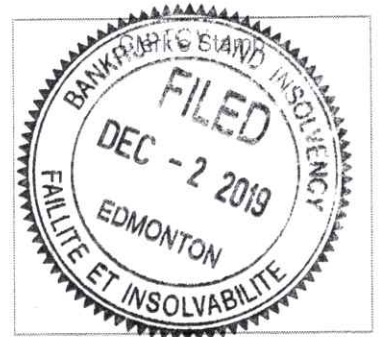


COURT FILE NO. B203 582587  
ESTATE NO. 24-2582587  
COURT Court of Queen's Bench of Alberta  
JUDICIAL CENTRE Edmonton



PLAINTIFF(S) IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF **MCG RESTAURANTS LTD.**

DOCUMENT **BENCH BRIEF OF MCG RESTAURANTS LTD.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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## I. INTRODUCTION

- 1) MCG Restaurants Ltd. ("MCG" or the "Company") brings an application before the Court for an extension of time within which to file its Proposal with the Office of the Superintendent in Bankruptcy ("OSB").
- 2) This Application is made pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA").

## II. FACTS

- 3) The facts are generally set forth in the Affidavit of Rob Morris sworn December 2, 2019 and in the Trustee's First Report to the Court. The facts will not be repeated in detail but will be summarized very briefly for the purpose of this Bench Brief.
- 4) MCG is the Edmonton area franchisee for Moxie's Bar & Grill ("Moxie's"). The franchisor is Moxie's Restaurants, Limited Partnership ("Franchisor").
- 5) MCG operates five locations in the Edmonton area and employs 336 people at those locations.

- 6) From 2014 through and including the date of the filing of its Notice of Intention to Make a Proposal, November 12, 2019, MCG has experienced a steady increase in costs, and a decline in revenue and profits. The situation is attributable to:
  - a) A general decline in the economy in Alberta;
  - b) A significant increase in the minimum wage, a concomitant increase in remittance requirements generally attributable to the increase in the minimum wage and increases in payroll taxes;
  - c) A reduction in business due to the price increases necessitated by the wage changes; and
  - d) Disruptors in the food service industry.
- 7) Attempts to increase prices have not been sufficient to offset the significant increases in costs.
- 8) MCG has taken efforts to restructure independent of the proceedings including the closure of its Calgary Trail location at the end of October. It has also made arrangements with its first secured lender, Canadian Western Bank ("CWB") to reduce monthly payments to interest only to March of 2020.
- 9) The cashflow which was filed with the OSB (Exhibit "F" to the Affidavit of Rob Morris) projects that the Company should remain cashflow positive in a significant way during the 13 week period set forth in the forecast and certainly through to the proposed extension date of January 24, 2020.
- 10) The Company remains able to operate its remaining locations while it takes steps to restructure. The next step in that process will be to evaluate each location to determine the viability of the operations in each restaurant and develop a plan to address those operations and formulate a plan to its creditors generally.
- 11) The Company is also seeking to streamline the procedure in this case by asking the Court to approve an electronic service protocol, the details of which are outlined in the Trustee's Report. The mechanism which will be addressed in this Brief.

### **III. ISSUES**

- 12) The primary issue on this application is whether the Company is entitled to an extension in accordance with the provisions of section 50.4(9) of the BIA and in that regard must satisfy the Court that:
  - a) It has acted, and is acting, in good faith and with due diligence;
  - b) It will likely be able to make a viable proposal if the extension applied for were granted; and
  - c) No creditor will be materially prejudiced if the extension applied for is granted.

13) In respect of the e-service protocol, the Court will need to be satisfied whether it is appropriate to put that into effect in the circumstances.

#### **IV. ANALYSIS & ARGUMENT**

##### **A. Stay Extension**

14) Under the terms of the BIA, the Court has the ability to order an extension of the time within which to file a proposal provided that the debtor meets all three (3) criteria set out in s. 50.4(9):

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30 day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

BIA, Section 50.4(9) [TAB 1]

15) The Debtor has the onus of demonstrating, on a balance of probabilities, that it satisfies each of the three (3) elements of the test and before an extension is justified

*Re H & H Fisheries Limited* 2005 NSSC 346 (CanLii) at paras 12 & 13 ("*H & H Fisheries*") [TAB 2]

16) At all times, it is a question of fact whether the circumstances are met which would satisfy the Court that, in exercising its discretion to grant the extension, the extension is warranted.

17) Canada has two statutes that enable companies to reorganize. The first is the BIA, under which this proceedings has been taken. The second is the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA").

18) While the BIA is more rules based, the Supreme Court of Canada ("SCC") has recognized that:

- a) Reorganizations under both statutes serve the public interests by facilitating the survival of companies supplying goods or services to their markets and in preserving jobs;
- b) They afford the company an opportunity to rehabilitate or adjust business practices;
- c) They avoid a multiplicity of proceeding outside of normal civil context; and
- d) Avoid the social and economic cost of liquidating assets.

*Century Services Inc. v. The Attorney General of Canada*, 2010 SCC 60 at para 12-25 [TAB 3]

Good Faith

- 19) The BIA provides little to no guidance as to the definition of “good faith”. *Black’s Law Dictionary* defines “good faith” as:

A state of mind consisting of: (1) honesty and belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealings and giving trader business, or (4) absence of intent to defraud or seek unconscionable advantage.

*Black’s Law Dictionary 5<sup>th</sup> ed.*, pg. 623-624 [TAB 4]

- 20) In respect of these proceedings thus far, there is no indication in the evidence that the Company has not acted in good faith and is not acting consistent with its obligations under the terms and conditions of the BIA imposed upon it in these proceedings. The Trustee has observed that the Company is operating in good faith and with due diligence. It continues to make payments to its creditors post-filing in furtherance of continuing to operate its business. No bad faith conduct has been articulated nor does it appear evident.

Likely to make a viable Proposal if the extension applied for were granted

- 21) As of this writing, the Company has been operating under NOI proceedings for a period of three weeks. The cashflow presented forecasts positive results and an ongoing ability of the Company to continue to support its own operations without having to seek funding or secure suppliers or its professionals during the course of the proceedings. It has not, at this stage, been able to formulate a proposal but continues to work on options which will likely lead to that proposal.
- 22) The Court must be satisfied on a balance of probabilities that MCG would likely be in a position to put forward a viable proposal within the timeframe the extension is applied for. At this very least this means a reasonable effort dictated by the circumstances must have been made which gives some indication that the Company is moving towards that goal.

*H & H Fisheries, supra*, at para. 22 to 33 [TAB 2]

- 23) In the circumstances, while MCG does have work to do in relation to making a proposal its creditors, it is working toward that end and believes it is likely that it will be able to make a viable proposal to its creditors. The alternative in not granting its extension will be bankruptcy resulting in the closure of five locations, damage to the Moxie’s brand and the loss of 336 jobs. This result is not optimal and would not, at this stage, serve the interests of MCG or its stakeholders.

No creditor will be materially prejudiced

- 24) There is no indication that any creditor will be materially prejudiced by the extension.
- 25) There is a difference between prejudice and material prejudice. There must be evidence that a creditor will be substantially or considerably prejudiced if the extension being applied for is granted.

*Re Cantrail Coachlines Ltd.*, 2005 BCSC 351 at para 21 (“*Cantrail*”) [TAB 5]

26) The Court in *Cantrail, supra*, did note that a BIA filing in and of itself does engender the possibility of simple prejudice through a stay. However, the Court also noted that not being able to collect on an obligation is not considered material prejudice to a creditor in the circumstances.

*Cantrail, supra* at para 22

27) The *Cantrail* case was effectively followed in *Re Andover Mining Corp.* (2013) BCSC 1833 by Justice Steeves of the British Columbia Superior Court.

28) In *Andover*, the Court noted that where there was no evidence of bad faith on the part of the debtor even in the face of no determination as to what an actual proposal would be, the extension was allowed in circumstances where doing so was adjudged to be consistent with the intent of the BIA and that the application in question before the Court should be judged on a rehabilitation basis rather than a liquidation basis.

*Andover, supra* at para 49-50 [TAB 6]

29) In *H & H Fisheries*, the Court noted that material prejudice must be of some degree that it raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept.

*H & H Fisheries, supra*, at para 37 [TAB 2]

### Conclusions

30) In the circumstances, the Company has, it is submitted, met the test stipulated under section 50.4(9) for the extension to be granted:

- a) The Company continues to operate in good faith and with due diligence;
- b) Even in the face of not being able to present a determination as to what the actual proposal will be at this time, allowing the Company to continue its operations and providing the extension of the time within which to file its proposal is consistent with the intent of the BIA and the rehabilitative process it serves consistent with the Supreme Court of Canada's articulation of same in *Century Services*. Not allowing the Company to have the extension will certainly not facilitate an ability on its part to even consider making a viable proposal to its creditors and will result in significant economic and loss to all stakeholders including 336 employees; and
- c) No creditor will be materially prejudiced if the extension is granted.

### **B. E-Service Protocol**

31) The Company asks the Court to approve an e-service protocol on the following basis:

- a) An explanatory notice explaining the service protocol shall be served by the Trustee by way of regular mail on all of MCG's creditors as listed in the creditor's package dated November 15, 2019;

- b) For all future materials or applications by MCG, or other interested parties other than the Trustee, parties shall only be required to directly serve those creditors who provide an email address for service to Duncan Craig LLP in writing;
  - c) Duncan Craig LLP shall use best efforts to maintain and update as necessary a list of creditors who provide their e-mail addresses for service in accordance with the forgoing paragraph (the "Service List") and shall provide the Service List, and any updates made as addresses are received, to the Proposal Trustee for posting to the website noted below which is to be maintained for these proceedings;
  - d) Service of all future materials or applications on those creditors who do not provide an e-mail address as provided for herein shall be deemed effective by posting the materials or applications on Deloitte Restructuring Inc.'s website at [www.insolvencies.deloitte.ca](http://www.insolvencies.deloitte.ca) under the link for "MCG Restaurants Ltd.". No further service of process, except for Trustee initiated processes, shall be required;
  - e) Any party wishing to serve material in accordance this protocol shall provide filed copies of all material to the Trustee for posting to the Trustee's website prior to the hearing; and
  - f) In respect of Trustee initiated processes or any applications brought by the Trustee, the Trustee shall continue to follow the service and notice requirements under the provisions of the other than applications initiated by the Proposal Trustee which shall continue to follow the service and notice requirements under the provisions of the BIA.
- 32) E-mail service is, as a matter of practice in these proceedings, considered the most effective method of addressing service for all stakeholders concerned. The protocol effectively requires creditors, if they want timely service of materials, to provide an e-mail address for service. If they fail to do so, then posting on the Trustee's website is deemed effectively substitutional service of the material.
- 33) In terms of authority:
- a) The *BIA General Rules*, section 6, provide for a means of service electronically and gives the Court discretion to exempt any person from the strict requirements of the rule;

*BIA General Rules*, section 6 [TAB 7]
  - b) The *BIA General Rules* also provide that if there is a gap in the procedure where in cases not provided for in the BIA or the BIA Rules, the Court shall apply, to the extent required, the ordinary procedure set out in the Court rules to the extent they are not inconsistent with the BIA;

*BIA General Rules*, section3 [TAB 7]

- c) In that regard, the *Alberta Rules of Court* offer additional assistance with respect to service. Division 11 of the Rules generally speak to service. Rule 11.27 authorizes the Court to make an Order validating service of the document served inside or outside of Alberta. Rule 11.28 authorizes substitutional service. Rule 11.29 authorizes dispensation of service. Significantly for this process, Rule 11.21 allows for service electronically where parties provide an e-mail address for service.

