2019 01G
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

IN THE MATTER OF: An Application by BRITISH CONFECTIONERY COMPANY LIMITED and BRITISH BAZAAR COMPANY LIMITED (the "Applicants") for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as am.

SUMMARY OF CURRENT DOCUMENT	
Court File No.	2019 01G
Date of filing of document:	
Name of filing party or person:	Tim Hill, Q.C., (Counsel for the Applicants)
Application to which document being filed relates:	Application for Orders pursuant to Sections 11.02 and 11.52(1) of the *Companies' Creditors Arrangement Act*.
Statement of purpose in filing:	Memorandum of Fact and Law

APPLICANTS' MEMORANDUM OF FACT AND LAW

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TO: The Service List appended to the Originating Application (*Inter Partes*)

TO: Supreme Court of NL
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Attention: Court Registry

INTRODUCTION

1. British Confectionery Company Limited ("Confectionary") and British Bazaar Company Limited ("Bazaar") (collectively "the Companies or "the Applicants") apply for two orders pursuant to the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as am. ("*CCAA*"). Specifically, the Companies seek an Initial Order pursuant to section 11.02 and a Charging Order pursuant to section11.52(1).

2. The Companies have had the benefit of a stay of proceedings upon the filing of Notices of Intention to Make a Proposal ("NOI") under Part III, Division I, of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as am. ("*BIA*").

3. The maximum stay period under the *BIA* will soon be exhausted. There is a real prospect of a compromise being offered to the Companies' creditors. However, due to circumstances beyond the Companies' control no proposal can be made before the stay period ends. Without relief under the *CCAA*, the Companies will be deemed to have made assignments in bankruptcy on May 5, 2019.

4. In this memorandum the Companies set out the factual matrix giving rise to the present Application, set out the relief being sought, identify the issues to be considered by the Court, and set out the arguments in favour of granting the orders applied for.

SUMMARY OF FACTS

5. The Companies are incorporated in Newfoundland and Labrador.

6. The Companies are qualified to make this application pursuant to section 3(1) of the CCAA as their debts total in excess of $5,000,000.

7. Confectionery and Bazaar are the primary operating entities of a group of companies. Confectionery operates a manufacturing facility from leased premises located in St. John's, Newfoundland and Labrador. This facility specializes in the production of specialty paper products; specifically, break-open lottery and promotional products.

8. Bazaar is a company wholly owned by Confectionary. Bazaar owns and administers customer contracts for the purchase of break-open lottery and promotional products. To fulfill these contracts, Bazaar purchases tickets directly from Confectionery. Outside of the purchase and sale of tickets from Confectionery, the economic activity within Bazaar is negligible.

9. A significant portion of the Companies' revenue is generated from two customers: Atlantic Lottery Corporation ("ALC") and British Columbia Lottery Corporation ("BCLC").

10. On October 31, 2018, Confectionary, Bazaar and David Connolly Sr. received a demand for repayment of outstanding amounts owing and a Notice of Intention to Enforce Security from the Bank of Montreal ("BMO").

11. On November 5, 2018, Confectionery and Bazaar filed NOIs pursuant to section 50.4 of the *BIA*.

12. Over the last four years the Companies' sales performance has demonstrated significant variability. The financial performance during that period was impacted by the following factors:

(i) Operational and organizational deficiencies – a number of factors hindered the ability of the Companies to operate efficiently;

(ii) Development costs – the Companies invested in development costs related to new product offerings, production improvements and barcode technology which have not as yet generated an economic return;

(iii) 2016 inventory write off – a review of inventory in 2016 which resulted in a write off of approximately $1.3 million;

(iv) 2017 ALC product recall – during fiscal 2017, seven ALC games distributed into the market were recalled, and an additional six games in production were withheld, all due to reports that the barcodes on certain tickets were not validating properly;

(v) Fire at production facility – in December 2017, a fire at the production facility resulted in the destruction of finished goods inventory and equipment;

(vi) Contract renegotiations with ALC – Effective July 1, 2018, the Companies extended their contract with ALC at a price per ticket approximately 30% lower than the previous contract; and

(vii) Production delays –Production delays experienced in fiscal 2017 have had residual effects that were still impacting the Company during the initial quarters of fiscal 2018.

13. The Companies undertook a number of restructuring initiatives prior to the NOI filings. These included:

(i) reorganizing the Companies' ownership structure;

(ii) partnering with another company so as to increase the Companies' ability to source product and sell to the United States and central Canadian market;

(iii) hiring of a Chief Financial Officer in March 2018 and a new corporate accountant in October 2018; and

(iv) focusing on overhead cost reductions.

14. Since the date of the NOI Filing, the Companies' activities have included, but were not limited to:

(i) working with the Proposal Trustee to complete statutory requirements, including giving notice to creditors and preparing the NOI Cash Flow;

(ii) meeting in person with both key customers, ALC and BCLC;

(iii) holding discussions with potential lenders and equity sources;

(iv) working with the Proposal Trustee to answer questions of creditors and establish payment arrangements regarding post-filing obligations;

(v) working with the Proposal Trustee to organize discussions with the significant secured and unsecured creditors including BMO, Atlantic Canada Opportunities Agency and Business Investment Corporation;

(vi) working with the Proposal Trustee to monitor actual cash flow and reporting on variances to the NOI Cash Flow;

(vii) working with the Proposal Trustee and legal counsel to satisfy information requests made by ALC;

(viii) Having discussions with potential lenders, equity sources and the government of Newfoundland and Labrador;

(ix) Working with the Proposal Trustee to develop a Confidential Information Memorandum ("CIM") in support of the search for alternative financing;

(x) Cooperating with the Proposal Trustee in reviewing the expressions of interest received from potential financing sources and parties interested in purchasing the Companies' assets; and

(xi) Working with the Proposal Trustee to solidify equity investment and financing, or an asset sale, such as to enable a Proposal to be made.

15. On April 9, 2019, the Companies received a binding expression of interest ("BEOI") from a third-party investor ("the Investor"), as will be described in a confidential addendum to the 5th Report of the Proposal Trustee in the NOI proceedings (the 1st report of the Proposed Monitor in this proceeding) (hereafter the "Proposed Monitor's Report). That BEOI was subject to conditions which included due diligence and the participation of the Province of Newfoundland and Labrador, Department of Tourism, Culture, Industry and Innovation ("TCII"), in future lending to the Companies.

