current or future directors or officers of the CCAA Protected Companies with respect to any claims against the directors or officers of the CCAA Protected Companies prior to the date of the Initial Order in their capacity as directors and officers until a plan of arrangement is sanctioned by the Court or refused by the creditors of the CCAA Protected Companies or the Court (the "Stay").

Initial Order at para. 25

10. The Monitor has repeatedly opined that the CCAA Protected Companies appear to be acting in good faith and with due diligence since the Initial Order. The Monitor also noted that the CCAA Protected Companies have been cooperating with the Monitor and appeared to be making efforts to formulate a plan of arrangement.

First Report of the Monitor, dated February 17, 2015 at para. 112
Second Report of the Monitor, dated March 23, 2015 at para. 108

11. The Application of Randy Kellen, filed May 21, 2015 (the "Kellen Application") seeks to have the Stay lifted such that all of the creditors of the CCAA Protected Companies may file statements of claim against the officers and directors of the CCAA Protected Companies.

Kellen Application at para. 1

12. No draft statement of claim with respect to the proposed action has been provided by the Applicant. It is unclear against whom the proposed claim would be advanced and on what grounds.

Third Report of the Monitor, dated June 15, 2015 (the "Third Report") at para.15

13. The plans of arrangement with respect to the CCAA Protected Companies (the "Plans") are in the process of preparation but will not be completed in time for the next application. There is concern that dealing with the proposed action will force those individuals directly involved in the preparation and approval of the Plans to redirect their focus away from formulating the Plans in order to defend the proposed action.

Third Report at para. 16.1.2

14. The Kellen Application seeks to obtain the contact information of all of the creditors of the CCAA group. This is a large and diverse group which includes those individuals who lent money to the District (the "CEF Depositors"), those individuals with various registered accounts

with DIL (the "DIL Depositors"), Alberta Health Services and various trade creditors, including those trade creditors declared critical suppliers by the Initial Order.

Kellen Application at para 2

15. Pursuant to the February 20, 2015 Order granted in this Action, committees have been elected by the CEF Depositors and the DIL Depositors (collectively, the "Depositor Groups") to represent the CEF Depositors and the DIL Depositors (the "Creditors Committees"). The Creditors Committees act in a fiduciary capacity and are mandated to maximize the amount available for distribution to the creditors. Both of the Creditors Committees have engaged counsel.

Third Report at para. 16.2

16. The Creditors Committees are currently reviewing the potential claims against the directors and officers of the CCAA Protected Companies. They have the ability to file any necessary claims on behalf of the Depositor Groups as well as to negotiate with the company providing the D&O Policy. Any funds recovered from any negotiated settlement would be included as part of the Plan. Granting this Application could interfere with that process.

Third Report at para. 16.2 and 16.4

17. Some members of the Depositor Groups have indicated that they find the CCAA proceedings confusing. Allowing the proposed claim to go forward could further confuse the members of the Depositor Groups and hinder the ability of the Monitor and the CCAA Protected Companies from effectively communicating with the Depositor Groups. It could also negatively impact the ability of the Monitor and the CCAA Protected Companies to advance the Plans.

Third Report at para. 16.5

18. There does not appear to be any prejudice to the Applicant from denying the relief he is seeking.

Third Report at para. 16.3

## II. ISSUES

19. Should the Stay be lifted?

## III. ANALYSIS OF THE LAW

### A. Should the Stay be lifted?

20. The stay provisions of the *Companies' Creditors Arrangement Act*, RSC 1985, c. 36 (Tab 1)(the "*CCAA*") are central to the process of reorganization that has been developed by the Courts. It is intended to affect anyone who could potentially jeopardize the success of the restructuring plan.

> The stay provisions of the CCAA are well recognized as the key to the successful operation of the CCAA restructuring process. As this court stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36:
>
> > In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...
>
> *Re: Nortel Networks Corp.*, 2009 ONCA 833 ("*Nortel*"), at 33 (Tab 2)
> See also, *Re: Canwest Global Communications Corp.*, 2011 ONSC 2215 ("*Canwest*") at 28 (Tab 3)

21. Since the lifting of the stay has the potential to place some stakeholders in a better position than other stakeholders, the party seeking to lift the stay has a heavy onus to overcoming in justifying lifting the stay.

