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Docket: CI 12-01-79231
(Winnipeg Centre)
Indexed as: *Re Puratone et al*
Cited as: 2013 MBQB 171

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

IN THE MATTER OF:	)	<u>Appearances:</u>
<i>The Companies' Creditors Arrangement Act,</i>)	
R.S.C. 1985, c. C-36, as amended	)	David Jackson
	)	for Puratone Corporation
AND IN THE MATTER OF:)	
A Plan of Compromise or Arrangement of	)	J.J. Burnell
The Puratone Corporation, Pembina Valley	)	for Bank of Montreal
Pigs Ltd. and Niverville Swine Breeders Ltd.)	
(the "Applicants")	)	Jeffrey Lee and
	)	Sandra Zinchuk
APPLICATION UNDER:	)	for Farm Credit Canada
<i>The Companies' Creditors Arrangement Act,</i>)	
R.S.C. 1985, c. C-36, as amended	)	Richard Schwartz and
	)	Jason Harvey
	)	for ITB Claimants
)	
	)	Ross McFadyen
	)	for Deloitte Touche Inc.
)	
	)	David Kroft and Aaron Challis
	)	for Directors and Officers

DEWAR J.

[1] On September 12, 2012, an Initial Order was pronounced by me in a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA") filed on that date by three of the companies within the Puratone umbrella, namely The Puratone Corporation, Pembina Valley Pigs Ltd., and Niverville Swine Breeders Ltd. (hereinafter "Puratone").

[2] The Puratone Group of companies ran a commercial hog production business. Their business included the breeding, farrowing, finishing and marketing of hogs. In order to carry on this business, Puratone needed grain to be used in feed for its hogs.

[3] This motion involves 17 farming operators who claim priority to some of the proceeds of sale of the assets of the companies covered by the within CCAA proceedings. The lead farming operator, Interlake Turkey Breeders Ltd. claims to be a part of the steering committee for a group of farmers who supplied grain to the Puratone Group of Companies within two weeks of the filing of this CCAA proceeding. I will hereinafter refer to the group of farmers as "the ITB Claimants".

[4] The Initial Order contained many of the usual provisions, including stay provisions as follows:

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

18. THIS COURT ORDERS that until and including October 12, 2012, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

19. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or

proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

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

[5] Although the Initial Order included the stay provisions for only 30 days ending October 12, 2012, the stays have been extended as a result of a series of motions whilst Puratone has been undergoing its "restructuring". The restructuring referred to has essentially involved the sale of substantially all of its assets to Maple Leaf Foods Inc. on a going concern basis. That sale was approved by the court on November 8, 2012 and closed on December 17, 2012. As part of the order approving the sale, I ordered that the proceeds of sale should be paid to the Monitor to be held pending receipt of a Distribution Order. On March 12, 2013, I granted an order authorizing the distribution of most of the net proceeds from the sale of the assets. The creditors who received funds from the Distribution Order were as follows:

- | | | |
|----|---|---------------|
| a) | Bank of Montréal | \$17,726,173; |
| b) | Farm Credit Corporation | \$15,817,303 |
| c) | Manitoba Agricultural Services Corporation (MASC) | \$1,041,524 |

[6] The sworn pre-CCAA claim of Bank of Montréal before receiving this distribution was \$43,322,558. The sworn pre-CCAA claim of the Farm Credit Corporation (FCC) before receiving this distribution was \$41,025,891.76. The sworn pre-CCAA claim of MASC before receiving the distribution was \$5,263,767.

[7] There are therefore significant shortfalls being sustained by each of the major secured creditors.

[8] The Monitor has retained a sum in an amount of \$6,753,765 from the net proceeds. Of this amount, \$1,573,765 has been withheld to deal with an issue that has arisen with the purchaser out of the sale and to that extent, as against Puratone and its creditors, the purchaser has the first claim against those funds. A further \$5,000,000 was also recommended to be held back. These monies, in addition to whatever might be obtained from the relatively small number of assets yet to be liquidated, are intended to serve as a general holdback pending completion of the CCAA proceedings including the continued realization of remaining assets, resolution of the dispute with the purchaser and potential legal actions.