16. The Investor is proceeding with its due diligence inquiries, but these are not yet complete.

17. As will be described in the a confidential addendum to Proposed Monitor's Report, as a result of the calling of the provincial election TCII is not in a position to make a final determination on future lending to the Companies, and have indicated that the determination of same will be delayed until after the installation of the next government.

18. Under the provisions of section 50.4(9) of the *BIA*, the Companies have exhausted the possible extensions available under Part III, Division I of the statute. The Companies will not be in a position to make a proposal under the *BIA* until the Investor completes its due diligence and the position of TCII is confirmed. As a result, on May 5, 2019, the Companies will be deemed to have made an assignment in bankruptcy by virtue of section 50.4(8) of the *BIA*.

NATURE OF THIS APPLICATION

19. In this Application the Companies seek the following relief:

(a) An Order abridging the notice periods pursuant to Section 11 of the *CCAA* and the *Rules of the Supreme Court, 1986,* Rule 2.01(1);

(b) An Order pursuant to Section 11 of the *CCAA* directing that service on the service list used in the BIA proceedings is sufficient for the purposes of this Application;

(c) An Order pursuant to Section 11.02 of the CCAA:

(i) staying, for a period not to exceed 30 days, or until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the Companies under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act,* which would include staying the deemed assignment in bankruptcy;

(ii) restraining, for a period not to exceed 30 days, or until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the Companies, which would essentially continue the stay conditions in force to date under the *BIA*; and

(viii) prohibiting, for a period not to exceed 30 days, or until otherwise ordered by the court, the commencement of any action, suit or proceeding against the Companies, again mirroring the BIA stay.

(d) An order pursuant to Section 11.052(1) of the CCAA granting the Monitor, counsel to the Monitor and the Applicant's counsel a charge on the property of the Companies, not to exceed an aggregate amount of $100,000, as security for their professional fees and disbursements. This order would contain in essence the same terms and conditions as set out in the Administration Charge Order granted by this Honourable Court in the *BIA* proceedings on January 15, 2019.

20. The simple purpose of seeking the Initial Order under the *CCAA* is to allow the process with the Investor and TCII to reach a conclusion. If that conclusion is not positive, subject to court approval the Companies would proceed to seek an asset sale.

ISSUES ON THE APPLICATION

21. The issues arising include:

(a) Under what circumstances may an Initial Order under the CCAA be issued where, as here, a proceeding under Part III of the BIA is extant;

(b) Have the Companies meet the burden imposed on those seeking an Initial Order;

(c) Is this a suitable case to combine the estates of the Applicants; and

(d) Is it appropriate to grant an Administration Charge Order?

ARGUMENT

Under what circumstances may an Initial Order under the CCAA be issued where, as here, a proceeding under Part III of the BIA is extant?

22. This Application is somewhat unusual in that it seeks to "convert" a Part III BIA proposal proceeding into a CCAA proceeding. However, the situation is not without precedent or statutory basis.

23. Section 11.6 of the CCAA reads:

> Notwithstanding the *Bankruptcy and Insolvency Act*,
>
> (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
>
> (b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
>
> (i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or
>
> (ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

24. No proposal has been made by the Companies so there is no impediment to the proceedings being "taken up and continued under" the *CCAA*.

25. The court's attention is respectfully drawn to *Re Clothing for Modern Times Ltd*[1], which involved circumstances somewhat similar to those at bar in that the last date for the making of a proposal under the BIA was just a few days away. The court began its deliberations with the following commentary:

> 9 It strikes me that on a motion to continue under the *CCAA* an

[1] 2011 ONSC 7522 (Tab 1)

> applicant company should place before the court evidence dealing with three issues:
>
> (i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the *CCAA* that it has not filed a proposal under the *BIA*;
>
> (ii) The proposed continuation would be consistent with the purposes of the *CCAA*; and,
>
> (iii) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act.

26. It is submitted that the Companies have shown that they have met the sole statutory condition in that no proposals have been made.

27. It is further submitted that the 1st Report of the Proposed Monitor contains "the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act", or a "reasonable surrogate" thereof.

28. This leaves the question as to whether "the proposed continuation would be consistent with the purposes of the *CCAA*".

Have the Companies meet the burden imposed on those seeking an Initial Order?

29. Having dealt with two of the prerequisites described by the court in *Re Clothing for Modern Times Ltd.*, the Companies are left with the task of meeting the burden of showing that "the proposed continuation would be consistent with the purposes of the *CCAA*".

30. In *Re Clothing for Modern Times Ltd* the court accepted that the sale of the debtor as a going concern was consistent with the objects of the CCAA:

> 12 The jurisprudence under the *CCAA* accepts that in appropriate circumstances the purposes of the *CCAA* will be met even though the re-organization involves the sale of the company as a going concern, with the consequence that the debtor no longer would continue to carry on the business, as is contemplated in the present case. In *Stelco Inc., Re* Farley J. observed that if a restructuring of a company is not feasible, "then there is the exploration of the feasibility of the sale of

the operations/enterprise as a going concern (with continued employment) in whole or in part". It also is well-established in the jurisprudence that a court may approve a sale of assets in the course of a *CCAA* proceeding before a plan of arrangement has been approved by creditors. In *Nortel Networks Corp., Re* Morawetz J. set out the rationale for this judicial approach:

> The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

31. It may be that, should the proposed transaction with the Investor not proceed, an asset sale to a third party which would enable the business to continue as a going concern would be an alternative, subject to the required court approval. There has been interest expressed as the Court is aware. That interest may be renewed.

32. The purposes of the *CCAA* were canvassed by this Honourable Court in *Re Humber Valley Resort Corp*[2]. wherein the Court adopted the reasoning of the British Columbia Supreme Court in *Pacific National Lease Holding Corp.:*

> 3 The legislative purpose behind the CCAA and the principles to be considered in applications made under it have been considered by many Canadian courts. A clear delineation of the principles to be considered in applications under the CCAA is contained in the decision of Mr. Justice Brenner in *Pacific National Lease Holding Corp. (Re)* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]) where he states those principles at page 10 as follows:
>
> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent maneuvers (sic) for positioning amongst the creditors of the company.