*Re: Timminco*, 2012 ONSC 2512 ("*Timminco*") at 16 (Tab 4)

### B. Test

22. In determining whether there are sound reasons for lifting the stay, the factors the Court should consider include:

a. the balance of convenience;

b. the relative prejudice to the parties;

c. the merits of the proposed action, where they are relevant to the issue of whether there are sound reasons for lifting the stay; and

d. good faith and due diligence of the debtor company.

*ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 71 @ para. 68 (Tab 5)
*Timminco* @ para. 17 (Tab 4)

## C. Balance of Convenience and Relative Prejudice

23. In considering the balance of convenience, the Court in *Timminco* considered the effect of a class action lawsuit on the ability of the executive team of Timminco in dealing with the CCAA process. In that case, a class action lawsuit, in that instance, was already underway against the officers and directors when the initial order was granted. The class action apparently included allegations of fraud. None of the insurance proceeds would be available under the CCAA. The Court held that a class action could detract from the ability of the executive team of Timminco to focus on the CCAA process to the detriment of the other stakeholders. Moreover, there was no time sensitivity with respect to the class action lawsuit. In considering the relative prejudice to the parties and the balance of convenience, the Court held that the application to lift the stay was premature and dismissed the application.

*Timminco* @ para. 19 and 22 (Tab 4)

24. Section 5.1(2) of the CCAA only excludes claims against directors. Claims against officers and the company itself with respect to those matters set out in s. 5.1(2) can still be released under the Plans.

*Re: Allen-Vanguard Corp.*, 2011 CarswellOnt 8984 ("*Vanguard*") at para. 47 and 48 (Tab 6)

25. A plan may compromise all claims against directors except those set out in s. 5.1(2). The section does not prevent the compromise of claims framed in negligence against the directors. Other than those specific exclusions set out in s. 5.1(2), a plan of arrangement may compromise any claim that could be released as part of a contract.

*Vanguard* at para. 45 & 51 (Tab 6)
*Cheng v. Worldwide Pork Co.*, 2009 CarswellSask 303 ("*Worldwide Pork*")at para. 33, 35 (Tab 7)

26. Section 5.1(2) also does not prevent the compromise of claims with respect to breach of fiduciary duty. It is limited to claims of misrepresentations made by directors to creditors or of wrongful or oppressive conduct.

*CCAA*, s. 5.1(2) (Tab 1)

27. In the current action, the argument being presented by the Applicant is even less favourable with respect to the balance of convenience and relative prejudice than that before the Court in *Timminco*. In this instance, there is no proposed statement of claim, much less a developed lawsuit progressed to the stage the one in *Timminco* was. Further, in the case at bar, it is possible to include the insurance proceeds as part of the Plans. If the Applicant pursues the proposed action, it may interfere with the ability of the Creditors Committees to negotiate a settlement.

Third Report at para. 16.2 and 16.4

28. The Applicant has demonstrated no urgency requiring the lifting of the Stay at this time. There are no allegations of prejudice that would arise from requiring the Applicant to wait until the Plans have been completed and approved.

29. Similarly, there is no allegation of undue delay on the part of the CCAA Protected Companies. To the contrary, the Monitor has repeatedly opined that the CCAA Protected Companies are acting in good faith and with due diligence.

First Report of the Monitor, dated February 17, 2015 at para. 112
Second Report of the Monitor, dated March 23, 2015 at para. 108

30. There is a potential of prejudice to the Depositors should the proposed action proceed. Some members of the Depositor Groups already find the proceedings confusing and the Monitor has expressed concern that should the proposed claim go forward, it could add to the confusion. There is a risk that members of the Depositor Groups could misunderstand the nature of some of the Plans communications or some of the communications surrounding the proposed action and take actions which are inconsistent with their actual intentions.