[9] One of the potential legal actions is a claim by the ITB Claimants ("the ITB Claim"). At the time of the application of the Monitor for a Distribution Order, a motion was brought by the ITB Claimants requesting that \$903,250.50 be withheld from any distribution to the major secured creditors, and requesting leave to commence an action against Puratone and its directors and/or officers in order to make the said claim. On its initial return date, I adjourned the motion of the ITB Claimants while authorizing the distribution set out above, which contemplated the holdback that had been

recommended by the Monitor. I set time frames for the parties to provide briefs and any further affidavit material. On April 10, 2013 the ITB Claimants filed a further notice of motion which amplified their requests. The matter came on for hearing on April 11, 2013 at which time, after hearing submissions, I reserved judgment.

[10] The claim of the ITB claimants is that they supplied grain to Puratone on an individual contract basis on various dates between August 29 and September 11, 2012, a period within two weeks of the filing of the CCAA proceeding. It is alleged that the grain was used by Puratone to feed the hogs that were ultimately sold to Maple Leaf Foods Inc. as part of the going concern sale ultimately approved by the court. The ITB Claimants argue that at the time of the supply transactions, Puratone was gearing up for its CCAA application and must have then known that it would have been unable to pay for the grain once an Initial Order was pronounced. In essence, the claim of the ITB Claimants boils down to allegations that Puratone acquired the grain when it had no intention of paying for it. As a result, the ITB claimants argue that they have causes of action against Puratone entitling them to :

- a) damages for fraudulent misrepresentation on the part of Puratone;
- b) a claim [an order] under s. 234 of ***The Corporations Act***, C.C.S.M. c. C225, that Puratone's conduct was oppressive as regards the plaintiffs;
- c) a declaration that an implied or constructive trust exists in favour of the plaintiffs, and that Puratone and its secured creditors were unjustly enriched by the feed supplied by the plaintiffs;
- d) a declaration that the secured creditors claims are subordinate to those of the plaintiffs, and/or that in equity they subordinated their security to the ITB Claimants;
- e) a declaration that Puratone and its directors and officers wrongfully and/or fraudulently caused Puratone to obtain feed from the plaintiffs which they knew would not be paid for;

- f) a declaration that the secured creditors colluded with Puratone and/or its directors and officers to, in effect, wrongfully obtain feed which they knew would not be paid for; and
- g) a declaration that the secured creditors indemnified, in fact or at law, Puratone and/or its directors and officers by supporting and participating in a process that was designed to ensure that the secured creditors received the benefit of the feed without having to pay for it.

ANALYSIS

[11] A stay of proceedings is normally included in an Initial Order in order to permit an applicant to proceed with its restructuring (including, in some cases, its liquidation) without continually being harassed by creditors who are dissatisfied with the state of their outstanding accounts. The theory behind the stay order is that it will allow the applicant to devote its full time, efforts and resources to presenting and executing a restructuring plan which is in the best interests of the creditors generally, rather than fighting rearguard actions against individual creditors who are trying to collect their individual accounts.

[12] A stay of proceedings however can be lifted in the appropriate case, but those cases will be the subject of judicial consideration which normally involves a balancing of stakeholder interests.

[13] The CCAA does not set out a specific test identifying the circumstances in which the stay of proceedings should be lifted. Rather, it is in the discretion of the supervising CCAA judge whether a proposed action should be allowed to proceed. Apart from giving the judge the authority to grant the stay, the only guidelines expressed in the CCAA respecting such a stay order are found in section 11.02(3) which says:

(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.

[14] In ***ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.***, 2007 SKCA 72, 9 W.W.R. 79, the Saskatchewan Court of the Appeal indicated that there must be “sound reasons”, consistent with the scheme of the CCAA, to relieve against the stay. In the search for “sound reasons”, the court suggested the following considerations:

- a) the balance of convenience;
- b) the relative prejudice to the parties; and
- c) the merits of the proposed action.