*Alberta Rules of Court*, Rules 11.21, 11.27, 11.28 & 11.29 [TAB 8]

- d) The protocol will enable parties to provide e-mail addresses to counsel for the Company. That list will be maintained on a best efforts basis and provided to the Trustee for updating to the website as often as is practical;
- e) Parties not providing e-mail addresses will be effectively substitutionally served by having the documents posted to the website prior to any Court application which is consistent with the BIA service rules; however
- f) The Trustee, and any processes that it must initiate or applications which it must bring will continue to follow the service and notice requirements set forth in the BIA.

**V. CONCLUSIONS**

- 34) In all the circumstances, it is submitted that the Company has met the test for an extension of its time within which to make a Proposal to its creditors under the provisions of section 50.4(9) of the BIA.
- 35) It is reasonable and practical to implement the service protocol as outlined in the Applicant's materials.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of December, 2019.

DUNCAN CRAIG LLP  
Per:

  
\_\_\_\_\_  
Darren R. Bieganeck, QC  
Counsel for MCG Restaurants Ltd.

**TAB 1**



**(b)** shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

**(i)** with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

**(ii)** with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

**(c)** shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

### **Where assignment deemed to have been made**

**(8)** Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

**(a)** the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

**(b)** the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

**(b.1)** the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

**(c)** the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

### **Extension of time for filing proposal**

**(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

### **Court may not extend time**

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

### **Court may terminate period for making proposal**

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19 1997, c. 12, s. 32 2004, c. 25, s. 33(F) 2005, c. 47, s. 35 2007, c. 36, s. 17 2017, c. 26, s. 6(E).

### **Trustee to help prepare proposal**

**50.5** The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

### **Order – interim financing**

# TAB 2

**IN THE SUPREME COURT OF NOVA SCOTIA  
IN BANKRUPTCY AND INSOLVENCY**  
**Citation: *H &H Fisheries Limited, Re*, 2005 NSSC 346**

**Date:** 20051219  
**Docket:** SH B259148  
**Registry:** Halifax

**IN THE MATTER OF:**        H & H Fisheries Limited

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**DECISION**

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**Judge:**                    The Honourable Justice Walter R.E. Goodfellow

**Heard:**                    December 14, 2005 in Halifax, Nova Scotia

**Counsel:**                Victor J. Goldberg and Martha L. Mann for  
H & H Fisheries Limited  
Stephen J. Kingston and Bob Mann, articulated clerk, for  
the Bank of Nova Scotia

**By the Court:**

**BACKGROUND:**

[1] H & H Fisheries Limited (HHFL) owns and operates a fish processing plant at Eastern Passage, Halifax, Nova Scotia, which is a somewhat seasonal operation and it presently employs seventy-five people which diminishes to approximately twelve people off-season.

[2] Reginald P. Hartlen is the president, a founding shareholder and director of HHFL and the company became a customer of the Bank of Nova Scotia (BNS) in May of 2003.

[3] HHFL and BNS secured a commitment letter December 2, 2004 with the stated purpose of BNS "to finance trade receivables and inventory". It provided that BNS would have a first charge over accounts receivable and inventory and set out the terms and conditions of their agreement including "for ongoing credit risk management purposes, all operating accounts of the borrower shall be maintained with the Bank as long as the borrower has any operating line facilities with the Bank". There were several additional terms and conditions dealing with reporting ratios of current assets to current liabilities, ratio of debt to tangible net worth, etc. The letter of commitment contained a clear outline of the general borrower reporting conditions. The letter of commitment made reference to two specific receivables outstanding; Emporio and Simone, upon which I will comment further.

[4] In November 2004 HHFL applied to increase its limit on its operating credit line from \$400,000 to \$1,100,000 and this increase was approved subject to confirmation as to the collection of the Emporio and Simone accounts.

[5] In December 2004 the Simone account was paid in full but Emporio remained outstanding. Because the lobster season was approaching, HHFL requested BNS to waive the condition relating to the Emporio account. BNS did not waive the requirement in relation to that account but did allow access to the full operating line of \$1,100,000 to January 31, 2005 when the limit was reduced to \$750,000.

[6] In February 2005, HHFL again requested access to the \$1,100,000 credit limit to February 28, 2005 when again it would be reduced to \$750,000 and this

was agreed upon by the parties. HHFL provided BNS with an update on the status of the Emporio account which continued to remain outstanding. BNS became increasingly concerned with respect to the impact of the potential write-off of the Emporio account and as a result in March 2005 conversations took place between BNS and Reginald Hartlen, who undertook April 7, 2005 to inject equity of \$200,000 into HHFL by April 22, 2005. Mr. Hartlen did come up with \$100,000 and endeavoured to obtain additional funds in relation to mortgaging his residence but unfortunately there was a lien/judgment against his property and his financing has not been possible.

[7] In June 2005 HHFL advised that as part of its 2005 fiscal year ending June 30, 2005, the company would write off the Emporio account which would give it an operating loss of \$300,000 which would be partially set off by an SR&ED refund of \$200,000, leaving a net loss of \$100,000 for the fiscal year 2005.

[8] In September 2005 BNS received a copy of HHFL's unaudited financial statement for the year ending June 30, 2005 which showed a net loss of \$596,043. This compared with a net loss of \$21,003 for the year ending June 30, 2004.

[9] HHFL had problems with cash flow and operating and contrary to the letter of commitment started to deposit funds to its accounts with CIBC and this was acknowledged by the director of finance of the company in September 2005. There followed innumerable meetings, correspondence between the parties and Mark S. Rosen, a licensed trustee in bankruptcy, who has consented to act as trustee for any proposal in this matter.

## **LEGISLATION:**

**Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 1; 1992, c. 27, s. 2.**

**ss. 50.4(9):**

### **Extension of Time for Filing Proposal**

In order to obtain an extension, the debtor must establish the following three items

(a) that it is acting in good faith and with due diligence;

(b) that it would likely be able to make a viable proposal if an extension were granted; and

(c) that no creditor would be materially prejudiced.

s. 54(2.2)(3):

**Related creditor** - A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

62(1.2)(2):

**On whom approval binding** - A proposal accepted by the creditors and approved by the court is binding on creditors in respect of

(a) All unsecured claims, and

(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal.

but does not release the insolvent person from the debts and liabilities referred to in section 178, unless the creditor assents thereto. (S.C. 1992, c. 27, s. 26).

## Interpretation Act, R.C.C. 1985, c. I-21

### Law Always Speaking

#### *Law always speaking*

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

### Enactments Remedial

#### *Enactments deemed remedial*

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

### APPLICATION:

[10] HHFL filed a Notice of Intention dated November 3, 2005 under ss. 50.4(1) to make a Proposal of H & H Fisheries Limited. An order was granted extending the time to file a proposal November 29, 2005 to December 8, 2005.

Unfortunately, the Chambers' docket was so heavy that the Justice presiding on December 8, 2005 was unable to address the matter and I was asked to deal with it and it was put over by consent to December 14, 2005. The application is comprised of several affidavits and both parties declined cross-examination of the other sides' supporting affidavits. On December 14<sup>th</sup> I heard almost four hours of argument and reserved my decision in order to thoroughly review the extensive material filed by both parties and arrive at a determination.

### ONUS:

[11] The court, as directed by s. 50.4(9) above, must be satisfied on each application that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

[12] The onus is upon the applicant, in this case HHFL), to satisfy the court on a balance of probabilities that all three prerequisites of s. 50.4(9) have been established on the application.

[13] This is so because of the use of the "semi-colon" and the use of the word "and" in (b), rendering the requirements conjunctive. This requires the court to consider each of the subsections as to whether the applicant has established the prerequisite contained in the subsection on a balance of probabilities. For the application to be successful the court must be satisfied that all three prerequisites



of the application have been established on a balance of probabilities before extending the time for filing a proposal. It is, in essence, a three part test and if the applicant fails on any part the court would not then be satisfied, requiring the application to be dismissed.

**[14] Has HHFL satisfied the court that it has acted in good faith and exercised due diligence?**

[15] There is some merit to the arguments advanced by BNS and the court is particularly concerned about a party HHFL signing a commitment letter with the clear undertaking noted above that all its operating accounts were to be maintained with BNS. This is for the obvious purpose of providing BNS with an opportunity to monitor and protect its interests as a creditor and clearly HHFL in moving all its trading, operating business to its CIBC accounts has committed a breach of contract, a breach of the commitment it made in the original committal letter executed by both parties December 2, 2004.

[16] Does a breach of contract automatically constitute bad faith? The answer is, “not necessarily”, but it is evidence that must be weighed very carefully and the evidence here does show a deliberate failure to notify BNS of this redirection of operating funds and at one point a signed invoice or record which was somewhat misleading with respect to the possibility of some relatively minor accounts having been directed to the CIBC in error.

[17] The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable. If, for example, the diversion of operating/trading proceeds had been diverted to the CIBC for the purposes of personal gain for any officer, director or shareholder of HHFL, an example of which would be payment to one's family or a pay-down on a mortgage or judgment on one's home, etc., or to enhance the third level of a secured creditor being Mr. Hartlen's company, R. Hartlen Investments Inc., then clearly such would amount to bad faith and quite possibly fraud. It is clear that the motivation for moving the funds to the CIBC account was, in one word, for the purpose of “survival”. Funds were essential in that I accept the view expressed by HHFL that had it continued to direct its operating/trading funds to BNS the probability is almost a certainty that BNS would have utilized such funds to pay-down its advances precluding the company from having any operating funds and the door to the plant would have been shut. This result would not have been, and is not at this time, in the best

interest of either party and coincidentally the seventy-five employees who are at the moment gainfully employed by HHFL. I make it clear that it is not necessary that there be fraud for the conduct to fall short of good faith. HHFL have also fallen behind in many other aspects of the original commitment letter but they have responded and provided documentation, bank records, reconciliation of invoices with cash withdrawals. Its recent conduct probably directed by the trustee entirely mitigates against any suggestion of the diversion being for personal gain other than as I have said, a course of conduct taken for the benefit of both parties some other ninety-six outstanding creditors and the seventy-five employees. In some cases a breach of contract may be such of itself that it precludes acceptance on a balance of probabilities that the overall conduct meets the good faith requirement.

[18] It is argued by HHFL that only its conduct since the filing of the Notice of intention November 3, 2005 should be considered and with respect, I am inclined to disagree. The manner in which a party conducts itself in the past, particularly the immediate past, is often an indicator of likely conduct in the immediate future. In addition, what you have here is a breach of the contract/commitment letter which occurred before November 3, 2005 and continued and overlapped the date of the filing of the Notice of intention.

[19] The court does have the opinion of a respected trustee whose sworn testimony by affidavit has not been challenged and Mark S. Rosen, LLB, FCIRP, has been involved for some time and very active in endeavouring to come to grips with the challenge and has met with and communicated with officials of BNS, BDC and many of the unsecured creditors. After reciting in detail the extent of such activity he deposes in paragraph 14 of his affidavit of December 1, 2005 as follows:

14. I have been working with and receiving information from Messrs. Hartlen and Limpert as well as Harley Hiltz, the director of marketing and production for the Company, who at all times have been fully co-operative. From my experience and dealings with the Company, I believe that the Company has acted and is acting in good faith and with due diligence in working towards formulating a viable proposal. I believe that the Company would likely be able to make a viable proposal if the extension is granted.