[2] 2008 NLTD 160 (Tab 2)

> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

33. In the case at bar, provided that the due diligence of the Investor is completed and the TCII confirms the contemplated loan, the "broad constituency" including the unsecured creditors, the shareholders, the guarantors of the Companies' debts, the Companies' employees, and indeed the greater society, will be far better off than in a bankruptcy. Clearly there will be nothing for anyone except the senior secured creditor if a bankruptcy was to occur.

34. At this point in time there is no evidence that the attempted compromise is "doomed to failure". Indeed, the opposite appears to be the case.

35. Continuing under the *CCAA* will represent a continuance of this Court's "supervisory role to preserve the status quo and to move the process along" until a compromise is proposed, or a sale approved. This is opposed to a bankruptcy where a trustee may sell with the permission of inspectors (*BIA*, Section 30(1)(a)), or if there are none, sell anyway (*BIA*, Section 30(3)), without reference to the Court, except in limited circumstances. This of course may not be an issue as a secured creditor may act on its security, given that the property of the bankrupt vests in the trustee subject to the rights of secured creditors: *BIA*, section 71. That means that only one member of the "broad constituency", in this case BMO, will be in control of liquidation of its security, without any obligation to other stakeholders.

36. In all the circumstances, it is respectfully submitted that this is an appropriate case in which to continue the stay under the provisions of the *CCAA*. Clearly, we are not looking at a significant amount of time for the Investors' due diligence to be completed, and for TCII to make its final decision. If this does not materialize there is also the potential of an asset sale

which would see the business continue as a going concern. There is no pressing need to place the fate of all the stakeholders in the hands of a trustee, or, more realistically, in BMO.

Is this a suitable case to combine the estates of the Applicants?

37. The Court's attention is respectfully drawn to Section 3 of the *CCAA*, the germane parts of which read:

> 3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.
>
> Affiliated companies
>
> (2) For the purposes of this Act,
>
> (a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
>
> (b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.
>
> Company controlled
>
> (3) For the purposes of this Act, a company is controlled by a person or by two or more companies if
>
> (a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
>
> (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

38. The Applicants are clearly affiliated companies for the purpose of the Act in that one of them is the subsidiary of the other (Bazaar is wholly owned by Confectionary). As noted, the debt is well in excess of $5,000,000.

39. It is respectfully submitted that this proceeding should encompass both companies as being affiliated as prescribed by the statute.

Is it appropriate to grant an Administration Charge Order?

40. An Administration Charge was granted in the *BIA* proceedings.

41. A virtually identical charge is sought pursuant to section 11.52(1) of the *CCAA* which reads:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

42. This section is almost identical to section 64.2(1) of the BIA, under which the charge in the BIA proceedings was granted, and there exist no distinguishing circumstances upon this Application. The form of the order, almost identical, is discussed below.

FORMS OF ORDER

The Initial order

43. The draft order submitted is in the form of the model CCAA Initial Order developed by the superior courts of the Atlantic Provinces, which to some extent follows precedents of the Toronto Commercial List. Submitted are a clean copy of the order sought, together with a blackline showing the changes from the model order.

44. The following material changes are brought to the Court's attention:

(a) The heading is changed to conform with practice before this Court;

(b) The parties receiving notice are shown to be those parties on the BIA Service List (appended as Schedule "A" to the draft order);

(c) In paragraph 6 wording is added to allow the payment of obligations arising after the filing of the NOIs on November 6, 2018. These changes are also reflected in paragraphs 7b, 7c, 8 and 9;

(d) In paragraph 10(c) the amount provided for sale of non-material assets is set at $10,000;

(e) In paragraph 11 the duration of the stay is left blank. The maximum period allowable in the Initial Order is 30 days: *CCAA*, section 11.02(1);

(f) In paragraph 17 Deloitte Restructuring Inc. is proposed as the Monitor;

(g) Paragraphs 24-29 are deleted, as a separate charging order is being sought;

(h) In renumbered paragraph 26 the Deloitte Restructuring Inc. webpage for this proceeding and the *BIA* proceeding is added;

(i) In renumbered paragraph 29 the correct jurisdiction is inserted; and

(j) In renumbered paragraph 31 the correct rule citation is inserted.

45. There are no other material changes to the order being sought.

The Charging Order

46. On January 19, 2019, the court in the *BIA* proceeding granted an order pursuant to section 64.2 of the *BIA* declaring that the professional advisors of the Companies should have a charge over the assets of the Companies in respect of fees and expenses.

47. The charge was limited to the sum of $100,000, and the Court ordered that accounts should be rendered to the Companies on a bi-weekly basis, to be payable when rendered. There was

a provision requiring the Proposal Trustee to advise the Court and the Service List if any accounts were not paid within five days of being rendered.

48. Similar provisions have been added to the proposed charging order, which otherwise follows the form of the model CCAA Charging Order developed by the superior courts of the Atlantic Provinces.

49. As with the Initial Order, a redline and clean copy of the Charging Order is filed for the benefit of the Court. The changes to the model order (upon which the order in the BIA proceedings was based) restrict same to simply the Administration Charge, and the order includes additional paragraphs 11 and 12 which are copied from the charging order granted by the Court in the *BIA* proceedings. However, the reporting period in section 12 (now five days), after which notice is to be given the Court and the Service List, is left blank. Cashflow has usually had the effect of extending that period by a few days, and it is suggested that ten days would be more reasonable and would not materially prejudice anyone.

SUMMARY

50. The orders sought essentially give a little more time to the Companies to either complete a refinancing, or to arrange an asset sale so as to enable the Companies to continue as going concerns.

51. No stakeholder will be prejudiced by the grant of the orders. To the contrary, there is a potential benefit to all if the Companies are allowed to continue under a *CCAA* stay.

52. Based upon all the foregoing, it is respectfully submitted that the orders ought to be granted.

DATED AT the Dartmouth, in the Province of Nova Scotia, this 24th day of April, 2019.