It also indicated that, “The supervising CCAA judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6)”.

[15] In my respectful view, these considerations are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being

left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.

The stay respecting claims against Puratone

[16] The motion of the ITB Claimants was opposed by Bank of Montréal and FCC. They essentially argued that the ITB Claimants had not demonstrated the existence of a cause of action with enough of a reasonable prospect of success to justify a delay in the distribution of the holdback monies to the secured creditors. In short they focused on the third of the considerations described in *ICR*. They argued that the proposed claim of the ITB Claimants for a constructive trust respecting some of the assets of Puratone would fail for a number of reasons, namely:

- a) The sale of grain by the ITB Claimants involved transactions that do not qualify for the application of the doctrines of unjust enrichment, or equitable subordination. These transactions were essentially commercial transactions as between buyer and seller. It was argued that an unpaid seller is simply a debtor of Puratone. Although Puratone has received a benefit, the normal buyer-seller relationship provides a juristic reason for the benefit, and therefore the doctrine of unjust enrichment does not apply. Furthermore the banks argued that the doctrine of equitable subordination has never been recognized in Canada.
- b) The secured creditors are to be viewed as *bona fide* third parties with a commercial interest in the assets of Puratone and the ITB Claimants should not be entitled to jump the queue from the status of unsecured

creditors and receive a priority ahead of secured creditors who hold valid and properly registered securities.

- c) It is impossible to trace the grain into the hogs that were ultimately sold during the CCAA proceedings. Therefore, the ITB Claimants have no claim to the proceeds of sale of the hogs.

[17] Counsel for the ITB Claimants has argued that this situation is a relatively new phenomenon. Historically, CCAA proceedings involved the restructuring of a company to permit it to carry on its business. CCAA proceedings in days gone by were not intended to be used where there were no future plans for the company. Counsel for the ITB Claimants argued that in this case, the plan was always to liquidate the assets in a controlled way in order to maximize the return to the secured creditors, but with the expectation that a shortfall would invariably occur to the secured creditors. He submitted that it must have been well known to Puratone as well as its secured creditors and directors and officers that at the time that the grain was supplied by the ITB claimants, Puratone was deeply underwater to its secured creditors. He argued that the evidence of knowledge of such insolvent condition can be inferred by the large shortfall suffered by Bank of Montréal and FCC notwithstanding a going concern sale which was negotiated during the CCAA proceedings only two months after the feed was supplied by the ITB Claimants. Counsel submits that CCAA applications of the scale of this proceeding are not prepared overnight, and that at the time of the supply of grain, Puratone would have been preparing its CCAA materials and would have known that the CCAA proceedings would only yield a sale which resulted in large secured creditor

deficiencies. He argued that at the time of these contracts of supply, there was no likelihood that the ITB claimants would receive any of their money. He argued that by ordering the grain under these circumstances, essentially Puratone was perpetrating a fraud on the ITB claimants.

[18] It was urged upon me by counsel for the two banks that the case authorities require a judge to scrutinize the claim which a creditor intends to advance before lifting the stay in a CCAA proceeding. It was argued that the authorities suggest that the test to be employed in lifting a CCAA stay is more than the test used in striking out a statement of claim as disclosing no cause of action or being frivolous and vexatious, but does not require prospective plaintiffs to demonstrate a *prima facie* case. The terms "reasonable cause of action" or "tenable case" have sometimes been used.

[19] In the **ICR** case, at paragraph 64 and 65, Jackson, JA wrote:

[64] Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco*, but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.