My finding on this prerequisite is that by a relatively small margin HHFL has satisfied the court on a balance of probabilities that it has been and is likely to act in good faith. In reaching this conclusion I have not taken into account the

representation made in oral argument that Mr. Hartlen has probably advanced \$90,000 to \$95,000 to HHFL recently because I do not recall seeing anything in the evidence, particularly documentation confirming this infusion and therefore I am unable to give it any weight.

[20] The second wing of subparagraph (a) is in relation to due diligence and while the company has not acted in quite the timely manner it ought to have acted its deficiency in this regard is not severe and the cumulative evidence before me including the summary contained in Mr. Rosen's affidavit of December 1, 2005 and the volume of response which has been made to the BNS's requests and entitlement for documentation, combined with the efforts being made by the trustee in bankruptcy, Mark S. Rosen, to address a resolution constitutes satisfaction on a balance of probabilities of due diligence to this date.

**[21] Would HHFL likely to be able to make a viable proposal if the extension being applied for were granted?**

[22] "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (*Re Baldwin Valley Investors Inc.*, [1994] 23 C.B.R. (3<sup>rd</sup>) 219). Again, the court must be satisfied on a balance of probabilities that HHFL would likely. This at the very least means that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for.

[23] Lack of detail and assurance of this kind was considered in *St. Isidore Meats Inc. v. Paquette Fine Foods Inc.* [1997] O.J. No. 1863. In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):

"...[T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future."

[24] The BNS points to a number of specifics of what it considers a lack of effort that should result in a finding that there is little likelihood of HHFL making a viable proposal. BNS notes the fact that it has stated clearly that it no longer has any interest of being involved in the affairs of HHFL which will necessitate, in all

probability, an alternate financial institution and to date no inquiries have been made by HHFL or the Trustee of any financial institution. The absence of this step will take on weight depending upon the totality of the circumstances that exist at the time of the Notice of intention and that have developed since the Notice of intention was filed.

[25] There has been a considerable degree of activity before and since the Notice of intention was filed November 3, 2005. It seems in the total evidence available to the court through the affidavits filed that it is a reasonable inference to draw that it is highly unlikely that any financial institution would show any interest in filling the shoes of BNS until a determination is made with respect to this application for an extension of time to January 30, 2006. Since the Notice of intention has been filed the evidence is that HHFL has made a profit for November 2005 greater than that was anticipated. It had been anticipated that the profit would have been \$7,000 and it appears to be approximately \$19,600. There is an indication that the company is operating a new business model as a processing facility and there is evidence of the projected sales. In addition, there is evidence of a company, Pesca Pronta, having entered into a contract which by now would have had two substantial deliveries of lobster and in response to my inquiry during argument it appears that the first delivery has been paid for. HHFL advances the affidavit of Francesco Amoruso of Rome, Italy as to a possible solution and substitution by financial injection from that company, however, at this stage all that affidavit establishes is that an effort is being made by HHFL to address their situation. It further confirms that this is a busy, crucial period for HHFL but it does not at this point provide any comfort to be BNS or the court as to being a probable element of a viable proposal.

[26] Paragraph 5 of Francesco Amoruso's affidavit merely states:

I have had discussions with Mr. Hartlen with respect to a potential share investment in H & H by Pesca Pronta in the approximate amount of \$400,000.00 Cdn. I am very interested in pursuing the investment opportunity but will require 30 days to discuss the situation with my brothers/partners. I am hopeful that the transaction can be finalized. In the meantime, my company will continue to deal with H & H.

[27] To this point the court has not been advised nor has BNS of any further developments, inquiries or progress with respect to Amoruso's affidavit which can only be classified as a statement of interest.

[28] HHFL has made a concerted effort to secure government financing by way of a grant. The company has spent \$6,000 for the services of a consultant in the preparation of its grant application and on December 9, 2005 a science officer who is performing the due diligence for the grant indicated her satisfaction with the scientific basis of the claim and that she would be making a positive recommendation. The only weight that can be given at this stage to the grant application is that it is another example of the efforts being made by HHFL and its proposed trustee but until the grant reaches the stage of being a balance sheet item it can be given no further weight.

[29] BNS raises an objection to a determination that HHFL can satisfy the requirement pointing out that BNS and BDC as one class of secured creditor represent a substantial majority position of the secured claims. R. Hartlen Investments Inc. is bound by s. 54.2.2(3) as noted above.

[30] BNS takes the position that it has a clear veto over any proposal that may be advanced and that it will not be supporting any proposal to secured creditors that might be filed by HHFL.

[31] In *Re Cumberland Trading Inc.*, [1994] O.J. No. 132, wherein Farley J. stated at para. 4:

Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed \$750,000. On that basis, Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly, Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under BIA regime, one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-a-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality of a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

[32] In that case Farley, J. held that Skyview's position was satisfactory proof that the company would not likely be able to make a proposal that would be accepted by the creditors. In that case Skyview had 95% in value of Cumberland's admitted secured creditors and here the math appears to give BNS a virtual veto.

HHFL counters that when you look at the funds in the company's bank accounts at the end of November 2005 of approximately \$170,000 that such reduces the debt outstanding of BNS and again reiterates that BNS has since the Notice of intention being filed received approximately \$90,000 U.S. on its account. BNS is correct in that the mere presence of money in a debtor's bank account does not reduce indebtedness unless it is applied to the indebtedness. Since the notice of intention was filed HHFL has paid the required interest to BNS for November 2005. In this case, it is clear from the evidence before me and particularly the affidavit of the Trustee that there is a recognition of the proposal providing either alternate financing, such as speculated in Mr. Amoruso's affidavit or approaching alternate financial institutions. It would seem reasonable to assume that the proposal that will be advanced if it has a means of essentially paying out by substitution injection of capital of BNS indebtedness then the proposal presumably would be acceptable. It is inconceivable that if the BNS indebtedness were satisfied that BNS should retain the right to apply a guillotine effect to the extreme prejudice of itself and all other interested parties including the probable closure of the plant. The second largest secured creditor is the Business Development Corporation and they are in agreement to the granting of an extension to HHFL.

[33] In these circumstances, again by the a fairly narrow margin, I conclude that HHFL has met this prerequisite on a balance of probabilities. In doing so, I am not overlooking the considerable debt of HHFL that, while the projections for the next couple of months are favourable, clearly, the proposal will require addressing BNS.

[34] The third step is: **Will any creditor be materially prejudiced if the extension being applied for were granted?** As noted, there has been some improvement in the position of BNS since the Notice of intention was filed in that it has received approximately \$95,000 U.S. which the Bank's solicitor points out came direct to it and not through any exercise of direction by HHFL. BNS has also received the November 2005 interest. In this case there are only two significant unrelated secured creditors, BNS and BDC. BDC consents to the extension of time but I am mindful of the fact that its security is a first charge over the fixed assets which are by themselves not likely to significantly decrease in value but on the other hand would probably have some measure of increased value by virtue of an operating going concern and also there is an indication of additional land being acquired from government by HHFL. I do agree with BNS that additional land, even if the obtaining of it is imminent, does not by itself provide any comfort to the

Bank which has as its security a first charge on trade receivables and inventory. What does come through from the totality of the evidence is that this is a busy and likely profitable time for the industry and Mr. Rosen, in his affidavit, deposes at paragraphs 11 and 12:

11. I believe that the forty five day extension for filing the proposal is critical to the operations of the Company. It is my opinion that no creditor would be materially prejudiced if the extension is granted. The security of BNS would actually be enhanced during the extension period because of the profitable time of year and increase in inventory and receivables. BDC would have an opportunity to add to their security the land which I understand is to be conveyed to the Company by the government.
12. In the event the Company were to become bankrupt, it is my opinion that both BDC and R. Hartlen Investments Inc., which has a third charge on the assets would be severely prejudiced. It is also my opinion that the unsecured creditors would lose any opportunity of recovery.

[35] I struggle with what constitutes material prejudice and there is some guidance in *Re Cumberland Trading Inc.* above. In that case the creditor under the BIA applied to have a stay, etc. In paragraph 11 Justice Farley stated:

Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one- ie., it refers to the degree of the prejudice suffered vis-a-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *quo* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. ...

[36] In the case before the court, the accounts receivables as of November 31, 2005 amounted to \$956,532.16, almost double the indebtedness outstanding to BNS. HHFL certainly has as great if not greater motive in pursuing and collecting receivables as does BNS and I do not think there need be any concern as to the attempts in the short run for collection. Arguably, if an accounts receivable is uncollectible now its position cannot be any worse a few weeks from now. Extending the time period obviously creates some risk and some possibility of benefit. Provided a proper monitoring scheme is in effect, what normally should follow an extension is a flowing of proceeds from existing accounts receivables, new sales and new accounts receivables into the operating costs in an operation where in the immediate future a degree of profitability is projected.

[37] This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

### CONDITIONS:

[38] During the course of argument I indicated if an extension was granted that BNS at the very least was entitled to have timely full disclosure of the utilization of funds for the continued operation of the company. This could be achieved by requiring HHFL to return to the commitment of having all operating funds passed through its accounts with BNS but it will also require a direction that other than interest entitlement, if not paid, BNS would not be able in the intervening period to encroach upon the trading funds which are absolutely necessary for the continued operation and survival chances of the business. The direction would probably also require any outstanding documentation, possibly requiring HHFL to produce the invoices in the reconciliation it provided for cash withdrawals for cash purchases from Pacmar Norway, etc. There would be a requirement of timely disclosure. There are a number of other possible conditions that come to mind. However, as both counsel indicated if the extension was granted they requested the opportunity to address possible conditions, I readily accede to their offer of assistance. Counsel, if they agree, may take some time to consult with each other and put their views in writing or alternatively address the matter orally and, in any event, I will, as scheduled be available at 2:00 p.m. this afternoon unless both counsel agree on the appropriate terms and conditions of the order of extension.

J.



# TAB 3

**Century Services Inc.** *Appellant*

v.

**Attorney General of Canada on behalf  
of Her Majesty The Queen in Right of  
Canada** *Respondent***INDEXED AS: CENTURY SERVICES INC. v. CANADA  
(ATTORNEY GENERAL)****2010 SCC 60**

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,  
Fish, Abella, Charron, Rothstein and Cromwell JJ.**ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA**

*Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).*

*Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.*

*Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.*

**Century Services Inc.** *Appelante*

c.

**Procureur général du Canada au  
nom de Sa Majesté la Reine du chef du  
Canada** *Intimé***RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA  
(PROCUREUR GÉNÉRAL)****2010 CSC 60**

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,  
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et  
Cromwell.**EN APPEL DE LA COUR D'APPEL DE LA  
COLOMBIE-BRITANNIQUE**

*Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).*

*Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.*

*Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?*

### 3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor “[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)” (s. 222(3)), while the *CCAA* stated at the relevant time that “notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded” (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.’s conclusion that an express trust in favour of the Crown was created by the court’s order of April 29, 2008.