Third Report at para. 16.5

31. As in *Timminco*, there is also a significant risk that the existence of the proposed action could interfere with or delay the preparation and advancement of the Plans process by taking resources and distracting focus from the preparation of the Plan.

Third Report at para. 16.1.2

32. The balance of convenience overwhelmingly favours denying the Application.

33. No risk of prejudice to the Applicant that has been established. Conversely, there is a risk of prejudice to the stakeholders under the Plans due to the potential for delay and

distraction of resources from completion of the Plans as well as potential confusion among the creditors arising from the existence and advancement of the proposed action.

**D. Merits of the Proposed Action**

34. In *Re: Ivaco Inc.*, 2006 CarswellOnt 8025 ("*Ivaco*") (Tab 8), the Court analyzed the proposed form of pleading to determine merits of the claim. Based upon the review of those pleadings and the evidence, the Court was able to determine that either the claims were already being dealt with by the Monitor or there was no merit to the claims as plead.

*Ivaco* at 28 and 29 (Tab 8)

35. How the pleadings are framed can affect whether or not the claims reflected in those pleadings can be compromised under the Plans.

*Vanguard* at para. 51 (Tab 6)

36. Section 5.1(2) of the *CCAA* only excludes claims against directors. Claims against officers and the company itself with respect to those matters set out in s. 5.1(2) can still be released under the Plans.

*Vanguard* at para. 47 and 48 (Tab 6)

37. A plan may compromise all claims against directors except those set out in s. 5.1(2). The section does not prevent the compromise of claims framed in negligence against the directors. Other than those specific exclusions set out in s. 5.1(2), a plan of arrangement may compromise any claim that could be released as part of a contract.

*Vanguard* at para. 45 & 51 (Tab 6)
*Worldwide Pork* at para. 33, 35 (Tab 7)

38. Section 5.1(2) also does not prevent the compromise of claims with respect to breach of fiduciary duty. It is limited to claims of misrepresentations made by directors to creditors or of wrongful or oppressive conduct.

*CCAA*, s. 5.1(2) (Tab 1)

39. In the absence of a statement of claim, it is not at all clear as to what the nature of the pleadings will be nor what potential impact the Plans may have on the underlying claims. Indeed, upon review of a statement of claim, it may be apparent that in order to advance some

of the claims, the CCAA Protected Companies may need to be parties. Other claims may be subject to compromise under the Plans.

40. Based upon the brief filed by the Applicant, it appears that at least some of the claims in question will be causes of action in negligence and breach of fiduciary duty.

Brief of the Applicant, sections III(B) and (C)

41. The Applicant is incorrect in its assertion that claims for breaches of their fiduciary duty and negligence by officers and directors cannot be compromised as part of the Plans.

*Vanguard* at para. 45 & 51 (Tab 6)
*Worldwide Pork* at para. 33, 35 (Tab 7)

42. The Applicant has failed to clearly demonstrate the proposed action it seeks to pursue. As such, the merits of the proposed action cannot be assessed and the Applicant cannot meet the threshold required to lift the Stay.

## E. Good Faith and Due Diligence by the CCAA Protected Companies

43. The Monitor has repeatedly opined that the CCAA Protected Companies are acting in good faith and with due diligence.

First Report of the Monitor, dated February 17, 2015 at para. 112
Second Report of the Monitor, dated March 23, 2015 at para. 108
*CCAA*, s. 11.02(3)(b) (Tab 1)

## F. Is the Applicant the Proper Party to Bring the Proposed Action

44. The Creditors Committees have been formed and are currently assessing possible claims against the CCAA Proposed Companies, their officers and directors. They have counsel to assist them. As noted, they have the ability to bring any necessary claims against the officers and directors and to potentially settle any claims with the D&O Insurer. The proposed claim essentially duplicates the efforts already undertaken by the Creditors Committees.

45. The Applicant apparently has not even provided a proposed statement of claim.

46. The Applicant also appears to be unclear about the nature of the relationship between CEF and the District, that being that they are one and the same entity. CEF is merely a department of the District. Based upon his reading of the Second Report and the Initial Affidavit, the Applicant concludes in on page 10, paragraph 26 of the Applicant's Affidavit

"[a]pparently, District and CEF granted two different mortgages on the same property, which gives rise to the question: which of them owned the property".