Tim Hill, Q.C.
Counsel for the Applicants

PL# 144921/8585317

TAB 1

2011 ONSC 7522
Ontario Superior Court of Justice [Commercial List]

Clothing for Modern Times Ltd., Re

2011 CarswellOnt 14402, 2011 ONSC 7522, 210 A.C.W.S. (3d) 575, 88 C.B.R. (5th) 329

In the Matter of the Notice of Intention to make a Proposal of Clothing for Modern Times Ltd.

D.M. Brown J.

Heard: December 16, 2011
Judgment: December 16, 2011
Docket: 31-1513595

Counsel: M. Poliak, H. Chaiton for Applicant
M. Forte for A. Farber & Partners Inc., the Proposal Trustee and Proposed Monitor
I. Aversa for Roynat Asset Finance
D. Bish for Cadillac Fairview
L. Galessiere for Ivanhoe Cambridge Inc., Oxford Properties Group Inc., Primaris Retail Estate Investment Trust, Morguard Investment Limited, 20 VIC Management Inc.
M. Weinczuk for 7951388 Canada Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Continuation of Bankruptcy and Insolvency Act (BIA) proposal proceedings under Companies' Creditors Arrangement Act (CCAA) — Debtor company filed notice of intention to make proposal pursuant to s. 50.4 of BIA — Time to file proposal was running out and no further extensions of time to file proposal were available to debtor under BIA — Debtor brought motion to continue BIA proposal proceedings under CCAA — Motion granted — Debtor had not filed proposal — Continuation to enable going-concern sale of part of debtor's business would be consistent with purposes of CCAA — Debtor filed cash flow statements which showed net positive cash flow for period and that debtor had sufficient resources to continue operating in CCAA proceeding, as well as to conduct sale process without need for additional financing — Proposal Trustee regarded cash flow statements as reasonable — Previous extension orders made under s. 50.4(9) of BIA indicated that debtor established it had been acting in good faith and with due diligence.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Brainhunter Inc., Re (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — referred to

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

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

Stelco Inc., Re (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — considered

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

Statutes considered:

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

Pt. III — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — pursuant to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

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

s. 10(2) — considered

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

s. 11.6 [en. 1997, c. 12, s. 124] — considered

s. 11.6(a) [en. 1997, c. 12, s. 124] — pursuant to

MOTION by debtor company to continue *Bankruptcy and Insolvency Act* proposal proceedings under *Companies' Creditors Arrangement Act.*

***D.M. Brown J.*:**

I. Motion to continue BIA Part III proposal proceedings under the CCAA

1 Clothing for Modern Times Ltd. ("CMT"), a retailer of fashion apparel, filed a Notice of Intention to Make a Proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, on June 27, 2011. A. Farber & Partners Inc. was appointed CMT's proposal trustee. At the time of the filing of the NOI CMT operated 116 retail stores from leased

locations across Canada. CMT sold fashion apparel under the trade names Urban Behavior, Costa Blanca and Costa Blanca X.

2 CMT has obtained from this Court several extensions of time to file a proposal. That time will expire on December 22, 2011. Under section 50.4(9) of the *BIA*, no further extensions are possible.

3 Accordingly, CMT moves under section 11.6(a) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 for an order, effective December 22, 2011, continuing CMT's restructuring proceeding under the *CCAA* and granting an Initial Order, as well as approving a sale process as a going concern for part of CMT's business.

II. Key background events

4 Following the filing of the NOI, pursuant to orders of this Court, CMT conducted a self-liquidation of underperforming stores across Canada and, as well, a going-concern sale of its Urban Behavior business. The latter transaction is scheduled to close on January 16, 2012.

5 At the time of the filing of the NOI there were three major secured creditors of CMT: Roynat Asset Finance, CIC Asset Management Inc., and CMT Sourcing. The company's indebtedness to those creditors totaled approximately $28.3 million. CMT anticipates that the proceeds from the Urban Behavior transaction and the liquidation of under-performing stores will prove sufficient to repay its loan obligations to Roynat in full before the expiration of a forbearance period on January 16, 2012.

6 When CMT was last in court on November 7, 2011 it stated it intended to make a proposal to its unsecured creditors, an intention supported by the two remaining secured creditors, CIC and CMT Sourcing. Subsequently CMT met with representatives of certain landlords and commenced discussions about its proposed restructuring plan. As a result of those discussions CMT lacks the confidence that its proposal would be approved by the requisite majority of its unsecured creditors, and it does not believe that it can make a viable proposal to its creditors. Instead, CMT thinks that a going-concern sale of its Costa Blanca business would be in the best interests of stakeholders and would preserve employment for about 500 remaining employees, both full-time and hourly retail staff.

7 In its Sixth Report dated December 14, 2011 Farber agrees that a going concern sale of the Costa Blanca business would be in the best interests of CMT's stakeholders, maximize recoveries to the two secured creditors, CIC and CMT Sourcing, and preserve employment for CMT's remaining employees. Farber supports CMT's request to continue its restructuring under the *CCAA*. Farber consents to act as the Monitor under *CCAA* proceedings and to administer the proposed sale process.

III. Continuation under the CCAA

A. Principles governing motions to continue BIA Part III proposal proceedings under the CCAA

8 Continuations of *BIA* Part III proposal proceedings under the *CCAA* are governed by section 11.6(a) of that Act which provides:

> 11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,
>
> (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part.

9 It strikes me that on a motion to continue under the *CCAA* an applicant company should place before the court evidence dealing with three issues:

(i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the *CCAA* that it has not filed a proposal under the *BIA*;

(ii) The proposed continuation would be consistent with the purposes of the *CCAA*; and,

(iii) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act.

Let me deal with each in turn

B. The applicant has not filed a proposal under the BIA

10 The evidence shows that CMT has satisfied this statutory condition.

C. The continuation would be consistent with the purposes of the CCAA

11 In *Ted Leroy Trucking Ltd., Re*,[1] the Supreme Court of Canada articulated the purpose of the *CCAA* in several ways:

(i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;[2]

(ii) To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made;[3]

(iii) To avoid the social and economic losses resulting from liquidation of an insolvent company;[4]

(iv) To create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.[5]

As the Supreme Court noted in *Century Services*, proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved "through a rules-based mechanism that offers less flexibility."[6] In the present case CMT bumped up against one of those less flexible rules — the inability of a court to extend the time to file a proposal beyond six months after the filing of the NOI.