#### 3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors’ enforcement actions and attempt to obtain

### 3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l’insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l’égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l’époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d’imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c’est souvent le cas, le conflit apparent peut être résolu au moyen des principes d’interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l’historique de la *LACC*, la fonction de cette loi parmi l’ensemble des textes adoptés par le législateur fédéral en matière d’insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d’insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l’objectif de cette loi et l’interprétation qu’en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l’espèce, j’aborderai la conclusion du juge Tysoe selon laquelle l’ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

#### 3.1 *Objectif et portée du droit relatif à l’insolvabilité*

[12] L’insolvabilité est la situation de fait qui se présente quand un débiteur n’est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d’insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolubles — personnes physiques ou personnes morales — qui doivent 1 000 \$ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

*Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the CCAA's remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The CCAA fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la LACC, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la LACC. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La LACC est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The manner in which courts have used CCAA jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the CCAA, the House of Commons committee studying the BIA's predecessor bill, C-22, seemed to accept expert testimony that the BIA's new reorganization scheme would shortly supplant the CCAA, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the CCAA enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venues à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la LACC. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la LACC.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite et l'insolvabilité de 1992* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolubles ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la LACC dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la LFI a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la LFI supplanterait rapidement la LACC, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3<sup>e</sup> sess., 34<sup>e</sup> lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la LACC dans la pratique contemporaine,

flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The “flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions” (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, “the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world” (R. B. Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors’ remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor’s assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu’offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la *LACC* [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d’un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d’insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d’insolvabilité peuvent être régies par des régimes législatifs différents, elles n’en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l’objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

[TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d’éviter l’anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l’absence d’un processus collectif, chaque créancier sait que faute d’agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l’inefficacité et au chaos qui résulteraient de l’insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d’un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec



rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenu) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

# TAB 4

# BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of  
American and English Jurisprudence,  
Ancient and Modern

By

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BY

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**Golden Rule argument.** "Golden Rule" type of argument, by which jurors are urged to place themselves or members of their families or friends in place of person who has been offended and to render verdict as if they or either of them or member of their families or friends was similarly situated, is improper in both civil and criminal cases. *Lycans v. Com.*, Ky., 562 S.W.2d 303.

**Goldsmiths' notes.** Bankers' cash notes (*i.e.*, promissory notes given by a banker to his customers as acknowledgments of the receipt of money) were originally called in London "goldsmiths' notes," from the circumstance that all the banking business in England was originally transacted by goldsmiths.

**Gold standard.** A monetary system in which every form of currency is convertible on demand into its legal equivalent in gold or gold coin. The United States adopted the gold standard in 1900 and terminated it in 1934.

**Goldwit.** A mulct or fine in gold.

**Gomashtah** /gomashtə/. In Hindu law, an agent; a steward; a confidential factor; a representative.

**Good.** Valid; sufficient in law; effectual; unobjectionable; sound; responsible; solvent; able to pay an amount specified.

Of a value corresponding with its terms; collectible. A note is said to be "good" when the payment of it at maturity may be relied on.

**Good abearing.** See **Abearing**.

**Good and clear record title, free from all incumbrances.** A title which on the record itself can be again sold as free from obvious defects and substantial doubts, and differs from a "good, marketable title," which is an actual title, but which may be established by evidence independently of the record.

**Good and valid.** Reliable, sufficient, and unimpeachable in law; adequate; responsible.

**Good and workmanlike manner.** In a manner generally considered skillful by those capable of judging such work in the community of the performance.

**Good behavior.** Orderly and lawful conduct; behavior such as is proper for a peaceable and law-abiding citizen. "Good behavior," as used in an order suspending sentence upon a defendant during good behavior, means merely conduct conformable to law, or to the particular law theretofore breached.

Under some state penal systems, each day of "good behavior" by a prisoner reduces his or her sentence by one day. See also **Goodtime allowance**.

**Good cause.** Substantial reason, one that affords a legal excuse. Legally sufficient ground or reason. Phrase "good cause" depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed. *Wilson v. Morris*, Mo., 369 S.W.2d 402, 407. "Good cause" is a relative and highly abstract term, and its meaning must be determined not only by verbal context of statute in which term is employed but also by context of action and procedures involved in type of case presented. *Wray v. Folsom*,

D.C.Ark., 166 F.Supp. 390, 394, 395. See also **Probable cause**.

**Discovery.** "Good cause" for discovery is present if information sought is material to moving party's trial preparation. *Daniels v. Allen Industries, Inc.*, 391 Mich. 398, 216 N.W.2d 762, 766. "Good cause" requirement for discovery and production of documents is ordinarily satisfied by a factual allegation showing that requested documents are necessary to establishment of the movant's claim or that denial of production would cause moving party hardship or injustice. *Black v. Sheraton Corp. of America*, D.C.D.C., 47 F.R.D. 263, 273. Under a 1970 amendment to Fed.R. Civil P. 34, however, "good cause" is no longer required to be shown for production of documents and things. Federal Rule 35(a) does, however, require that "good cause" be shown for order requiring physical or mental examination, as does Rule 26(c) for protective orders to restrict scope of discovery.

**Quitting employment.** "Good cause" for leaving one's employment is such good cause as would compel a reasonably prudent person to quit under similar circumstances. *Chamblee v. Employment Division*, Or.App., 541 P.2d 165, 167.

**Unemployment compensation.** "Good cause" within statute denying unemployment compensation benefits if claimant has refused without good cause to accept an offer of suitable work is that cause that to an ordinary intelligent man is a justifiable reason for doing or not doing a certain particular thing. *Wallace v. Bureau of Unemployment Compensation*, Ohio Com.Pl., 160 N.E.2d 580, 582.

**Good character.** Sum or totality of virtues of a person which generally forms the basis for one's reputation in the community, though his reputation is distinct from his character. See **Character**; **Reputation**.

**Good conduct.** See **Certificate of good conduct**.

**Good consideration.** Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise. That consideration or detriment which the law considers valid and to this extent "good" does not refer to moral goodness. See **Consideration**.

**Good faith.** Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259, 260. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. In common usage this term is ordinarily used to

describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. *Efron v. Kalmanovitz*, 249 Cal.App. 187, 57 Cal.Rptr. 248, 251. See *Bona fide*.

**Commercial law.** Honesty in fact in the conduct or transaction concerned. U.C.C. § 1-201(19). In the case of a merchant, honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. U.C.C. § 2-103(1)(b).

**Good faith purchaser.** Those who buy without notice of circumstances which would put a person of ordinary prudence on inquiry as to the title of seller.

**Good health.** Good health, as employed in insurance contract, ordinarily means a reasonably good state of health. It means that the applicant has no grave, important, or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. A mere temporary indisposition not tending to weaken or undermine constitution does not render a person in "bad health". It does not mean a condition of perfect health.

**Good jury.** A jury of which the members are selected from the list of special jurors.

**Good, merchantable abstract of title.** An abstract showing a good title, clear from incumbrances, and not merely an abstract of matters of record affecting the title, made by one engaged in the business of making abstracts in such form as is customary, as passing current among persons buying and selling real estate and examining titles. See also *Marketable title*.

**Good order.** Goods or property are in "good order" when they are in acceptable condition under all the circumstances. See *Merchantability*.

**Good record title.** A "good record title," without words of limitation, means that the proper records shall show an unincumbered, fee-simple title, the legal estate in fee, free and clear of all valid claims, liens, and incumbrances. See also *Marketable title*.

**Good repute.** An expression, synonymous with and meaning only "of good reputation." See *Reputation*.

**Goodright, goodtitle.** The fictitious plaintiff in the old action of ejectment, most frequently called "John Doe," was sometimes called "Goodright" or "Goodtitle."

**Goods.** A term of variable content and meaning. It may include every species of personal property or it may be given a very restricted meaning.

Items of merchandise, supplies, raw materials, or finished goods. Sometimes the meaning of "goods" is extended to include all tangible items, as in the phrase "goods and services."

All things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. Also includes the unborn of animals and growing crops and other identified things attached to realty as fixtures. U.C.C. § 2-105(1). All things treated as movable for the purposes of a contract of storage or transportation. U.C.C. § 7-102(1)(f).

As used with reference to collateral for security interest, goods include all things which are movable at the time the security interest attaches or which are fixtures. Section 9-105(1)(h) of the 1972 U.C.C.; § 9-105(1)(f) of the 1962 U.C.C.

See also *Confusion of goods; Future goods; Identification of goods*.

**Capital goods.** The equipment and machinery used in production of other goods or services.

**Consumer goods.** Goods which are used or bought for use primarily for personal, family or household purposes. U.C.C. § 9-109(1). See also *Consumer goods*.

**Durable goods.** Goods which have a reasonably long life and which are not generally consumed in use; e.g. refrigerator.

**Fungible goods.** Goods, every unit of which is similar to every other unit in the mass; e.g. uniform goods such as coffee, grain, etc. U.C.C. § 1-201.

**Hard goods.** Consumer durable goods. See *Durable goods, supra*.

**Soft goods.** Generally consumer goods such as wearing apparel, curtains, etc., in contrast to hard goods.

**Good Samaritan doctrine.** One who sees a person in imminent and serious peril through negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not recklessly or rashly made. *Jobst v. Butler Well Servicing, Inc.*, 190 Kan. 86, 372 P.2d 55, 59. Under doctrine, negligence of a volunteer rescuer must worsen position of person in distress before liability will be imposed. *U. S. v. DeVane*, C.A.Fla., 306 F.2d 182, 186. This protection from liability is provided by statute in most states.

**Goods and chattels.** This phrase is a general denomination of personal property, as distinguished from real property. In the law of wills, the term "goods and chattels" will, unless restrained by the context, pass all the personal estate.

**Goods sold and delivered.** A phrase frequently used in the action of *assumpsit*, when the sale and delivery of goods furnish the cause.

**Goods, wares, and merchandise.** A general and comprehensive designation of such chattels and goods as are ordinarily the subject of traffic and sale. The phrase is used in the statute of frauds, and is sometimes found in pleadings and other instruments.

**Goodtime allowance.** "Good time" is awarded for good conduct and reduces period of sentence which prisoner must spend in prison although it does not reduce the period of the sentence itself. *Carothers v. Follette*, D.C.N.Y., 314 F.Supp. 1014, 1026, 1027. Credit allowed on the sentence which is given for satisfactory conduct in prison. Introduced as an incentive for inmates, it has become practically automatically awarded. It may reduce the minimum or maximum sentence or both. See also *Good behavior*.

**Good title.** One free from reasonable doubt, that is, not only a valid title in fact, but one that can again be sold to a reasonable purchaser or mortgaged to a

**TAB 5**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: *In the Matter of the Proposal of  
Cantrail Coach Lines Ltd.*  
2005 BCSC 351

Date: 20050301  
Docket: B050363  
Registry: Vancouver

**IN THE MATTER OF THE PROPOSAL OF CANTRAIL  
COACH LINES LTD.**

2005 BCSC 351 (CanLII)

Before: Master Groves

**Oral Reasons for Judgment**

In Chambers  
March 1, 2005

Counsel for Petitioner	H. Ferris
Counsel for Creditor (Volvo)	R. Finlay
Place of Trial/Hearing:	Vancouver

[1] **THE COURT:** This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.

[2] Cantrail applies to the Court pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* for extension of time for filing a proposal.

[3] VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-

applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.

[4] The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.

[5] Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as September 11<sup>th</sup> and SARS. More recently, and more significantly, the decline in the US dollar has made the travel industry generally and the travel industry specifically for Cantrail difficult. It appears to have caused a significant challenge for Cantrail to continue to operate profitably.



[6] Cantrail was apparently able to meet its obligations up until the 16<sup>th</sup> of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20<sup>th</sup> of January 2005 and perhaps in response to that, but in any event, on the 1<sup>st</sup> of February, 2005 Cantrail issued a Notice of Intention to make a Proposal. There are, I am advised, 81 creditors of Cantrail who have been notified of this application and only Volvo objects.

[7] I am satisfied that under the proposal thus far, and this is not contested in the affidavit, Cantrail has been able to meet its obligations to its employees as well as the obligations to statutory authorities. The suggestion in the materials is that Cantrail has been operating within the initial budget set by the trustee under the proposal.