47. The Creditors Committees are in a much better position to assess and advance any potential claims alleged by the Applicant and they should be allowed to do so.

## IV. CONCLUSION

48. The Applicant has a heavy onus to discharge to justify lifting the Stay.

49. The Applicant has failed to provide a draft statement of claim to assist the Court in understanding and analyzing the proposed claim that they wish to advance if the Stay is lifted.

50. The Applicant has failed to establish:

a. The balance of convenience favours lifting the Stay;

b. The relative prejudice to the parties and other stakeholders favours lifting the stay;

c. The claims to be advanced cannot be compromised in the Plans; and

d. There has been a lack of good faith and due diligence by the CCAA Protected Companies in advancing the CCAA process and bringing forward a plan for consideration.

51. In addition, it would appear that the existing Creditors Committees would be the most appropriate potential parties to advance the proposed claims.

52. In the absence of the lifting of the Stay, the balance of the relief sought by the Applicant is unnecessary.

53. The Application should therefore be dismissed.

54. The CCAA Protected Companies seek costs of this application.

55. It is respectfully submitted that this is the only outcome that is just and appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Bishop & McKenzie LLP

Per: _____
Francis N. J. Taman
Solicitors for the CCAA Protected Companies

## Table of Authorities

**Statutes**



**Cases**

## 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 may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

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

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

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

Stays, etc. — other than initial application

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

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

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

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 arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

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

Persons deemed to be directors

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

2005, c. 47, s. 128.

**5.1** (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings unde this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(*a*) relate to contractual rights of one or more creditors; or

(*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where 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 debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

2009 ONCA 833
Ontario Court of Appeal

Nortel Networks Corp., Re

2009 CarswellOnt 7383, 2009 ONCA 833, [2009] O.J. No. 4967, 184 A.C.W.S. (3d) 300, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, 99 O.R. (3d) 708

# 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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Appellants) and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915, George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Appellants) and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

S.T. Goudge, K.N. Feldman, R.A. Blair JJ.A.

Heard: October 1, 2009
Judgment: November 26, 2009*
Docket: CA C50986, C50988

Proceedings: affirming *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List])

Counsel: Mark Zigler, Andrew Hatnay, Andrea McKinnon for Appellants, Nortel Networks Former Employees
Barry E. Wadsworth for Appellant, CAW-Canada
Suzanne Wood, Alan Mersky for Respondents, Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation
Lyndon A.J. Barnes, Adam Hirsh for Respondents, Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Benjamin Zarnett for Monitor, Ernst & Young Inc.
Gavin H. Finlayson for Informal Nortel Noteholder Group
Thomas McRae for Nortel Canadian Continuing Employees
Massimo Starnino for Superintendent of Financial Services
Alex MacFarlane, Jane Dietrich for Official Committee of Unsecured Creditors

 

Subject: Insolvency; Constitutional; Employment; Public; Corporate and Commercial; Civil Practice and Procedure

**Related Abridgment Classifications**

  

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

### Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Motion by former employees and union for continued benefits as well as severance and termination pay was dismissed — Trial judge found poor financial performance of company, which was insolvent, was important consideration — Trial judge found proceedings were at early stage and no classification of creditors had occurred — Trial judge found company had breached terms of collective agreement with union, and to former employees not covered by agreement — Trial judge found claims were unsecured — Trial judge found s. 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Trial judge found s. 11.3 should be construed narrowly — Union and former employees made separate appeals, which were heard together — Appeals dismissed — Trial judge was correct that stay was necessary — Stay provisions are important part of restructuring process under Act — Periodic payments were not for services rendered, and were not excluded by s. 11.3(a) of Act — Fact that rights to payment were vested and could be enforced under earlier collective agreements indicated they were not for current services — Fact that at time of hearing business was likely to be sold rather than restructured did not affect order.

### Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Paramountcy of federal legislation — Statutes governing labour and employment — Miscellaneous

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Motion by former employees and union for continued benefits as well as severance and termination pay was dismissed — Trial judge found poor financial performance of company, which was insolvent, was important consideration — Trial judge found proceedings were at early stage and no classification of creditors had occurred — Trial judge found company had breached terms of collective agreement with union, and to former employees not covered by agreement — Trial judge found claims were unsecured — Trial judge found s. 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Trial judge found key factor was not payment obligation arose but rather when services performed — Trial judge found s. 11.3 should be construed narrowly — Union and former employees made separate appeals, which were heard together — Appeals dismissed — Trial judge was correct that stay was necessary — CCAA overrides provincial Employment Standards Act which requires immediate payment of termination and severance obligations — Paramountcy doctrine dictated that intent of parliament to freeze debt obligations through Act would be frustrated if stay order did not apply to statutory termination and severance payments regarding past services.

## Table of Authorities

### Cases considered:

*Canadian Western Bank v. Alberta* (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — considered

*Crystalline Investments Ltd. v. Domgroup Ltd.* (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 CarswellOnt 220, 184 O.A.C. 33, 16 R.P.R. (4th) 1, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 46 C.B.R. (4th)

  

35, 234 D.L.R. (4th) 513, 316 N.R. 1 (S.C.C.) — referred to

*Dayco (Canada) Ltd. v. C.A.W.* (1993), 1993 CarswellOnt 883, 1993 CarswellOnt 978, 14 Admin. L.R. (2d) 1, (sub nom. *Dayco (Canada) Ltd. v. CAW-Canada)* [1993] 2 S.C.R. 230, (sub nom. *Dayco (Canada) Ltd. v. C.A.W.-Canada)* 102 D.L.R. (4th) 609, 63 O.A.C. 1, 152 N.R. 1, 13 O.R. (3d) 164 (note), (sub nom. *Dayco v. C.A.W.)* 93 C.L.L.C. 14,032 (S.C.C.) — referred to

*Metropolitan Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board)* (1999), 178 D.L.R. (4th) 440, 45 O.R. (3d) 622, 22 C.C.P.B. 1, 123 O.A.C. 384, 1999 CarswellOnt 2669 (Ont. C.A.) — considered

*Mirant Canada Energy Marketing Ltd., Re* (2004), 1 C.B.R. (5th) 252, 2004 CarswellAlta 352, 2004 ABQB 218, 36 Alta. L.R. (4th) 87 (Alta. Q.B.) — referred to

*Multiple Access Ltd. v. McCutcheon* (1982), 1982 CarswellOnt 128, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 738 (S.C.C.) — 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

*Windsor Machine & Stamping Ltd., Re* (2009), 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]) — referred to

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
Generally — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

s. 11(3) — considered

s. 11(4) — referred to

s. 11(5) — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — referred to

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

*Employment Standards Act, 2000*, S.O. 2000, c. 41
Generally — referred to

APPEALS by union and former employees from judgment reported at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List]), dismissing motion for continued payments under collective agreement.

  

*S.T. Goudge, K.N. Feldman JJ.A.:*

1 On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, ("*CCAA*").

2 In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

3 The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

4 The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

5 We will address each of the two appeals in turn.

**The Union Appeal**

***Background***

6 The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and severance payments to unionized employees who have been terminated or who have severed their employment at Nortel.

7 Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

8 The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[1]

  

11.3 No order made under section 11 shall have 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.

9 The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the *CCAA*.

10 The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

11 The Union challenges this conclusion.

12 In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

13 Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

14 Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

15 In our opinion, this argument must fail.

***Analysis***

  

16 Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

17 Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

18 Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

19 What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Mirant Canada Energy Marketing Ltd., Re* (2004), 36 Alta. L.R. (4th) 87 (Alta. Q.B.).

20 Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

21 The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board)* (1999), 45 O.R. (3d) 622 (Ont. C.A.), at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

22 Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only

  

be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230 (S.C.C.), at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

23 In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

24 The Union's appeal must be dismissed.

**The Former Employees' Appeal**

***Background***

25 The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

26 After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

27 For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

28 Neither the provincial nor the federal governments responded to the notice on this appeal.

  

29 Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *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 and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> . . .
>
> > (b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court.*
>
> . . .
>
> all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.
>
> [Emphasis added.]