12 The jurisprudence under the *CCAA* accepts that in appropriate circumstances the purposes of the *CCAA* will be met even though the re-organization involves the sale of the company as a going concern, with the consequence that the debtor no longer would continue to carry on the business, as is contemplated in the present case. In *Stelco Inc., Re* Farley J. observed that if a restructuring of a company is not feasible, "then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part".[7] It also is well-established in the jurisprudence that a court may approve a sale of assets in the course of a *CCAA* proceeding before a plan of arrangement has been approved by creditors.[8] In *Nortel Networks Corp., Re* Morawetz J. set out the rationale for this judicial approach:

> The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.[9]

13 The evidence filed by CMT and Farber supports a finding that a continuation under the *CCAA* to enable a going-concern sale of the Costa Blanca business and assets would be consistent with the purposes of the *CCAA*. Such a sale likely would maximize the recovery for the two remaining secured creditors, CIC and CMT Sourcing, preserve employment for many of the 500 remaining employees, and provide a tenant to the landlords of the 35 remaining Costa Blanca stores. Avoidance of the social and economic losses which would result from a liquidation and the maximization of value would best be achieved outside of a bankruptcy.

D. Evidence which serves as a reasonable surrogate for CCAA s. 10(2) information

14 As the Supreme Court of Canada observed in *Century Services*, "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority."[10] On an initial application under the *CCAA* a court will have before it the information specified in section 10(2) which assists it in considering the appropriateness, good faith and due diligence of the application. Section 10(2) of the *CCAA* provides:

> 10. (2) An initial application must be accompanied by
>
> (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
>
> (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
>
> (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

15 Section 11.6 of the *CCAA* does not stipulate the information which must be filed in support of a continuation motion, but a court should have before it sufficient financial and operating information to assess the viability of a continuation under the *CCAA*. In the present case CMT has filed, on a confidential basis,[11] cash flows for the period ending January 31, 2012, which show a net positive cash flow for the period and that CMT has sufficient resources to continue operating in the *CCAA* proceeding, as well as to conduct a sale process without the need for additional financing.

16 In addition, the Proposal Trustee filed on this motion its Sixth Report in which it reported on its review of the cash flow statements. Although its opinion was expressed in the language of a double negative, I take from its report that it regards the cash flow statements as reasonable.

17 Finally, the previous extension orders made by this Court under section 50.4(9) of the *BIA* indicate that CMT satisfied the Court that it has been acting in good faith and with due diligence.

E. Conclusion

18 No interested person opposes CMT's motion to continue under the *CCAA*. Its two remaining secured creditors, CIC and CMT Sourcing, support the motion. From the evidence filed I am satisfied that CMT has satisfied the statutory condition contained in section 16(a) of the *CCAA* and that a continuation of its re-structuring under the *CCAA* would be consistent with the purposes of that Act.

IV. Sale Process

19 In *Nortel Networks Corp., Re* Morawetz J. identified the factors which a court should consider when reviewing a proposed sale process under the *CCAA* in the absence of a plan:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) is there a better viable alternative?[12]

20 No objection has been taken to CMT's proposed sale of its Costa Blanca business or the proposed sale process under the direction of Farber as Monitor. Chris Johnson, CMT's CFO, deposed that CMT is not in a position to make a viable

proposal to its creditors and has concluded that a going-concern sale of the Costa Blanca business would be the most appropriate course of action. The Proposal Trustee concurs with that assessment. In light of those opinions, an immediate sale of the Costa Blanca business would be warranted in order to attract the best bids for that business on a going-concern basis. Such a sale, according to the evidence, stands the best chance of maximizing recovery by the remaining secured creditors and preserving the employment of a large number of people. No better viable alternative has been put forward.

21 Accordingly, I approve the proposed sale process as described in paragraph 37 of the affidavit of Chris Johnson.

V. Administration Charges

22 CMT seeks approval under section 11.52 of the *CCAA* of an Administration Charge over the assets of CMT to secure the professional fees and disbursements of Farber as Monitor and its counsel, as well as the fees of Ernst & Young Orenda Corporate Finance Inc. ("E&Y"), who has been acting as CMT's financial advisor, together with its counsel. The order sought reflects, in large part, the priorities of various charges approved during the *BIA* Part III proposal process. CMT proposes that the Professionals Charge approved under the *BIA* orders and the CCAA Administration Charge rank *pari passu*, and that whereas the *BIA* orders treated as ranking fourth "the balance of any indebtedness under the Professionals Charge", the *CCAA* order would place a cap of $250,000 on such portions of the Professionals and CCAA Administration Charges.

23 No interested person opposes the charges sought.

24 I am satisfied that the charge requested is appropriate given the importance of the professional advice to the completion of the Urban Behavior transaction and the sale process for the Costa Blanca business.

VI. Order granted

25 I have reviewed the draft Initial Order submitted by CMT and am satisfied that an order should issue in that form.

26 CMT also seeks a variation of paragraph 3 of the Approval and Vesting Order of Morawetz J. made November 7, 2011 in respect of the Urban Behavior transaction to include, in the released claims, the Professionals Charge and the CCAA Administration Charge. None of the secured creditors objects to the variation sought and it is consistent with the intent of the existing language of that order. I therefore grant the variation sought and I have signed the order.

Motion granted.

Footnotes

1 2010 SCC 60 (S.C.C.).

2 *Century Services*, para. 15.

3 *Ibid.*, para. 59.

4 *Ibid.*, para. 70.

5 *Ibid.*, para. 77.

6 *Ibid.*, para. 15.

7 (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]), para. 1. In *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3482

(Ont. C.A.) the Court of Appeal held that a sale of a business as a going concern during a *CCAA* proceeding is consistent with the purposes of that Act.

8 See the cases collected by Morawetz J. in *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), paras. 35 to 39. See also section 36 of the *CCAA*.

9 *Ibid.*, para. 40.

10 *Century Services*, para. 70.

11 CMT has filed evidence explaining that disclosure of the cash flows prior to the closing of the Urban Behavior transaction would make public the proceeds expected from that transaction. I agree that such information should not be made public until the deal has closed. CMT has satisfied the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) and a sealing order should issue.

12 *Nortel Networks*, *supra.*, para. 49. See also *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13.