[8] As indicated, Cantrail is applying purport to s. 50.4(9) of the **Bankruptcy and Insolvency Act**. That reads and I will take out some of the language that is not necessary:

The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned in subsection (8), if satisfied on each application that:

- (a) the insolvent person has acted and is acting in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

[9] Volvo applies under s. 50.4(11), the section relating to termination of proposals. That section reads, and again I am taking out some unnecessary language:

The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned subsection (8) or any extension thereof granted under subsection (9) if the Court is satisfied that:

(a) the insolvent person has not acted or is not acting in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiry of the period in question,

(c) the insolvent person will not likely be able to make a proposal before the expiry of the period in question that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

Essentially, s. 50.4(11) is the mirror of s.50.4(9).

[10] The test that Cantrail has to meet is essentially threefold. The first consideration is, are they acting in

good faith? I would say on this point it was not argued nor does it appear to be disputed that they are. Secondly, would they likely make a viable proposal if the extension were granted. Thirdly, they must show no creditor would be materially prejudiced by the extension.

[11] I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of **Re: N.T.W. Management Group Ltd.** [1993] O.J. No. 621, a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the **Act** and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.

[12] I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

[13] Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable

proposal. On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.

[14] If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the **Bankruptcy and Insolvency Act**. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.

[15] If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the **Bankruptcy and Insolvency Act** if that were the case.

[16] If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if

50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

[17] Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buy-out of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout -- a proposal which if they voted against they would probably be viewed as irrational businesspeople.

[18] In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.

[19] I note the words in the legislation are "a viable proposal". According to the *Concise Oxford Dictionary* viable means feasible. Viable also means practicable from an economic standpoint.

[20] I am impressed thus far with the efforts of Cantrail and with the efforts of the trustee, Patty Wood, in trying to get this matter resolved. I am satisfied that the insolvent company, in my view, would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.

[21] Under the third aspect of the test, I must be satisfied that no creditor would be materially prejudiced if extension being applied for were granted. That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced. Again, consulting the *Concise Oxford Dictionary* materially means substantially or considerably. The creditor here must be substantially or considerably prejudiced if the extension being applied for is granted.

[22] There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The **Act** in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything

other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.

[23] That being said, I am satisfied that Cantrail has met the test of applying for an extension of time for filing a proposal and I am granting the extension for a further 45 days from the 3<sup>rd</sup> of March 2004.

[24] It stands to reason from this analysis that the applications of Volvo are dismissed.

"Master J. Groves"

**TAB 6**



# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Andover Mining Corp. (Re)*,  
2013 BCSC 1833

Date: 20131004  
Docket: B131136  
Registry: Vancouver

**In the Supreme Court of British Columbia  
in Bankruptcy and Insolvency**

**In the Matter of the notice of Intention to Make a Proposal of**

**Andover Mining Corp.**

**And in the matter of**

**The Application by Enirgi Group Corporation under ss. 50.4(11) and 47.1(1)(b)  
of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-5**

Between:

**Enirgi Group Corporation**

Creditor

And

**Andover Mining Corp.**

Insolvent Person

Before: The Honourable Mr. Justice Steeves

## **Reasons for Judgment**

Counsel for the Creditor:

D.R. Brown  
M. Nied

Counsel for the Insolvent Person:

M.R. Davies

Place and Date of Trial/Hearing:

Vancouver, B.C.  
September 24, 2013

Place and Date of Judgment:

Vancouver, BC.  
October 4, 2013

Introduction

[1] Enirgi Group Corporation ("Enirgi") holds three promissory notes (by means of assignment) with a total value of \$6.5 million against Andover Mining Corp. ("Andover"). One of the notes, in the amount of \$2.5 million, was due on October 1, 2012 and it has not been paid. In August 2013 Andover filed an intention to file a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 ("*BIA*"). That proposal expires on October 4, 2013.

[2] This is a decision about two applications related to those notes.

[3] Andover seeks an order pursuant to s. 50.4(9) of the *BIA* for an extension of time for the filing of a proposal for a period of 45 days. According to Andover it has acted, and is acting, in good faith and with due diligence. Further, it would likely be able to make a viable proposal if the extension was granted and no creditor would be materially prejudiced if the extension was granted. Andover also submits that it has significantly more assets than debts and Enirgi has persistently been disruptive of the affairs of Andover as part of a campaign to target the assets of Andover.

[4] The second application is by Enirgi pursuant to s. 50.4(11) of the *BIA*. It seeks declarations that Andover's attempt to file a proposal is immediately terminated, a previous stay of proceedings is lifted, Andover is deemed bankrupt and a trustee in bankruptcy is appointed. The primary basis for Enirgi's application is the submission that Andover will not be able to make a proposal before the expiration of the period in question that will be accepted by Enirgi. Enirgi disputes that Andover has significantly more assets than debts. It also submits that it has a veto over any proposal by Andover because it is the largest creditor, it has lost faith in Andover's ability to manage its assets and it is concerned that Andover is restructuring its affairs to dissipate its assets. In the alternative, if there is to be an extension of Andover's proposal, Enirgi submits that a receiver should be appointed pursuant to s. 47.1 of the *BIA* to ensure transparency and fairness.

[5] Each party submits that its application should supersede the application of the other party. There are also disputes between the parties about a number of factual issues set out in affidavit evidence.

**Background**

[6] Andover is an advanced mineral exploration company incorporated under the laws of British Columbia in 2003. Its shares have been listed for trading on the TSX Venture Exchange since 2006. As of September 6, 2013 approximately 12,000,000 shares of Andover were issued and outstanding with more than 398 shareholders. Andover had a market capitalization of about \$9 million, as of September 14, 2013; its payroll is \$2,441 per month. According to publicly available audited financial statements, as of March 31, 2013, Andover had \$42.5 million of assets and \$9.1 million of liabilities.

[7] Andover has two main assets. It owns 83.5% of Chief Consolidated Mining Company ("Chief") that owns extensive amounts of land and mining equipment in Utah, U.S.A. Andover also owns 100% of the shares of Andover Alaska Inc. ("Alaska"), a company with large land holdings and mineral claims in Alaska, U.S.A. Affidavit evidence from Andover is that it has the prospect of significant and imminent cash flow from more than one project. This is discussed below.

[8] Enirgi is a natural resources development company incorporated under the laws of Canada.

[9] In 2011 and 2012 Andover issued non-interest bearing, unsecured promissory notes to Sentient Global Resources Fund IV ("Sentient"). The first note was dated September 23, 2011 with a principal of \$2.5 million and a maturity date of October 1, 2012. The second note was dated April 30, 2012 with a principal of \$2.5 million and a maturity date of May 1, 2014. The third note was dated August 31, 2012, the principal was \$1.5 million and the maturity date was September 1, 2014.

[10] In September 2012 there were discussions between Andover, Enirgi and Chief in regards to a potential joint venture, with the possibility that Enirgi would take

majority ownership of Andover. A memorandum of understanding was executed and Enirgi commenced a process of due diligence. According to Enirgi, the due diligence revealed a complex joint venture agreement between Chief and another company. Ultimately, in March 2013, the parties were not able to agree on terms that were commercially acceptable to Enirgi. On March 27, 2013 Sentient assigned the above three promissory notes to Enirgi including all of the rights and obligations of Sentient under the terms of the notes. These notes are the subject of the current applications. According to Enirgi, it made a reasonable business decision to cease discussions with Enirgi, it became the assignee of the three promissory notes and it then sought repayment of the first promissory note.

[11] Andover had not paid the first promissory note at this time, March 2013 (and it had not been paid up to the date of the hearing of these applications). According to Andover, the reason it was not paid on the due date was because there was an expectation that Sentient and then Enirgi would become a partner of Andover in the joint venture (or something more significant) and discussions on this were taking place as late as January 2013. The expectation of all parties, according to Andover, was that any agreement would have included cancellation of the first promissory note. Andover says Enirgi knew this and agreed to it.

[12] By letter dated April 5, 2013 Enirgi advised Andover of the assignment of the notes from Sentient to it and that the full amount of the first note (with a maturity date of October 1, 2012) remained outstanding. The letter also expressly put Andover on notice that demand for repayment could occur at any time. According to Andover, Enirgi's demand was made at a meeting in Toronto in May 2013. Andover describes the demand from Enirgi as a "shock" because Andover believed Enirgi acquired the notes from Sentient as part of a process to become a partner with Andover. Because of the short demand period, three days, Andover had no ability to meet the demand. This was the beginning of Enirgi becoming "very aggressive", according to Andover.

[13] In a letter dated May 28, 2013 Andover advised Enirgi that it was making its best efforts to secure funding to repay the first promissory note. On May 30, 2013

Enirgi again demanded repayment of the first promissory note. In a letter of that date Enirgi advised Andover that failure to pay would be considered default and the second and third notes would become immediately due and payable. Enirgi takes the position that, by application of the wording of the other two notes, they are now due and owing. As above, the total for all three notes is \$6.5 million and the due date for the second and third notes are May 1, 2014 and September 1, 2014, respectively. Whether Enirgi is correct in its interpretation of the notes and, therefore, all three notes are now due and owing is not an issue to be decided at this time.

[14] At the end of May 2013 Andover received \$1.7 million as a result of a private placement. Enirgi objects to the fact that Andover did not make prior public disclosure of Enirgi's demand letter prior to closing the private placement. Andover did not use the funds from the private placement to repay the first note. There is a dispute between the parties as to how the \$1.7 million was used.

[15] In a letter dated May 31, 2013 Andover advised Enirgi that it was expecting to receive funds from Chief greater than the amount of the first promissory note. The letter also offered a written undertaking to pay the first promissory note no later than September 3, 2013. On June 3, 2013 Enirgi demanded repayment of the first note, for the third time.

[16] Enirgi commenced this action on June 4, 2013 seeking to recover the total amount of the three promissory notes. At the end of July 2013 Andover filed affidavit evidence that it was engaged at the time in negotiations with third parties to raise funding to pay the \$2.5 million of the first promissory note. This payment was expected to occur on or before August 22, 2013. On August 8, 2013 the parties agreed to a Consent Order in the following terms:

...  
BY CONSENT the Defendant [Andover] is required to pay the Plaintiff [Enirgi] the amount of CAD \$2,604,000 on August 22, 2013 and if that amount is not paid by the Defendant to the Plaintiff as of August 22, 2013 this order shall for all purposes be of the same effect as a judgment of This Honourable Court for the payment of CAD \$2,604,000 by the Defendant to the Plaintiff;

...

[17] Andover says it agreed to the Consent Order because it expected to receive the funds to pay the Order. However, Enirgi obstructed the negotiations that were ongoing for the loan. Enirgi says that Andover's actions were misleading. These and other disputes between the parties are discussed below.

[18] According to Enirgi, Andover avoided having to meet its obligations pursuant to the first promissory note and the August Consent Order and this resulted in Enirgi losing confidence in Andover. Disclosure of information from the trustee was sought by Enirgi but, according to their submission, only very limited information was provided with regards to Andover's prospects and intentions. For example, Enirgi characterizes a September 6, 2013 letter from Andover as unresponsive and inconsistent with previous statements made by Andover. Enirgi also takes issue with a cash flow statement prepared by the trustee and it is submitted by Enirgi that subsequent requests for disclosure were also not complied with. Enirgi responds, in part, by saying that, as a result of a sophisticated tracking system, Andover has information available to it at a level of detail that is not normally available.

