

Superior Court of Justice  
Judges' Chambers

Cour supérieure de justice  
Cabinet des juges



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### ***PLEASE DISTRIBUTE TO ALL OTHER COUNSEL***

**From: Diane Lincourt, Judicial Assistant to Mr. Justice R. Beaudoin**

**Pages:** 11 (including transmittal form)

**Date:** January 14, 2011

**Re: IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.  
1985, c C - 36 AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF Envision  
Engineering & Contracting Inc., Iona Contractors Ltd., Western Construction and combustion Services  
Inc., Bow Valley Electrical Services Ltd., Inter Project systems Inc. and Landex Construction Inc.  
(collectively, the "Debtors")**

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COURT FILE NO.: 10-50109

DATE: 2011/01/14

## ONTARIO

## SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.  
1985, c C – 36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
Envision Engineering & Contracting Inc., Iona Contractors Ltd., Western Construction and  
combustion Services Inc., Bow Valley Electrical Services Ltd., Inter Project systems Inc. and  
Landex Construction Inc. (collectively, the "Debtors")

DECISIONBEAUDOIN J.

[1] This is a Motion by Alberta Treasury Branches ("ATB"), to extend the Stay Period originally ordered by this Court on December 14<sup>th</sup>, 2010 pursuant to s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c C-35 as amended ( the "CCAA"). A short extension is sought until February 1<sup>st</sup>, 2011. Subject any exceptions set out in that Order, that initial order stayed proceedings and enforcement processes in any court or tribunal against the Debtors for a period until and including 30 days and appointed RSM Richter Inc. as monitor with certain powers. The request for the extension is opposed by Guarantee Company of North America ("GCNA") and by AXA Pacific Insurance Company ("AXA"). GCNA and AXA are surety bonding facilities for the Debtors.

Background

[2] This proceeding commenced was on December 7<sup>th</sup>, 2010 by Envision Engineering and Contracting Inc. ("Envision") and certain affiliated companies as set out in the title of these proceedings. The Affidavit filed in support of the application indicated that the total of claims against the group of companies was an excess of \$35,000,000.00 and that the group was then

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insolvent. The group sought an order granting a stay of proceedings against all its creditors to permit and develop a restructuring plan. According to the affidavit Lynn Zienka filed in support of the application, the requested stay would offer the group an opportunity to review the viability of its various projects and to devise a strategy to preserve and maximize value.

[3] The Honourable Justice Ray granted the initial Stay Order on December 14<sup>th</sup>, 2010. The order recites that the secured creditors who were likely to be affected by the charges created by the order were given notice and that the order was made on the submissions of counsel for the applicants and of ATB and as well as the consent of RSM Richter to act as monitor.

[4] Shortly thereafter, GCNA brought an application/motion to vary the initial order such that nothing in that Order would interfere with the rights of GCNA or any of the obligees under the bonds issued by it to pursue their rights and remedies in respect of any bonds issued by them. GCNA had not been given notice of the application.

[5] As a result of that application/motion a further order was issued on December 23<sup>rd</sup>, 2010 which gave GCNA certain rights to attend and investigate any bonded projects and other remedies. At this time, AXA also submits that it was not given notice of the initial application and it seeks similar relief if the extension is granted.

#### **The First Report of the Monitor**

[6] The first report of RSM Richter Inc. dated January 11<sup>th</sup>, 2011 has been filed with the Court. I note the following:

##### **Purpose of this Report**

4. The purpose of this report ("Report") is to:
  - a) Provide background information regarding the Envision Group;
  - b) Provide an update on the Envision Group's restructuring efforts; and

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- c) Recommend that the Court issue an order providing for an extension of the stay under the CCAA to February 1<sup>st</sup>, 2011 with expanded Monitor powers to allow for a detailed assessment of the financial affairs of the Envision Group by the Monitor for the benefit of the various stakeholders.