End of Document

TAB 2

2008 NLTD 160
Newfoundland and Labrador Supreme Court (Trial Division)

Humber Valley Resort Corp., Re

2008 CarswellNfld 262, 2008 NLTD 160, 170 A.C.W.S. (3d) 235, 280 Nfld. & P.E.I.R. 87, 48 C.B.R. (5th) 128, 859 A.P.R. 87

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

A plan of compromise or arrangement of Humber Valley Resort Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited and Humber Valley Interiors Limited (Applicants)

R.M. Hall J.

Heard: October 6, 2008
Judgment: October 10, 2008
Docket: 200801T3743

Counsel: John Stringer, Q.C., Stephen Kingston, Douglas B. Skinner for Applicants
Archibald Bonnell for Notre Dame Agencies Limited, R & T Custom Woodworking Limited
Geoffrey E.J. Brown, Q.C. for Alex Lee
Joseph F. Hutchings, Q.C. for Marine Contractors Inc., Home Construction Limited
Bruce C. Grant, Q.C. for Her Majesty the Queen in right of Newfoundland and Labrador
Shawn M. Kavanagh for Simon and Jean Burch
Geoffrey L. Spencer for Maxium Financial Services Inc.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Extension of stay — Debtor was resort developer which completed 220 chalets out of 370 that were sold, but cost to complete all chalets would result in $7.5 million loss — Debtor obtained stay of proceedings under s. 11 of Companies' Creditors Arrangement Act and authorization to enter into arrangement to obtain debtor in possession ("DIP") credit facility for $600,000 — Debtor brought application for order extending stay termination date — Application was granted for stay extension — Debtor closed golf course, reduced staff, and pursued sale of portion of resort with efforts which were diligent, reasonable and in good faith — Debtor also met with representatives of province to discuss provincial assistance and involvement in restructuring — If stay was not extended, creditors would commence proceedings which would be prejudicial

by eliminating debtor's ability to propose and complete any successful restructuring — Without stay resort would fail and even though restructuring plan was still in initial stages of development it could not be concluded that it would be unsuccessful — Stay was lifted to extent of permitting certain corporations to commence actions under Mechanics' Lien Act and stay would be re-instated upon issuance of statements of claim.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Debtor was resort developer which completed 220 chalets out of 370 that were sold, but cost to complete all chalets would result in $7.5 million loss — Debtor obtained stay of proceedings under s. 11 of Companies' Creditors Arrangement Act and authorization to enter into arrangement to obtain debtor in possession ("DIP") credit facility for $600,000 — Debtor brought application for order for approval of additional DIP financing and securitization thereof — Application granted — Annulling previously approved termination arrangements or salary augmentations as requested by chalet owners was not appropriate since this could create negative reputation for resort compounding difficulties in restructuring and marketing itself — Cash flow statement was sufficiently detailed so that it was not necessary for court to specifically order that DIP financing be used in specified amounts for specified purposes — Additional DIP financing sought in amount of $1,400,000 was not of sufficient magnitude as to greatly prejudice existing creditors in event restructuring plan should fail by not being accepted by them — Adverse effect on creditors of failure to restructure would be greater than any diminution of their recovery caused by allowing proposed financing — Additional DIP financing in amount of $1,400,000 and securitization thereof was approved.

Table of Authorities

Cases considered by *R.M. Hall J.*:

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — considered

Statutes considered:

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

s. 11 — referred to

s. 11(4) — considered

s. 11(6) — considered

Labour Standards Act, R.S.N. 1990, c. L-2
Generally — referred to

Mechanics' Lien Act, R.S.N. 1990, c. M-3
Generally — referred to

APPLICATION by debtor for order extending stay termination date and for approval of additional debtor in possession financing and securitization thereof.

***R.M. Hall J.*:**

Introduction

1 Humber Valley Resort Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited and the Humber Valley Interiors Limited (collectively, the "Resort" and/or the "Applicant") applied to this Court for

an order seeking a stay of proceedings under section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as a amended (the "CCAA"). An Initial Order (the "Initial Order") was granted and filed September 5, 2008, providing a stay of proceedings up to and including October 6, 2008, or such later date as this Court may further order stipulate (the "Stay Termination Date"). Additionally on the same date, the Court authorized the Resort to enter into an arrangement to obtain a non-revolving credit facility (the "DIP Facility") from Newfound UK Limited (the "DIP Lender") in a maximum principal amount of $600,000. Under that order (the "First DIP Order") the DIP Lender was granted the right to obtain first priority charge, mortgage and security interest (the "DIP Charge") over real and personal property of the resort comprising a portion of its operations and land known as "Strawberry Hill", as described in a commitment letter between the Resort and the DIP Lender.

2 This present application is brought *inter partes* by the Resort seeking two further orders. The first order sought is for an extension of the Stay Termination Date from October 6, 2008, to December 5, 2008, as may be granted by this court under the authority of Section 11(4) of the CCAA. The second order sought is for approval of additional debtor-in-possession and the securitization thereof (the "Second DIP Order").

3 The legislative purpose behind the CCAA and the principles to be considered in applications made under it have been considered by many Canadian courts. A clear delineation of the principles to be considered in applications under the CCAA is contained in the decision of Mr. Justice Brenner in *Pacific National Lease Holding Corp. (Re)* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]) where he states those principles at page 10 as follows:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent maneuvers (sic) for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

4 Section 11(4) of the CCAA specifically deals with the powers of a Court on applications other than an application for the Initial Stay Order. It provides

> **Other than initial application court orders**
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> > (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

5 In making application for either an Initial Order or subsequent orders, section 11(6) of the CCAA establishes that certain preconditions must be met as follows:

> **Burden of proof on application**
>
> (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

It is important to note that subsection 11(6) of the CCAA requires not only that the Applicant has acted in good faith and has acted with due diligence, but that the Applicant is continuing to do so.