30 Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

31 As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

32 Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

> 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; [the Bankruptcy and Insolvency Act and the Winding Up Act]
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;

  

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

*Analysis*

33 As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36:

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

34 Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

35 As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 (S.C.C.) at para. 43.

36 The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.) at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.):

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

37 However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188,

  

2005 SCC 13. (para. 73)

38 Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

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

40 The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

41 In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

42 While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

43 The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need. This will have the effect of granting

  

the "super-priority" to some. This is an acceptable result in appropriate circumstances.

44 However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

45 Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

46 Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the *CCAA* process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

47 The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

48 We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

49 The appeal by the former employees is also dismissed.

***R.A. Blair J.A.:***

I agree.

*Appeals dismissed.*

Footnotes

* A corrigendum issued by the court on December 8, 2009 has been incorporated herein.

1 The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

  

2 The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd., Re*, [2009] O.J. No. 3195 (Ont. S.C.J. [Commercial List]), decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

End of Document

2009 CarswellOnt 7882
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7882, [2009] O.J. No. 5379, 183 A.C.W.S. (3d) 634, 61 C.B.R. (5th) 200

# 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 GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Heard: December 8, 2009
Judgment: December 15, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Alex Cobb, Shawn Irving for CMI Entities
Alan Mark, Alan Merskey for Special Committee of the Board of Directors of Canwest
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
K. McElcheran, G. Gray for GS Parties
Hugh O'Reilly, Amanda Darrach for Canwest Retirees and the Canadian Media Guild
Hilary Clarke for Senior Secured Lenders to LP Entities
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

**Related Abridgment Classifications**

 

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights**

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Substance and subject matter of moving parties' motion were encompassed by stay — Substance of moving parties' motion was "proceeding" that was subject to stay under initial order which prohibited commencement of all proceedings against or in respect of insolvent entities or affecting business or property of insolvent entities — Relief sought would involve exercise of any right or remedy affecting business or property of insolvent entities which was stayed under initial order.

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay**

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares from 441 Inc. to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Stay of proceedings not lifted — Balance of convenience, assessment of relative prejudice and relevant merits favoured position of insolvent entities — There was good arguable case that shareholders agreement, which would inform reasonable expectations of parties, permitted transfer and dissolution of 441 Inc. — Moving parties were in no worse position than any other stakeholder who was precluded from relying on rights that arose upon insolvency default — If stay were lifted, prejudice to insolvent entities would be great and proceedings contemplated by moving parties would be extraordinarily disruptive — Litigating subject matter of motion would undermine objective of protecting insolvent entities while they attempted to restructure — It was premature to address issue of whether insolvent entities could disclaim agreement — Issues surrounding any attempt at disclaimer should be canvassed on basis mandated in s. 32 of Act — Discretion to lift stay on basis of lack of good faith not exercised.

## Table of Authorities

  

**Cases considered by *Pepall J.*:**

*Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

*Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

*ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — 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]) — referred to

*Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

*San Francisco Gifts Ltd., Re* (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (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.) — referred to

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
Generally — referred to

s. 8 — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

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

s. 32 — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43
s. 106 — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
R. 25.11(b) — referred to

R. 25.11(c) — referred to

  

MOTION by moving party to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement; MOTION by insolvent entities for order that motion by moving party was stayed; CROSS-MOTION by moving party for leave to proceed with its motion.

*Pepall J.*:

**Relief Requested**

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.l and GS VI AA One Parallel Holding S.ar.l (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

**Background Facts**

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and

  

the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;

(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found

  

in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, 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 CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. 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 CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

 

(a) Setting aside and declaring void the transfer of the shares from 441 to CMI;

(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;

(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;

(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and

(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

**Issues**

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

**Positions of Parties**

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

  

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Canadian Airlines Corp., Re*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

**Discussion**

  

*(a) Legal Principles*

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 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.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Stelco Inc., Re*[3] and the key element of the CCAA process: *Canadian Airlines Corp., Re*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Lehndorff General Partner Ltd., Re*[5] , the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

 

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re*[14]and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

  

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

*(b) Application*

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or

(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an

 

order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd., Re*[17] :

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*[19] , one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate

  

replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts.