[19] As well, on September 4, 2013, Enirgi sent Andover a proof of claim and requested that Andover approve the claim. The claim was for payment of all three promissory notes as well as court order interest with respect to the first promissory note. In a letter dated September 12, 2013 the trustee acknowledged Enirgi's proof of claim but denied that the second and third promissory notes were due and payable. Further, according to the trustee, the proof of claim should be amended accordingly or it would be denied.

[20] On August 22, 2013 Andover filed a notice of intention to make a proposal under s. 50.4(1) of the *BIA* and a trustee was appointed. It would have been open to Enirgi to enforce the judgment described in the August 8, 2013 Consent Order the following day, August 23, 2013. The notice listed all of the creditors of Andover and the total is \$7,476,961.43. Enirgi is listed as the largest single creditor of Andover with a claim of \$6.5 million.

[21] During the hearing of these applications on September 24, 2013 counsel for Andover presented an affidavit filed the same day. Attached to the affidavits were two short emails and a letter from the president of Ophir Minerals LLC (“Ophir”) in Payson Utah, U.S.A. The letter states:

The following is a letter stating the intentions of Ophir Minerals LLC and Andover Ventures.. In an attempt to help secure the future of Andover Ventures, Al McKee, CEO of Ophir Minerals LLC, is in the process of securing a three dollar million loan (\$3,000,000) privately. This loan will be provided to Gordon Blankstein, Operating Manager for Andover Ventures. This loan will be considered prepayment of royalties due to Andover Ventures through mining operations of Ophir Mineral LLC.; The repayment of the loan will be deducted from the royalties to be paid. The purpose of the loan is to assist in the future financial security between the two companies to ensure future business operations.

[Reproduced as written].

[22] Andover relies on this letter as a basis for meeting its obligation to pay the first promissory note in the amount of \$2.5 million. Enirgi points to the use of “in the process” in the letter and submits that the letter is of little weight.

[23] At the conclusion of argument I was advised by counsel that Andover’s proposal expired that day, September 24, 2013. I extended the proposal to October 4, 2013.

## **Analysis**

### **Review of the evidence**

[24] There are some significant differences between the parties about the facts in this case. Some of these are portrayed by one party as evidence of bad faith on the part of the other party. These are primarily set out in original and reply affidavits from Gordon Blankstein, the CEO of Andover, and Robert Scargill, the North American Managing Director of Enirgi. There are the usual difficulties preferring one version of events over another on the basis of affidavit evidence. A full trial would be necessary to fully and conclusively decide these issues and this matter was set down for two hours, presumably because of the need to hear at least the application by Andover on the day its proposal expired.

[25] It is not in dispute that Enirgi holds three promissory notes (by means of assignment) with a total value of \$6.5 million against Andover. One of the notes, in the amount of \$2.5 million was due on October 1, 2012 and it has not been paid for the reasons discussed below. Enirgi's right to have the other two notes paid out is in dispute since they are due in 2014; that dispute is not part of the subject applications. All three notes are unsecured, non-interest bearing instruments.

[26] In April or May 2013 Enirgi demanded payment of the first note (\$2.5 million). Enirgi made a second demand in May 2013 and a third in June 2013.

[27] In June 2013 Enirgi commenced this action and in August 2013 Andover filed a notice of intention to file a proposal pursuant to s. 50.4(1) of the *BIA*. A trustee was appointed. A Consent Order of this court, dated August 8, 2013, stated that Andover was to pay an amount of \$2,604,000 to Enirgi on August 22, 2013.

[28] Andover has not paid the \$2.5 million due on the first promissory note (or the amount of \$2,604,000) for the reasons discussed below.

[29] I set out some of the factual differences between the parties as reflected in the affidavit evidence and my conclusions on that evidence as follows:

(a) Mr. Blankstein, on behalf of Andover, deposes that in May 2013 Enirgi issued an Insider Report advising the public of its demand on the first promissory note. According to Mr. Blankstein there "was no apparent legal basis to do so" and the directors of Andover "considered this a move to deflate Andover's share value and curtail its ability to raise funds."

In reply Mr. Scargill, with Enirgi, deposes that it "did not issue an insider report or otherwise advise the public that it had made demand on the first note at or about the time it made such demand on May 23, 2013." Further, "the first public announcement of the fact of the demand was made by Andover on June 5, 2013 only after Enirgi had commenced legal proceedings."



The result is that I am asked to prefer one person's affidavit evidence over another: either Enirgi issued an insider's report with the information of its demand, as deposed by Mr. Blankstein, or it did not, as deposed to by Mr. Scargill. However, since there is no evidence of an insider report with the statement in question I am unable to agree with Andover that such a report exists.

- (b) There were negotiations between Andover and Enirgi (and Chief) in October 2012 about a potential joint venture. A memorandum of understanding was signed but, following due diligence by Enirgi, there was no agreement on the joint venture.

According to Mr. Blankstein the prospect of these negotiations being successful (as well as previous negotiations to a similar end with Sentient) was the main reason that the first note was not paid. It was anticipated, by Andover at least, that any joint venture agreement would include purchase of stock in Andover and cancellation of the first note. There were "verbal assurances" from Sentient and Enirgi that there was no intention to make demand on the note and it was intended to convert the note as part of a venture agreement. Further, according to Andover, the demand on the first note was the beginning of a very aggressive campaign by Enirgi to ultimately get access to the assets of Andover, assets which were and are worth significantly more than the first note or all three notes.

In his affidavit evidence Mr. Scargill agrees that there were negotiations as described by Mr. Blankstein. However, they ended when he (Mr. Scargill) asked Mr. Blankstein to consider all or majority ownership by Enirgi in Andover. This was the "only possible involvement" by Enirgi in Andover, according to Mr. Scargill. He asked Mr. Blankstein to consider "what sort of transaction" that he and Andover might be interested in "but no transaction was ever proposed by Mr. Blankstein outside of a sale by him and his family of their equity ownership stake." Since there was "no realistic likelihood" of a

transaction, Enirgi decided to cease its efforts and turn its attention on being repaid for the first note.

It is clear that negotiations between Andover and Enirgi did not work out. It is also clear that Andover was surprised that the three promissory notes were assigned from Sentient to Enirgi. The evidence does not suggest that either party was more responsible than the other for the lack of an agreement (assuming there is some legal significance to that issue).

Mr. Scargill does not deny or mention the point raised by Mr. Blankstein that Enirgi agreed not to demand payment of the first note. Therefore, I conclude that there was at least acquiescence between the parties at the time of their negotiations that cancellation of the first promissory note would be part of any agreement. This conclusion also explains why payment on a note worth \$2.5 million and due in October 2012 was not demanded by Sentient and then Enirgi until after the negotiations failed.

In any event, the negotiations did fail and any commitment not to demand payment on the note ended. There is no evidence of any collateral agreement that amended the terms of payment and, therefore, the terms of the notes applied. That was obviously a shock to Andover's cash flow but it was permitted under the terms of the note, including the short period to make payment.

- (c) As above, I am not determining the issue of whether the second and third promissory notes are now due and payable because the first note was not paid.

A related matter is that Enirgi says that one of the deficiencies by Andover in disclosure of information relates to the Proof of Claim sent by Enirgi to Andover in September 2013. It required the trustee of Andover to confirm that the second and third notes were due and payable. The trustee declined to do so as long as the proof of claim included all three notes.

Since the issue of whether the second and third notes are now due is very much in dispute, I can find nothing objectionable in the trustee's response.

(d) In May 2013 Andover obtained about \$1.7 million from a private placement. According Mr. Scargill, none of this money was used to pay the first promissory note. Instead, it was used to repay a shareholder loan and to settle a wrongful dismissal lawsuit. Enirgi is concerned that all of the money from the private placement has been used for purposes other than payment of the first note.

Mr. Blankstein agrees that Andover received \$1.7 million from a private placement. However, he deposes that Mr. Scargill "neglects to include" all of the facts although Mr. Scargill "knew all about" the placement "from its inception" and Enirgi "was invited to participate in it." Specifically, Mr. Scargill was "fully aware" of the payment of the shareholder loan (in the amount of \$375,000). He was told about it at the time and he "never indicated any objection" to it then. Further, the funds from the placement were committed in April 2012 to "pay certain items" and for the operating expenses of Andover "for the next several months, well before the sudden demand for repayment by Energi [sic] on May 23, 2013." Despite knowing that Andover was to receive the money from the private placement at the time of its demand, Enirgi raised no complaints or allegations until Mr. Scargill's affidavit, filed September 17, 2013.

Mr. Blankstein also deposes that the former employee involved in the lawsuit was an employee of Chief and it made the settlement. The settlement was for \$275,000 but it is to be paid in instalments and only \$50,000 has thus far been paid. Chief is responsible for paying the balance.

Overall there was a private placement of about \$1.7 million dollars that was received by Andover before its proposal was filed. It was used to pay for a shareholder loan and for operating expenses and some of these at least were committed to as early as April 2012. Further, the wrongful dismissal payment

was a matter involving Chief, rather than Andover, and only \$50,000 has been paid by Chief. I conclude that Mr. Scargill did not have all of the pertinent information before him when he gave his affidavit evidence.

(e) According to the affidavit of Mr. Scargill, Andover's agreement to the August 2013 Consent Order:

... was calculated to encourage Enirgi to consent to the Judgment and mislead Enirgi into believing that Andover would be in a position to pay the Judgment as required and that available funds would not be used in the interim, for the Preferential Payments [the private placement, discussed above] or other improper purposes.

On the other hand, Mr. Blankstein deposes that Andover agreed to the Consent Order because it thought at the time that it was to receive \$3 million as a result of mortgaging assets of its Utah operations, through Chief. However, the mortgage did not complete. Efforts to obtain an unsecured loan were then unsuccessful. Mr. Blankstein has also deposed that in the summer of 2013, counsel for Enirgi contacted counsel for Andover, "[d]espite there being no apparent legal basis for doing so", and "insisted that Chief entering into a mortgage transaction would violate the agreements between Energi [sic] and Andover and was prohibited." This left Mr. Blankstein "scrambling to raise an unsecured loan in a very short time frame."

In argument, Enirgi described Mr. Blankstein's evidence on this issue as misleading. The basis of this is that the correspondence between counsel was without prejudice, it occurred on or about June 21, 2013 and, therefore, "the suggestion that Andover only learned after August 8, 2013 [the date of the Consent Order] that Enirgi refused to consent is clearly misleading."

From this I take it that Enirgi did contact Chief to say any mortgage by Chief would violate agreements between Andover and Enirgi. This took place before the date of the Consent Order. On its face it supports the contention by Andover that Enirgi has obstructed its efforts to obtain funding although there

is no evidence or argument before me to decide whether Enirgi was correct in taking the view it did with Chief.

- (f) Enirgi asserts, through Mr. Scargill, that Andover is attempting to restructure its assets and this is evidenced from its “continued failure to engage Enirgi” by refusing to provide information regarding its plans or opportunities, despite Enirgi’s repeated requests for information. Mr. Blankstein replies by deposing that Andover is not attempting to restructure; [i]t is simply attempting to gain some time and distance so as to be able to pay Enirgi.”

All that can be said on this point is that there is no evidence that Andover is restructuring its assets. Mr. Scargill is concerned that is happening or it is going to happen but the evidence here does not support that conclusion.

- (g) In argument Enirgi submits that Andover has been “unresponsive” to requests for information about the proposal process being followed by Andover. For example, Mr. Scargill deposes that Andover, in correspondence in August 2013, did not adequately address the concerns of Enirgi. Similarly, according to Enirgi, Andover has provided a deficient cash flow statement and has generally provided inadequate information. Enirgi also submits that Andover has given only “vague assertions” and inconsistent information about its assets and its potential plans.