#### Cash Flow

14. The Envision Group filed a cash flow statement in support of its application for the Initial Order. Management estimated that the Envision Group would have a positive net cash flow of approximately \$3.4 million for the 6 week period ended January 14, 2011. The actual cash flow of the Envision Group since the commencement of the CCAA Proceedings has been significantly lower than was projected. The reasons for this significant deviation from the projections appear to be as follows:
- Management was overly optimistic in its ability to collect accounts receivable. Essentially of the Envision Group's customers suspended payments upon learning of the CCAA Proceedings; and
  - Management did not fully comprehend the impact the CCAA Proceedings would have on its operations. Previous business practices employed by the Envision Group could no longer be used to resolve numerous issues with its customers and suppliers.
- ...
16. The Envision Group has been unable to continue with its construction projects other than the Landex projects. Since the CCAA Proceedings commenced, there have been several employee resignations, several construction sites have been abandoned because of an inability to complete the work, numerous liens have been filed by the sub trades on certain projects, several trades have filed claims with the bonding companies and customers are unwilling to make progress payments.

[7] After commenting on its inability to obtain financial information due to the holiday season and the lack of availability of certain Envision Group employees, the Monitor provided a summary of the various construction projects based on the information that was available to the Monitor at that time. The Monitor then concludes in his assessment at paragraphs 18, 19 and 20:

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### MONITOR'S ASSESSMENT

18. As noted earlier in this Report, the Monitor has experienced difficulty in obtaining information regarding the Envision Group's financial affairs and the status of each of the various construction projects.
19. Management has been unable to assemble the required information in a timely manner due to certain employees leaving and it appears that the accounting systems may be inadequate. Moreover, it appears management is not longer committed to the process and they have not been responsive to the Monitor's requests for information regarding the Envision Group's affairs.
20. Based on the information that the Monitor has been able to review to date, we are of the view that the Envision Group will be unable to advance a plan of arrangement of compromise for the benefit of its creditors. Management has advised the Monitor that they do not plan to seek an extension of the CCAA Proceedings.

[8] The Monitor seeks a short extension in order to establish an appropriate course of action for the Envision Group so that it can get the additional information and perform the necessary analysis. It concludes at paragraph 23:

23. The Monitor is of the view that its requisite powers under the Initial Order should be expanded to ensure Management's cooperation, access to all of the Envision Group's books and records, preserve and protect assets as appropriate, collect all accounts and control all disbursements and determine the appropriate and necessary employee complement. The suggested expanded powers are outlined in Appendix "E".

Appendix. "E" is attached to this decision.

### Jurisdiction

[9] It must be noted that the Debtors are not seeking the extension of the initial Order. This has been confirmed by their counsel. The extension is sought by ATB, a secured creditor of the Debtor companies.

[10] The relevant statutory provisions are as follows:

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

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

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

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

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

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

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

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

**(3) Burden of proof on application** – The court shall not make the order unless

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

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

[11] No one takes issue with ATB's status to bring this Motion. The significant issue here is whether or not the moving party can seek the extension if there is no good faith or due diligence by or on behalf of the original applicant Debtors. The mandatory language utilized in Section

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11.02(3) sets out the conditions precedent before the Court can exercise its discretion under the CCAA.

[12] In this case I am satisfied that the Debtors have not acted with due diligence or in good faith. Counsel for ATB submits that there is no such conclusion set out in the report of the Monitor. The Report states clearly: "that Management is no longer committed to the process and that they have not been responsive to the Monitor's request for information and that they do not plan to seek an extension." At the very least this constitutes a lack of due diligence. Any conclusions as to the good faith and due diligence on the part of the Debtors are ultimately reserved to this Court.

[13] Moreover, the Court is not limited to the information contained in the Monitor's report. In addition to that information, the Court has the benefit of the further affidavit evidence of Tara Wishart sworn on behalf of GCNA and dated January 12, 2011. She reports that "...no Envision Group employees are performing any on any of the bonded projects." She further advises that GCNA is receiving correspondence from owners regarding urgent attention needed on certain bonded projects.

[14] The Court has also had the benefit of the Affidavit of Roger Clarke sworn January 12<sup>th</sup>, 2011. Roger Clarke is the Superintendent of Schools for the Fort Vermillion School Division No. 52 in the Province of Alberta. That Affidavit is made in opposition to ATB's application to extend the stay of proceedings. He advises:

On or about December 20<sup>th</sup>, 2010 the School Division was informed that Western had laid off its Project Manager for the Project and, as at December 20<sup>th</sup>, 2010 had laid off the site Superintendent of the Project site. No arrangements for site security were made nor were arrangement for heating and hoarding of the Project undertaken.