6 My first obligation in considering this matter, therefore, is to determine whether the Applicant has and continues to act in good faith and has and continues to act with due diligence in this matter. It is necessary to provide some background in these Reasons for Judgment as to the nature and extent of the business of the Resort as this will enlighten the reader as to the difficulties facing the Resort in formulating a plan or arrangement under the CCAA. The business of the Resort has been diverse. It acquired freehold and leasehold interests in two very large parcels of land, with a view to developing a high-end resort development wherein expensive chalets would be sold to high net worth investors and buyers. These people would be attracted to purchase land in the development and have the Resort build chalets for them by the fact that a world-class golf course would be constructed together with a substantial clubhouse and separate restaurant and conference centre facilities, which facilities in combination, would make the Resort area an attractive tourist destination and recreation home area. This development necessitated immense expenditures on infrastructure including a very expensive bridge across the Humber River in order to provide access to the development lands; the installation of a full municipal level water supply and treatment system; the installation of separate septic disposal systems for each chalet; the development of a significant road network; and other related infrastructure. In addition, in order to attract purchasers it has been necessary to become engaged in an extensive marketing campaign in the United Kingdom and Europe whence the bulk of the purchasers have been solicited and obtained. In order to make purchasing in the Resort development attractive, the Resort developed a subsidized charter flight system from the U.K., which has proven to be expensive and a generator of considerable losses for the Resort.

7 Three hundred and seventy lots have been sold in the Resort development and two hundred and twenty chalets have been completed. All of these were completed at a loss to the Resort. An additional one hundred and thirty-five chalets are in various stages of construction, ranging from near completion to only the installation of foundations in some cases. Mr. Derrick White, a director of the Resort, testified that if all of the chalets are completed, this will result in a 7.5 million dollar loss to the Resort. In many cases, the cost to complete the chalet and to clear it of mechanics' liens and other encumbrances so that clear title can be delivered to the buyer exceeds the balance remaining to be paid to the Resort by that prospective purchaser.

8 Additionally, neither the clubhouse, the golf course, the beach house restaurant nor the Strawberry Hill restaurant and conference centre have generated any positive cash flow for the Resort.

9 Since the granting of the Initial Order in this matter, the Resort has closed the golf course, the clubhouse, the beach house restaurant and the Strawberry Hill restaurant and conference centre. The staffing of the Resort has been very seriously reduced with some employees remaining on staff in order to work out their notice and to provide services necessary to the Resort, in order to properly mothball it for the winter season. In addition, a much diminished staff exists in order to maintain core and key personnel for an ultimate reopening of the Resort and to deal with matters arising under the CCAA and relations with creditors and chalet owners.

10 The Resort, with the assistance of the Monitor, is actively pursuing the sale of that portion of the Resort known as "Strawberry Hill". Advertisements for its sale have been published and deadlines set for submission of tenders at October 15, 2008. I am satisfied that the efforts made by the Resort to dispose of this portion of its assets have been both diligent and

reasonable and done in good faith.

11 Mr. White deposed as well that the Resort and the Monitor had met with representatives of the Province of Newfoundland and Labrador to review with the Province the CCAA process and to discuss potential provincial assistance and involvement in the restructuring. No information was provided with respect to any details of those discussions or any outcomes therefrom. The Court was advised, however, that discussions remain ongoing with the Province.

12 In addition, the Resort has met with representatives of a major international corporation which has expressed interest in the Resort and a representative of that party has toured the Resort on two occasions since the date of the Initial Order and confidential discussions with that party are ongoing.

13 In addition to staff reductions, the Resort, with the concurrence of the Monitor, has taken steps to minimize its negative cash flow including closure of offices and reduction in the scale of operations. The Resort continues to provide essential services to maintain and preserve the key assets such as the golf course, the clubhouse and the beach house, which would be key components in a business restructuring of the Resort.

14 At present no plan or arrangement nor any outline thereof has been presented the Court. It is clear, and I am satisfied that if the Stay Termination Date is not extended, the Resort's creditors will commence proceedings and that those proceedings will be prejudicial to the Resort to the extent that it would eliminate its ability to propose and complete any successful restructuring. Therefore, without the extension of the Stay of the Resort will fail.

Ruling on Extension of Stay Termination Date

15 In other types of restructurings under the CCAA, one might have expected to see at this time a clearer indication from the Applicant that a plan or arrangement with creditors had been largely formulated and was projected to be successful. That is not the case here. The ultimate restructuring plan is still very much in the initial stages of discussion and development. The complex nature of the diverse operations of the Resort and the various factors which contributed to its accumulated losses are not in my view simple to either analyze or resolve. I am satisfied that the present lack of a plan is not reflective of a situation where the Applicant has engaged the Court only to defer liquidation without any real prospect of devising a plan acceptable to creditors. If I thought that were the case or that the Applicant was not proceeding with due diligence or in good faith, I would not exercise the discretion of the Court to grant the extension of the Stay. Obviously, however, in balancing the various interests which the CCAA is designed to protect and promote, stay periods can not be justified where there is no real prospect of a successful restructuring. However, I am satisfied that we are not at the point where a conclusion can be drawn that restructuring is likely to be unsuccessful.

16 I am therefore satisfied to grant the Stay Extension sought by the Applicant to December 5, 2008. Two of the interested parties, while not opposing a Stay in principle, have asked me to shorten the Stay Extension period to 30 days from October 6, 2008. I am not prepared to accede to those requests but will deal with them later in this Judgment.

Decision on Authorization of Additional DIP Financing and Securitization

17 As part of its application for Stay Extension and the authorization of additional DIP Financing, the Resort has filed the First Report of the Monitor dated October 1, 2008 (the "Monitor's Report"). The Monitor's Report has attached as Appendix B a revised cash flow projection for the period September 5, 2008, through to December 28, 2008. In the "Out Flows" section thereof, there is a categorized list of projected expenditures. As expected, the Monitor's fees and other professional fees feature prominently therein as well as ongoing labour costs and the costs to the Resort of early termination of employment. With respect to all contractual employees, termination allowances have been made on the basis of their contracts as opposed to mere statutory notice periods under the *Labour Standards Act*. In addition, certain key personnel have received salary augmentations over and above their pre-Initial Order salaries in order to maintain their continued employment with the Resort during the restructuring period and to diminish the likelihood of the lost key personnel who would be important for a successful restructuring of the Resort. I have been asked by counsel representing chalet owners to reverse the provisions of the Initial Order authorizing such salary augmentations and also to order that no future payments be made on the basis of contractual termination provisions versus *Labour Standards Act* termination rights.