For its part, Mr. Scargill deposes that Andover asked Enirgi by letter of September 6, 2013 (through counsel) to present “whatever proposal or suggestion” Enirgi might have and Andover would be “more than happy to consider same.” No reply was received.

Mr. Blankstein also deposes that Andover provided information to Enirgi about all of Chief’s information, files and data with the agreement by Enirgi that it would be returned. It was not returned. In reply Mr. Scargill deposes that “by oversight” the information was not returned and it was returned on or about September 18, 2013.

The evidence is that both parties have been tactical in their requests for information and their responses to those requests. There has been some unresponsiveness and some vagueness as the parties have positioned themselves for their competing applications. I can find no legal or other issue that is relevant to those applications.

(h) In its 2013 financial statements Andover stated that it had filed a notice "to seek creditor protection" and it was done "to ensure the fair and equitable settlement of the Company's liabilities in light of the legal challenges launched" by Enirgi. According to Enirgi the reference to "legal challenges" is incorrect and this statement by Andover demonstrates that the notice of proposal was a "purely defensive" act on the part of Andover.

I take it as beyond dispute that Andover has been operating in a defensive manner since the demand on the first note was made in May 2013. Further, I accept that its notice of intention to file a proposal is also defensive. As for what are "legal challenges" that is a phrase that is capable of many meanings.

(i) Andover alleges that Enirgi has obstructed its efforts to obtain financing to pay the first promissory note of \$2.5 million. Mr. Blankstein deposes that, to this end, Enirgi has done the following (in part, this is a summary of some of the above issues): made an abrupt demand for payment (after it and Sentient had given verbal assurances that there would be no demand); made demands on the second and third promissory notes that are payable in 2014; interfered in attempts by Andover to enter into a joint venture with Ophir without any legal basis to do so; and disrupted a mortgage transaction between Andover and Chief in the summer of 2013.

Mr. Scargill, in reply, deposes that neither he nor anyone ("after due inquiry") has been in contact with Ophir.

The allegation by Andover about Ophir is a vague one and I accept Mr. Scargill's evidence on it. I have discussed the issues of Enirgi's abrupt demand on the first promissory note and the allegation that Enirgi disrupted a mortgage arrangement between Andover and Chief above. Enirgi interprets the language of the three promissory notes to mean that all are due on default of the first one. That is a legal issue that is not before me.

- (j) Enirgi attempts to minimize the assets of Andover and maximize its debts. There may well be more detailed evidence that supports a different valuation of the assets than presented by Andover. However, on the evidence in this application, I accept that Andover is cash poor and asset rich.

[30] Despite vigorous argument to the contrary by both parties I am unable to find bad faith on the part of either party. There is the apparent communication by Enirgi to Chief about a possible mortgage arrangement for Andover which reflects the aggressive approach that Enirgi has taken to Andover. That represents the aggressiveness of Enirgi rather than any bad faith.

[31] Clearly there has been a falling out between the parties and it is also clear that Andover is vulnerable because of its lack of cash and Enirgi is being aggressive in seeking repayment of, at least, the first note.

### **The applications**

[32] Andover now seeks an extension of its proposal pursuant to s. 50.4(9) of the *BIA* and Enirgi seeks termination of Andover's proposal pursuant to s. 50.4(11) of the *BIA*.

[33] I set out the two provisions of the *BIA* at issue as follows;

#### **Extension of time for filing proposal**

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five

months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

...

**Court may terminate period for making proposal**

50.4(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

[34] Each party says that its application should prevail over the other's application. I will review the case law presented by the parties on this issue as well as some interpretive issues under s. 50.4(9) and s. 50.4(11).

**The approaches in *Cumberland* and in *Baldwin***

[35] In a decision relied on by Enirgi, Mr. Justice Farley of the Ontario Court of Justice denied the appeal of a registrar's decision that had dismissed an application for an extension of time by debtors under s. 50.4(9): *Baldwin Valley Investors Inc. (Re)*, [1994] O.J. No. 271, (C.J. (Gen. Div.)). The court noted that the test under s. 50.4(9)(b) was whether the debtors "would likely be able to make a viable proposal if the extension being applied for was granted." "Likely" did not mean a certainty and, using the Oxford Dictionary, it was defined as "such as might well



happen, or turn out to be the thing specified, probable ... to be reasonably expected." Applied to the facts, the conclusion was that it was not likely the debtors would be able to make such a proposal since they had only submitted a cash flow statement. At para. 4, Mr. Justice Farley concluded "I do not see the conjecture of the debtor companies' rough submission as being 'likely'". Further, the court noted at para. 6 that the debtors did not even attempt to meet the condition of material prejudice under s. 50.4(9)(c) and the debtor was changing inventory into cash.

[36] The court also noted that the registrar (who made the decision being appealed) focused on the fact that the creditor had lost all confidence in the debtor. The creditor held a substantial part of the creditor's debt. Mr. Justice Farley pointed out, at para. 3, that that was not the test under s. 50.4(9)(b):

This becomes clear when one examines s. 50.4(11)(b) and (c); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(b) and 11(b)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(c) but with no corresponding clause in s. 50.4(9)).

[37] Enirgi relies on this statement for its submission that its application for termination under s. 50.4(11) should prevail over the application of Andover under s. 50.4(9).

[38] However, that statement was made as a comment on the previous registrar's reliance on the fact that the creditor (who held significant security) would not vote for any proposal. Mr. Justice Farley in *Baldwin* pointed out that was not the test under s. 50.4(9). He reasoned that this was clear because Parliament had distinguished between a situation of a viable proposal under s. 50.4(9)(b) and s. 50.4(11)(b) from a situation where it is likely that the creditors will not vote for a proposal no matter how viable, under s. 50.4(11)(c). In s. 50.4(9) there was no clause corresponding to s. 50.4(11)(c). The result is that this part of *Baldwin* does not support Enirgi's submission that an application under s. 50.4(11) supersedes one under s. 50.4(9).

[39] The result in *Baldwin* was that the debtor's application under s. 50.4(9) was denied. There does not appear to have been an application for termination under s. 50.4(11), unlike the subject case. At para. 8, the court did contrast the provisions

by saying that, if the debtor had been successful in its application to extend, it would have been a "Pyrrhic victory" because the creditor bank would have been able "to come right back in a motion based on s. 50.4(11)(c)."

[40] This is broad language but I acknowledge that it is capable of meaning that s. 50.4(11) is to supersede s. 50.4(9). However, such an interpretation would seem to be inconsistent with the other reference in *Baldwin* that the two provisions apply to different situations (discussed above). I also note that *Baldwin* only decided the merits of the s. 50.4(9) application, there was no application under s. 50.4(11) and there was no decision in favour of the creditor on the basis of that provision. The above statement was, therefore, *obiter*.

[41] Another decision relied on by Enirgi is *Cumberland Trading Inc. (Re)*, [1994] O.J. No. 132, (C.J. (Gen. Div.)) where a creditor sought to terminate a debtor's proposal after the notice of intention was filed. There does not appear to have been an application by the debtor to extend the proposal under s. 50.4(9), only an application under s. 50.4(11). Mr. Justice Farley found there was no indication what the proposal of the debtor was to be; "... there was not even a germ of a plan revealed" only a "bald assertion" and "[t]his is akin to trying to box with a ghost" (paragraph 8). The application for termination under s. 50.4(11) was allowed.

[42] The court noted, at para. 5, that the BIA was "debtor friendly legislation" because it provided for the possibility of reorganization by a debtor but it (and the *Companies Creditors Arrangement Act*, R.S.C. 1985 c. C-36) "do not allow debtors absolute immunity and impunity from their creditors". Concern was expressed about debtors too frequently waiting until the last moment, or beyond the last moment, before thinking about reorganization. The automatic stay available to a debtor by filing a notice of intention to file a proposal was noted. However:

... [the] BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case [the creditor] is utilizing s. 50.4(11) to do so.

[43] Enirgi relies on this statement in its submission that its termination application should proceed over the extension application of Andover. This is broad language but I acknowledge Enirgi's submission that this statement provides support for its position that s. 50.4(11) permits it to "cut short" a stay or extension under s. 50.4(9).

[44] The court also described s. 50.4(11)(c) as permitting termination of a proposal if the debtor cannot make one before the expiration of the "period in question, that will be accepted by the creditors ..." Mr. Justice Farley concluded that s. 50.4(11) deals specifically with the situation "where there has been no proposal tabled." It provides that there is "no absolute requirement" that the creditors have to wait to see what the proposal is "before they can indicate they will vote it down" (paragraph 9). Enirgi relies on this statement.

[45] In my view, this statement goes no further than saying what is self-evident: under s. 50.4(11)(c) any proposal must be accepted by the creditors. However, as explained in *Baldwin*, that is not a requirement under s. 50.4(9). *Cumberland* also says that the making of the proposal may be still to come but a creditor can exercise its rights under s. 50.4(11)(c). I do not agree with Enirgi that this statement in *Cumberland* supports its submission.

[46] From the above I conclude that there is some support for the submission of Enirgi that I should consider (and allow) its application under s. 50.4(11) over that of Andover under s. 50.4(9). There is the *obiter* in *Baldwin* that a successful application under s. 50.4(9) would be a Pyrrhic victory because a creditor could come right back with an application under s. 50.4(11). And there is the statement in *Cumberland* that an application under s. 50.4(11) can cut short an application under s. 50.4(9).

#### **The approach in *Cantrail***

[47] A quite different view is set out in a more recent British Columbia case, *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, 2005 BCSC 351, [*Cantrail*] a decision relied on by Andover. Master Groves, as he then was, was presented with a submission by the creditor in that case that it intended to vote against any proposal from the debtor because it had lost faith in the debtor. The creditor was one of 91

creditors and its share of the total debt was not explained. This is essentially the position of Enirgi.

[48] In response to the creditor's submission that it could vote under s. 50.4(11) against any proposal of the debtor under s. 50.4(9) the court said:

14. If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type [sic] of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.

15. If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.

16. If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

[49] Since there was no evidence of bad faith on the part of the debtor in *Cantrail* and no determination of what the actual proposal would be, Master Groves allowed the application under s. 50.4(9) to extend the proposal and dismissed the application of the creditor under s. 50.4(11) to terminate the proposal (paragraphs 15-17). This is the result sought by Andover but opposed by Enirgi.

[50] Master Groves also adopted the view at para. 11 of *N.W.T. Management Group (Re)*, [1993] O.J. No. 621 (C.J. (Gen. Div.)) that the intent of the *BIA* is that s. 50.4(9) and s. 50.4(11) should be judged on a rehabilitation basis rather than on a liquidation basis. And, in *Cantrail*, at para. 4, the court concluded that an objective standard must be applied to determine what a reasonable person or creditor would do, as was done in *Baldwin*.

[51] Enirgi distinguishes *Cantrail* on two grounds. First, it is submitted that at para. 9 *Cantrail* contains the inaccurate statement that “s. 50.4(11) is the mirror of s. 50.4(9)”. As well, there was no discussion of *Cumberland* in *Cantrail*.

[52] I accept that, while there are a number of similarities between the two sections, there is one significant difference: under s. 50.4(11)(c) a creditor has a veto over any proposal. S. 50.4(9) does not contain such a veto and it is not a mirror to the extent of being exactly the same as s. 50.4(11). In my view this comment on a very small part of *Cantrail* does not affect the broader meaning of that judgement. And it is true that *Cumberland* was not discussed in *Cantrail* although the submission of the creditor in *Cantrail*, as recorded in the oral judgement, is in language very similar to that used in *Cumberland*.