[15] He goes on to state that the School Division has received notices that a number of liens had been placed on the School. Based on the available information, the School Division estimates that \$1,817,207.00 remains outstanding to sub trades. He advises that the Project is only 50% complete and that the delays and the inability of Western to even consider the

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completing the Project are placing added financial obligations on the School Division and Alberta Education. In addition to the financial burden, he notes that the students have lost the ability to utilize their school and will not be able to conclude the year in their new facilities.

[16] On behalf of AXA, Ron Fraser has deposed an affidavit wherein he advises that AXA has received Notices of Default on a number of projects and he also deposes that no work is being done on a number of projects. Additional affidavit information is provided by Luis Copat, a senior adjuster employed by the Defendant AXA. He identifies serious problems at the Bonnybrook Wastewater Treatment Plant, the Kings Heights Fire Hall, the Sundance Creek Culvert Installation and the City of Spruce Grove Calahoo Public Works Remediation. On the totality of all that evidence I am satisfied that the Debtor companies have not acted in good faith or with due diligence since the making of the initial Order.

[17] The Applicant ATB submits that a requirement of good faith and due diligence does not apply to them. It submits that there is no evidence of a lack of good faith or due diligence on its part and I have to agree. ATB argues that the statute makes a distinction between applications under 11.02(1) ("initial application") and application for an extension which is made under section 11.02(2). The powers of the Court in each case are identical. The significant difference between the two types of applications is found in 11.02(3)(b) which requires the applicant in seeking an extension to satisfy the Court that the applicant has acted, and is acting, in good faith and with due diligence.

[18] ATB says that since it is the applicant on this motion and there is no evidence of its acting in bad faith or without due diligence, there is no impediment for the Court granting the relief. It submits that the distinction in the Statute is deliberate. Furthermore, the ATB submits that the Court has jurisdiction under the *Courts of Justice Act* R.S.O. 1990, Chap. C.43 to stay any proceeding. That section provides;

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



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[19] In my view, the above statute has no application in this case. Section 106 stays an existing proceeding; it does not operate as a protective shield in the same manner as the CCAA.

[20] Counsel for GCNA submits that the reference to the applicant in sub-section 11.02(3)(b) must be applicable to the original debtor applicant otherwise it would permit a debtor company to disregard the terms of an Order and allow an innocent creditor to "pick-up the baton" and avoid any scrutiny or consequence of its actions by the Court. In the alternative, counsel for GCNA submits that the bad faith or the lack of due diligence on the part of the Debtors is evidence of circumstances that would suggest that the order is not appropriate in accordance with section 11.02(3)(a).

[21] "Applicant" is not a defined term in the CCAA. Counsel agree that there are no decided cases on point. The only authorities that have been cited to me are those where an extension is sought by the debtor company. In my view, the reference to "applicant" in section 11.02(3)(b) has to be read in the context of the entire section. The "applicant" in that section can only mean the original debtor company. Section 11.02(2) (*the extension provision*) refers to an application "in respect of the debtor company". It is the debtor company's conduct during the initial stay that is in issue. The Court is not concerned with the conduct of any other interested creditor in considering an extension to the stay. In my view, the lack of good faith and due diligence on the part of the Debtors in this case is fatal to the relief sought by ATB and the request for the extension is dismissed.

  
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Mr. Justice Robert Beaudoin

RELEASED: January 14, 2011

**Envision Group  
Proposed Enhanced Monitor Powers**

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**Exhibit "E"**

In addition to those powers granted to the Monitor under the Companies' Creditors Arrangement Act pursuant to the Initial Order, the Monitor is empowered and authorized, as a Court officer, as may be necessary and appropriate:

1. To take any steps to preserve and protect the Envision Group's property and assets including changing the locks at the various Envision Group's premises;
2. To take possession and control of all books and records of each company of the Envision Group including records in electronic form;
3. To collect all monies and accounts and pay all obligations incurred by the Envision Group, consistent with the Initial Order;
4. To determine the appropriate and necessary employee complement of the Envision Group and retain or terminate employees (without any liability or obligation for such termination) as necessary; and
5. To consent to the termination of the stay of proceedings in favour of the Envision Group in respect of bonded construction projects with prior written consent of Alberta Treasury Branches and the applicable bonding company.

**COURT FILE NO.: 10-50109**

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**DECISION**

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**Mr. Justice Robert Beaudoin**

**RELEASED: January 14, 2011**