[65] Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the CCAA proceeding.
(Emphasis added)

[20] When I scrutinize the proposed claim of the ITB Claimants against Puratone, I conclude that its dismissal is not a foregone conclusion. The ITB Claimants raise a point which so far as I am aware has not been addressed by this court. Here, the court is faced with a CCAA proceeding which has had from the outset all of the earmarks of a liquidation proceeding. The affidavit of Raymond Hildebrand, sworn September 12, 2012 underlying the request for the Initial Order as well as the Pre-Filing Monitor's Report outlined the financial difficulties being experienced by Puratone, the reasons for those difficulties, as well as the efforts that had been made by Puratone and its restructuring professionals to deal with them. Some of the efforts had included a Sales and Solicitation Process ("SISP"), a process designed to find people who were willing to inject money into Puratone either through a going concern sale of assets or in equity injection. Those efforts failed.

[21] In the Pre-Filing Report of Deloitte & Touche Inc., the then Proposed Monitor wrote:

46 The Proposed Monitor has been advised that the SISP, as originally proposed, failed to result in a successful investment or sale transaction. Accordingly, the SISP has been terminated and replaced with a short-term, expedited strategy to complete a sale of the business, or parts thereof, which will be undertaken by the Applicants with the assistance of the Proposed Monitor (the "Sales Process").

[22] The Initial Order was granted based on information, *inter alia*, that the major secured creditors were Bank of Montréal and FCC. As indicated earlier, less than three months later, the parties were recommending a sale which would result in large secured creditor shortfalls. The ITB Claimants argue that this result must have been contemplated by Puratone at the time that the ITB Claimants supplied their grain to

Puratone. This raises the interesting question as to whether that expectation was in the mind of Puratone at the time that the grain was supplied, and if so, whether the ITB Claimants are entitled to any relief from Puratone other than a meaningless monetary judgment. It raises the issue whether a company with exposed secured creditors should be incurring credit at a time when it is preparing to make a CCAA application.

[23] The ITB claimants request a constructive trust over the assets of Puratone that were sold during the CCAA proceeding which, if ordered, would erode the assets over which the banks claim security by the amount of the unpaid accounts of the ITB Claimants. A constructive trust has been recognized as a remedy against a debtor in the event that there has been a fraud. In Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, (looseleaf), Volume 1, at paragraph 5:200.30, the following is written:

Chancery's willingness to impose a constructive trust in circumstances where a fraud has been perpetrated is by no means a modern development. No pre-existing fiduciary relationship need be established for this category of constructive trust and, indeed, a breach of trust or other fiduciary obligation is, in itself, simply one form of equitable fraud. As Lord Westbury explained in *McCormick v. Grogan*: "it is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud." And, in *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.*, Lord Browne-Wilkinson recognized that "when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity". For example, one who acquires property by theft or fraudulent misrepresentation may be held a constructive trustee of the misappropriated property.

[24] The question arises whether there is any practical reason for permitting the ITB Claimants to make their claim against Puratone at this time. Courts will generally not

impose a constructive trust where the remedy jeopardizes the priority of innocent parties for value. In this regard, see ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, where LaForest J says:

197 ...In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, supra, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy....

The banks argue that there is no evidence that they are anything but innocent parties in these circumstances. Counsel for the two banks argue that there is no affidavit evidence adduced by the ITB Claimants that indicates that the banks were knowledgeable about any fraudulent intent on the part of Puratone, even if such existed. They argue that the court should not lift the stay simply on the basis that the ITB Claimants make such an unsubstantiated allegation. Rather it is argued that the banks should, for the purpose of this motion, be assumed to have had no knowledge of any bad intent that is alleged to have been possessed on the part of Puratone, and that being the case, there is no prospect, let alone a reasonable prospect, that the ITB Claimants will be successful in obtaining a constructive trust at the end of the day.