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,

  

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

*Insolvent entities' motion granted; motion and cross-motion of moving party dismissed.*

Footnotes

1 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

2 (B.C. C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

5 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

6 Ibid, at p. 32.

  

7 Supra, note 2

8 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

9 R.S.O. 1990, c.C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para.37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

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2012 ONSC 2515
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 5390, 2012 ONSC 2515, 216 A.C.W.S. (3d) 286

# 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 Timminco Limited and Bécancour Silicon Inc., Applicants

Morawetz J.

Heard: March 26, 2012
Judgment: April 27, 2012
Docket: CV-12-9539-00CL

Counsel: James C. Orr, N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, Penneyfeather v. Timminco Limited et al
P. O'Kelly, A. Taylor, for Applicants
P. LeVay, for Photon Defendants
A. Lockhart, for Wacker Chemie AG
K.D. Kraft, for Chubb Insurance Company of Canada
D.J. Bell, for John P. Walsh
A. Hatnay, James Harnum, for Mercer Canada, Administrator of the Timminco Haley Plan
S. Weisz, for Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Civil Practice and Procedure

**Related Abridgment Classifications**

 

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay**

Plaintiff sought to bring class proceedings regarding insurance proceeds against company that was protected under Companies' Creditors Arrangement Act — Stay under Act was lifted for purposes of bringing leave to appeal regarding limitation period — Hearing was held regarding lifting stay generally — Stay not lifted — Stay was put in place for restructuring and sale — If plaintiff's proceedings were to continue, executive team would have to devote considerable time to proceedings — Time sensitivity was largely alleviated by lifting stay with regards to leave proceedings — Insurance proceeds were not available to other creditors.

## Table of Authorities

**Cases considered by *Morawetz J.*:**

*Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

*Canwest Global Communications Corp., Re* (2011), 2011 ONSC 2215, 2011 CarswellOnt 2392, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]) — referred to

*Carey Canada Inc., Re* (2006), 29 C.B.R. (5th) 81, 2006 CarswellOnt 7748 (Ont. S.C.J. [Commercial List]) — referred to

*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.) — referred to

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — referred to

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6
Generally — referred to

s. 12 — referred to

s. 28 — referred to

*Securities Act*, R.S.O. 1990, c. S.5

  

Generally — referred to

s. 138.14 [en. 2002, c. 22, s. 185] — referred to

HEARING regarding lifting stay of proceedings imposed under *Companies' Creditors Arrangement Act.*

***Morawetz J.:***

1 St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

2 The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

(a) a carriage motion;

(b) a motion to substitute the Representative Plaintiff;

(c) a motion to force disclosure of insurance policies;

(d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;

(e) settlement discussions;

(f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;

(g) a motion for particulars; and

(h) a motion served but not heard to strike portions of the Statement of Claim.

3 On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act.*

4 The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

  

5 On April 10, 2012, the following endorsement was released in respect of this motion:

> The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

6 Counsel to Mr. Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

7 Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

8 Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

9 Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank*, [1992] O.J. No. 889 (Ont. C.A.) at paras. 13-15 and *Carey Canada Inc., Re*, [2006] O.J. No. 4905 (Ont. S.C.J. [Commercial List]) at paras. 7, 16-17.)

10 In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

11 The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

12 Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the

  

executive team is currently focussing on the CCAA proceedings and the sales process.

13 Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

14 It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

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

16 Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp., Re*, [2011] O.J. No. 1590 (Ont. S.C.J. [Commercial List]) at para. 27.

17 Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re)*, *supra*, at para. 27.

18 Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

19 I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timelines previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

  

20 It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an "equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full.

21 In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

22 Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also follows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

23 With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

24 I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

25 In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.

*Order accordingly.*

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