18 I am not satisfied that it is appropriate for the Court to annul the previously approved termination arrangements or salary augmentations. In the scheme of things, the amount of unpaid termination benefits is not significant, given the fact that a large portion thereof remains payable to employees who are working out their notice period, as opposed to those whose employment has been terminated absolutely. Therefore the Resort is receiving the benefit of their labours. With respect to annulling or varying the salary augmentations for key employees, it is my view that such a decision would be counterproductive as it may result in the loss of those key personnel or some of them at a point in time when they are very busy and their historic institutional knowledge of the Resort is extremely important to formulating a successful plan or arrangement with the creditors of the Resort. Additionally, a key component in a successful restructuring will be the continuing ability of the Resort after restructuring to market its remaining lots. In my view the Resort needs to reach a certain critical mass of sold lots and constructed chalets which level is not yet met. The practice in the Resort has been that certain chalet owners make their chalets available as part of a rental pool, which the Resort then markets much as a hotel would be marketed. If key staff are cut back and relations with existing chalet owners deteriorate further as a result thereof, the dissatisfaction of existing chalet owners would create a very negative reputation for the Resort thus compounding the difficulties of the Resort in restructuring and marketing itself thus inhibiting prospects of additional chalet construction, thus the Resort will be marginalized. I am therefore not satisfied that varying these salary augmentations is wise in the long term.

19 I have reviewed the cash flow statements provided and the categories of expense to which it is intended to apply any additional DIP Financing authorized by this Court. I am satisfied that the cash flow statement is sufficiently detailed so that it is not necessary for this Court to specifically order that the DIP Financing be used in specified amounts for specified purposes.

20 In addition, the amount of additional DIP Financing sought in the amount of $1,400,000 in my view is not of sufficient magnitude as to greatly prejudice existing creditors, in the event that the restructuring plan or arrangement should fail by not being accepted by the creditors. The real hope for creditors in this matter lies largely in a successful restructuring of the Resort. The effects of a failure of the Resort to be successfully restructured are virtually impossible to predict but I am satisfied that the adverse effect upon creditors of such a failure would be greater than any diminution of their recovery caused by allowing the proposed DIP Financing. Therefore, the additional DIP Financing in amount of $1,400,000 and securitization thereof over the clubhouse, the golf course, the beach house and Strawberry Hill is approved.

21 Counsel for chalet owners had asked me to reduce the amount of approved DIP Financing essentially by cutting it in half. The rationale behind this suggestion is that by early November the state of the proposed sale of Strawberry Hill, while not being completed, will be reasonably predictable and whether there is a need for all of the DIP Financing will then become clear because the available net proceeds from the sale of Strawberry Hill will then be known. While this proposal has an initial attractiveness to it, I am of the view that any hearing with respect to continuation of DIP Financing and the expansion thereof, up to the original amount requested by the Resort, would simply generate into a distracting hearing about the whole Stay Period Extension without much concomitant benefit resulting therefrom. Nothing in the Order authorizing the DIP Financing requires the Resort to draw down on that financing if it is not necessary to do so. I am satisfied, therefore, that normal commercial common sense will keep the DIP borrowings to the minimum amount necessary in order to carry out the development of and implementation of the plan or arrangement under the CCAA.

Maxium Financial Services Inc. ("Maxium")

22 Maxium is a corporation which finances and leases golf course equipment to various hotels and resorts. Its counsel filed an affidavit of John Barraclough, the senior manager, credit and collections, of Maxium. Mr. Barraclough disposed that under its master lease agreement 139 pieces of equipment were leased to the Resort for use in the operation of the golf course. Under the master lease agreement, title to that equipment remains in Maxium and defaults by the Resort, under the master lease agreement, have entitled Maxium to repossess the equipment, which right of repossession is stayed by the Initial Order. Maxium has indicated that there is definite limited season for the sale of golf course equipment to be utilized by resorts in the commencement of the 2009 golf season, which would commence around April 1, 2009. Maxium says that if the equipment is not available to it soon, Maxium will lose an opportunity to sell the equipment to another golf course prior to the commencement of the 2009 season. It estimates its loss as being as much as 20% to 25% of the value with respect to the equipment. Unfortunately with respect the sale of the equipment, Maxium does not provide any estimate of market value thereof. It only indicates that there is an outstanding balance as of September 5th owed to it by the Resort in the amount of

$895,990.15. Therefore, I have no way of knowing whether Maxium will in fact suffer any loss at all if the equipment is repossessed at a later date and has to be sold at a lesser value. I am therefore not prepared to lift the Stay of Proceedings presently in place against Maxium in order to allow it to repossess its security. Maxium, of course, is at liberty under the CCAA to make a specific application to have the Stay against it lifted upon sufficient grounds indicating to the Court that Maxium will be unduly prejudiced by a continuation of the Stay.

Marine Contractors Inc. and Home Construction Ltd.

23 These two corporations have applied for an order lifting the Stay in order to allow them to commence mechanics' liens actions in order to perfect mechanics' liens already filed. The Applicant and the Monitor as well as creditors present at the hearing had no objection to this process and it is therefore ordered that a Stay of Proceedings granted in the Initial Order of September 5, 2008, is lifted to the extent only as required to allow commencement of actions under the *Mechanics' Lien Act* to enforce claims for liens described on the Schedule annexed to the Applications of these two companies naming, amongst others, Humber Valley Resort Corporation as a defendant, such Stay to be re-instated forthwith upon issuance of the said Statements of Claim as regard to any claim against Humber Valley Resort Corporation, such Stay to continue thereafter in full force and effect in accordance with the terms of the Initial Order until further Order of this Court.

Notre Dame Agencies and R. & T. Custom Woodworking Limited

24 The above named corporations are in a similar position to Home Construction Limited and Marine Contractors Inc. They have filed mechanics' lien claims but have not as yet commenced any actions. They too will be seeking leave to commence their actions and have the Stay lifted against them on the same basis as ordered with respect to the previous two companies. Counsel for the Resort has no objection to this procedure and has undertaken to file a consent order in that respect. Upon the filing of an appropriate application to lift the Stay against them so as to allow the issuance of Statements of Claim under the *Mechanics' Lien Act*, leave to file a consent judgment is hereby granted without the need for further appearance in Court.

Application granted.

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