[25] The problem which I see with this submission is that evidence of the knowledge of the banks at the material times is a factual matter that is not readily apparent. Evidence such as that would normally only surface during the discovery process in civil litigation. The banks have chosen to file no affidavit material in this motion. It seems too high a threshold to require the ITB Claimants to demonstrate the knowledge of the

banks at the material times on this motion. For current purposes, it is sufficient to conclude that given the size of the troubled loans, a reasonable inference is that the two banks who appeared to oppose the ITB Claimants motion would have been aware of the pending CCAA proceedings before they were filed, and at the time that the grain was being supplied, bank representatives would have had more than a cursory understanding of the business of Puratone and its financial difficulties. Whether the banks were aware that Puratone was purchasing grain on other than a COD basis after the decision had been made to apply for a CCAA order, and if so, whether the banks were in any position to do anything about it, is currently unknown. I do not say that the ITB Claimants will prevail in demonstrating the necessary knowledge in the fullness of time, but they have a claim which raises interesting issues, and they should be given the opportunity to pursue it sooner rather than later, especially when the existence of the claim will not jeopardize any restructuring.

[26] What then of the other considerations enumerated by Jackson JA in the ***ICR*** case?

[27] The merits of the claim against Puratone aside for the moment, the ITB Claim essentially translates into a priority claim between competing creditors. There is no restructuring plan which is being put at risk in this case. This proceeding is almost over. There are a few assets left to be liquidated, but that process will not be put at risk by the existence of the proposed claim by the ITB Claimants. Indeed, the Monitor confirms as such when in its latest report, it observed:

20. The Monitor understands that the general purpose of a stay of proceedings under the CCAA is to maintain the *status quo* for a period of time in order that a

debtor company (and its directors and officers) can focus on restructuring efforts without undue interference.

21. Substantially all of the undertaking, property and assets of the Applicants have been sold and it is not anticipated that any formal restructuring will occur. In these circumstances, subject to the proviso which follows with respect to the role of the Monitor should litigation ensue, the Monitor is of the view that there would be no particular prejudice to the CCAA Proceedings if the stay of proceedings is lifted to enable ITB to initiate and proceed with an action against the Applicants and the directors and/or officers of the Applicants.

[28] The proviso of the Monitor was simply that it not be required to retain any role in the litigation, if it was allowed to proceed.

[29] Accordingly, the balance of convenience favors the ITB Claimants.

[30] What then is the prejudice to be suffered if the claim were permitted to proceed at this time? The real prejudice in this case is that if the ITB Claimants are entitled to commence their action now against Puratone and the secured creditors, there could be a delay in the distribution of the holdback monies to the secured creditors. The banks would essentially be deprived of their use of the monies during the litigation and the return on the monies while sitting in the Monitor's trust account would not match what the banks might earn on those monies were they in hand.

[31] On the other hand, if I do not permit the claim to be made at this time, the ITB Claimants would be forced to await the end of the CCAA proceeding before commencing their claim. By that time, there would be no money left in Puratone. It all will have been paid to the secured creditors, with at least the tacit acknowledgment by the court that those creditors were entitled to those monies ahead of anyone else. A

result such as this is inconsistent with the notion that in a CCAA proceeding, creditors have resort to the supervising court to adjudicate on priority disputes.

[32] Any prejudice created by the delay in distribution of funds can easily be alleviated by analogy to the Court Rules respecting prejudgment garnishment. In effect, that is the result which is being sought by the ITB Claimants. Although *Queen's Bench Rule* 46.14 (1) permits garnishment before judgment, Rule 46.14 (3) reads as follows:

- 46.14(3) An order under subrule (1) (Form 46D) may include,
- (a) a requirement that the plaintiff post security in a form and amount to be determined by the court; and
 - (b) such other terms and conditions as may be just.

[33] There is no doubt that the secured creditors are *prima facie* entitled to the proceeds of these proceedings. They have valid security agreements which have been properly registered. The ITB Claimants seek to challenge their priority not on the basis that the banks are not secured creditors, but on the basis of factual circumstances that would make it equitable to provide the ITB Claimants with a priority over the secured creditors. There are factual impediments to their claim for unjust enrichment and potentially legal impediments to their claim for equitable subordination and tracing. If I give them the right to make those claims, and those claims are not successful, the delays which those claims might cause to the timely receipt of monies by the secured creditors should not go unaddressed. This can be done by requiring the ITB Claimants to each file an undertaking whereby they would be liable to pay either or both of the banks damages arising from the delay in the payment of the holdback monies attributable to their claim. I am therefore ordering that out of the general holdback

monies the amount of \$903,250.50 be dedicated to the ITB Claim and not be paid out without further order of court, which presumably will occur either after the claim has been resolved or upon sufficient evidence being demonstrated that it has not been prosecuted in a timely way. Counsel may try and agree on the form of the undertaking as to damages, but may come back to me should agreement not be reached.

[34] As regards Puratone, I therefore make the following orders:

- a) Out of the general holdback monies, the sum of \$903,250.50 and any interest accrued thereon since March 12, 2013 shall be segregated in an interest bearing account designated as the ITB Claim Monies.
- b) Leave is given to the ITB Claimants to commence the action against Puratone described at Schedule A of their notice of motion dated April 10, 2013, provided:
 - (1) they issue it within 40 days after the date of signing of the Order that evidences this decision, and
 - (2) Prior to the issuance of the Statement of Claim, each named plaintiff will file an undertaking as to damages for its pro rata share of any damages sustained by Bank of Montréal and/or FCC arising from any delay after July 31, 2013 in the distribution of its portion of the ITB Claim monies to Bank of Montréal and/or FCC caused by the issuance of the ITB Claim.

[35] If a claimant does not file the requested undertaking as to damages, I will consider that such claimant has abandoned its claim and the ITB Claim Monies may be reduced by the amount of that claimant's claim.

The Proposed Claim against the directors and/or officers

[36] The claim of the ITB Claimants against the directors and/or officers similarly finds its roots in the allegations of fraud made against Puratone. Counsel for the directors and officers relies upon the case of *Peoples Department Stores Inc. (Trustee Of) v Wise*, 2004 SCC 68, [2004] S.C.J. No. 64, drawing from it the principle that deference ought to be given to the decisions that directors make as they fulfill their functions. Notwithstanding that case, there is an argument to be made that where a company has committed a fraud, be it legal or equitable, knowledge on the part of directors of such conduct by officers or employees of the company may make the directors vicariously and/or personally liable.

[37] Again, evidence of the actual knowledge of the directors and/or the officers is not readily apparent without the ability to inquire into the records of the company through the discovery process. For the same reasons that I expressed as regards the two banks, requiring the ITB Claimants to adduce evidence on this motion of the directors' and officers' knowledge is too high a threshold to impose. A reasonable inference is that at least some of the directors and officers would have known that a CCAA proceeding was being prepared within the two week period prior to the CCAA filing, and at least some of the directors and officers would have had intimate knowledge of the financial constraints of the company and the efforts which the

company was employing to solve them during the two week period prior to the filing of the CCAA proceeding. That reasonable inference in my view is sufficient to conclude that the proposed claim against the directors and/or officers is not necessarily doomed to fail. This case, as with many, will depend on facts not currently available to the court.

[38] Additionally, the balance of convenience favors the ITB Claimants, and I see no prejudice to the directors and officers facing the ITB claim sooner rather than later.

[39] In my view there are sound reasons to justify lifting the stay to permit the ITB Claimants to issue the proposed claim against the officers and are directors, providing it is issued within 40 days after the date of signing of the Order that evidences this decision. It will however be necessary for the claimants to name the particular individuals who they propose to sue, recognizing that they may expose themselves to costs, possibly on a solicitor and own client basis, for every person that they unsuccessfully sue.

GOING FORWARD

[40] I have contemplated that the claim should be commenced by one statement of claim, naming at least Puratone and the named officers and directors. The normal Rules of the Court should be followed with the additional requirement that the action will be case managed. A case management conference before me shall be set up within 30 days of the close of pleadings, or earlier upon written request of any party.

[41] If necessary, the costs of this motion shall be determined by me upon the resolution of the ITB Claims.

_____J.