[53] Another decision relied on by Andover as being similar to *Cantrail* is *Heritage Flooring Ltd. (Re)*, [2004] N.B.J. No. 286 (Q.B.) where a debtor filed an application under s. 50.4(9) for an extension and the creditor filed an application for termination under s. 50.4(11). The court allowed the application for an extension. The *Cumberland* and *Baldwin* decisions were noted but in *Heritage* the evidence was that the creditor would be paid out and, in any event, the creditor was not in a position to veto any proposal. *Cantrail* was also followed in *Entegrity Wind Systems Inc. (Re)*, 2009 PESC 25 although the facts in *Entegrity* did not include an application by the creditor under s. 50.4(11). The objective standard discussed in *Cantrail* was also adopted in *Convergix Inc. (Re)*, 2006 NBQB 288.

#### ***Cumberland or Cantrail?***

[54] The result of the above is that there are different approaches to situations where there are competing applications under sections 50.4(9) and 50.4(11).

[55] The comments from *Cumberland* discussed above suggest that an application by a creditor under s. 50.4(11) can “cut short” an application under s. 50.4(9) and there is no absolute requirement that a creditor has to wait to see a proposal before voting it down. And in *Baldwin* there is a comment, in *obiter*, that

any successful application under s. 50.4(9) would be a Pyrrhic victory because the creditor could “come right back” with an application under s. 50.4(11).

[56] On the other hand, in *Cantrail* the court decided that there should be an extension for a viable proposal, not yet formulated, under s. 50.4(9) even though the creditor has lost faith in the debtor and has said it will vote against any proposal.

[57] As a matter of interpretation of the *BIA* I consider that s. 50.4(9) and s. 50.4(11) set out distinct rights and obligations. In the first case a debtor is entitled to an extension of time to make a proposal; in the second case a creditor can apply for the termination of the time for making a proposal. As I understand the submission of Enirgi the fact that it is the primary creditor (by some considerable margin), that it has lost confidence in Andover and that it will not accept any proposal from Andover supports consideration of its application for termination under s. 50.4(11).

[58] The problem with this submission is that it does not reflect the factors under s. 50.4(9) for granting an extension of time for a proposal. A creditor under this provision does not have the rights that Enirgi seeks over the debts of Andover. Those rights are in s. 50.4(11)(c) but that is a different inquiry. Indeed, one effect of the submission of Enirgi is to conflate s. 50.4(9) and s. 50.4(11). I recognize the comments from *Cumberland* and *Baldwin* that may support a contrary view. However, recognition must be given to the differences between the provisions in dispute and that contrary view does not do so. In my view the analysis and conclusions in *Cantrail* is to be preferred.

[59] I add that there are some situations where an application for an extension is overtaken by an application for termination. In *Cumberland* there was not even a germ of a proposal from the debtor for the analysis under s. 50.4(9). In that circumstance the court then proceeded to the other application before it from the creditor under s. 50.4(11).

[60] Other cases relied on by Enirgi are of a similar kind. In *Baldwin* the proposal was conjecture and rough (and the debtor had not even considered the issue of any

material prejudice to the creditor from the proposal). Similarly, in *St. Isidore Meats Inc. v. Paquette Fine Foods Inc.*, [1997] O.J. No. 1863 (Gen. Div.) and *1252206 Alberta Ltd. v. Bank of Montreal*, [2009] A.J. No. 648 (Q.B.) the courts proceeded to a determination of the s. 50.4(11) application after finding there was no viable proposal. In *Triangle Drugs Inc. (Re)*, [1993] O.J. No. 40 (C.J. (Gen. Div.)) the creditors had a veto and they had actually seen the proposal. The court imported principles from the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, concluded that it was fruitless to proceed with a plan that is doomed to failure and allowed the creditor's application under s. 50.4(11). In *Com/Mit Hitech Services Inc. (Re)*, [1997] O.J. No. 3360 (C.J. (Gen. Div.)) there was no good faith or due diligence on the part of the debtor and the court proceeded to consider and allow the creditor's application under s. 50.4(11).

[61] In my view, these cases represent recognition of the procedural and business realities of the various situations rather than a legal conclusion that an application for termination will supersede an application for an extension.

[62] It follows that I find that Andover is entitled to have its application under s. 50.4(9) considered on its merits. If it is not meritorious then it is logical and consistent with the authorities to proceed with the application by Enirgi under s. 50.4(11).

#### **The application by Andover under s. 50.4(9)**

[63] With regards to the merits of Andover's application under s. 50.4(9) all of the following issues must be decided in its favour. Has it acted in good faith and with due diligence? Is it likely it would be able to make a viable proposal if an extension is granted? And, if an extension is granted, would a creditor be materially prejudiced?

[64] With regards to good faith and due diligence *N.T.W.* says that it is the conduct of Andover following the notice of intention in August 2013, rather than its conduct before then, that is to be considered. I have found above that the evidence does not support a finding of bad faith against either party.

[65] With regards to due diligence, since August 2013 Andover has obtained the September 24, 2013 letter from Ophir that says the latter "is in the process" of finalizing a loan of \$3,000,000 to Andover. This is not a firm commitment of funds and nor does it need to be under s. 50.4(9); it does reflect some diligence on Andover's part. Mr. Blankstein also deposes that he has been having discussions with another party but he cannot reveal the name of that party because he is concerned that Enirgi will obstruct those discussions, as they did with Chief in June 2013. This latter information is not particularly helpful. Nonetheless I conclude that Andover has acted with sufficient due diligence.

[66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": *Cumberland* at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not be a certainty and "likely" means "such as might well happen." (*Baldwin*, paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

[67] I turn to a review of the assets of Andover in order to consider whether they provide some support for the viability of any proposal from Andover. The evidence for this review is from the affidavit of Mr. Blankstein.

[68] Alaska (wholly owned by Andover) is expecting, as a result of preliminary discussions, a N143101 Resource Calculation for a property to show approximately 1,200,000,000 pounds of copper with a gross value of about \$3,600,000,000. An immediate net value of \$60,000,000 and \$120,000,000 is estimated, depending on the world price of copper. The State of Alaska is confident enough in the property that it has financed a road to it. In a separate property, Alaska has an estimated mineralization of 4,000,000 tons of 4.5 % copper and Andover has spent approximately \$10,000,000 in developing this project. Alaska is solvent and up to date in its financial obligations.



[69] With respect to Chief (83% owned by Andover), it is also solvent and generally up to date on its obligations. Andover purchased 65% of the shares of Chief in 2008 for \$8,700,000 with an environmental claim against it in the amount of \$60,000,000. That claim has been negotiated down to a smaller number and the current amount due is \$450,000, with half due in November 2013 and the other half due in November 2014. This has increased the value of Chief significantly, according to Andover.

[70] Financial statements in March 2013 showed Chief had \$33,000,000 in equity, based on land and equipment (not mineral deposits). It owns more than 16,000 acres of land in Utah and leases an additional 2,000 acres. Plant and equipment have been independently appraised at \$19,200,000. Andover estimates a cash flow in the next year of \$7,000,000 to \$11,000,000 to Chief.

[71] Andover and Chief are also presently involved in a joint venture with Ophir regarding deposits of silica, limestone and aggregate on property owned by Chief. Production will commence in November 2013 and sold to customers of Ophir. Ophir is spending \$3,000,000 on exploration and development and production equipment has been ordered. Andover expects to receive from these two mines and a third (a joint venture with Rio Tinto) \$7,200,000 to \$10,900,000 in annual production net revenues commencing at the end of 2014.

[72] Chief has another property called Burgin Complex. At one time Enirgi was apparently interested in this specific property. A Technical Report, dated December 2, 2011, shows an expected cash flow of \$483,000,000 in today's metal prices.

[73] By way of a summary, publicly available financial statements in March 2013 report that Andover had \$42.5 million in assets and \$9.1 of liabilities.

[74] Enirgi generally minimizes the asset value of Andover but it does not dispute the specific numbers above. In my view these are impressive numbers and they reflect a strong asset base for Andover. I accept that they do not demonstrate the cash at hand to pay the first promissory note and at this time Andover remains asset

rich and cash poor. But it is not “trying to box with a ghost” (as in *Cumberland*) to conclude that the assets of Andover support the view that it is likely that it can present a viable proposal. As above, there is also the prospect of a \$3,000,000 cash loan from Ophir and that is some evidence of an imminent injection of cash into Andover. It has not materialized as yet but it is further evidence of the likelihood of a viable proposal. A certainty is not required and I conclude that a proposal is likely in the sense it might well happen.

[75] Enirgi points out that it holds the largest portion of unsecured debt of Andover (more than 80%) and it submits that this gives them a veto over any proposal. That may take place but thus far there is no proposal and Enirgi will have to make a business decision about its response in the event one is presented. Again, as an issue under s. 50.4(9), a proposal does not have to be acceptable to Enirgi. As well, I also note comments from the Court of Appeal, in the context of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, that questioned the legal basis of a creditor forestalling an application for a stay and whether the court's jurisdiction could be “neutralized” in that way: *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, cited in *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775, at paras. 40-41.

[76] The third requirement under s. 50.4(9) is that no creditor should be materially prejudiced if an extension is granted. As emphasized in *Cantrail* at para. 21 the test is not prejudice but material prejudice. It is also an objective test: *Cumberland* at para. 11. In the subject case there is no evidence that the security in the first promissory note would be less if an extension was granted. Enirgi asserts that Andover is restructuring its assets but there is no evidence of that and, in the event it occurs, remedies are available on short notice. Unlike in *Cumberland*, the debtor here is not converting inventory into cash. It is true that the note (or notes) is non-interest bearing but Enirgi knew that when it became an assignee in March 2013 and the note had not been unpaid since October 2012. I conclude that there is some prejudice to Enirgi but not material prejudice.

[77] Finally, I note in *Cantrail* and *N.W.T.* that the objective of the *BIA* is rehabilitation rather than liquidation. Andover has a nominal payroll but liquidation of Andover and its assets would obviously affect a number of other companies and be a complicated and protracted affair. It may come to that but on the basis of the evidence available at this time I conclude that an extension of Andover's proposal should be granted.

[78] Since Andover has met the requirements of s. 50.4(9) I find that its application under that provision must be allowed. It should be given the opportunity to make a proposal and an extension of time of 45 days is granted to do so.

**Summary and conclusion**

[79] In cases such as this where there are competing applications under s. 50.4(9) and s. 50.4(11) the debtor is entitled to present a proposal under the former provision if it is likely a viable proposal can be presented and the other requirements of s. 50.4(9) are met. In that event the debtor should have the opportunity to present a proposal. A creditor has the ability under s. 50.4(11) to decide whether a proposal is acceptable but does not have that right under s. 50.4(9).

[80] In this case Andover has significant assets and it is likely that it will be able to present a viable proposal. As well, there is no evidence of the part of Andover of bad faith, it has acted generally in good faith, it has acted with due diligence in attempting to construct a proposal and there is no material prejudice to Enirgi if an extension is granted. In the event that Andover presents a proposal Enirgi will have then have the opportunity to decide what its position will be on it. This will be a business decision rather than a matter under s. 50.4(11).

[81] The application by Andover under s. 50.4(9) is allowed. It is entitled to an Order extending the time for filing a proposal under Part III of the *BIA* for a period of 45 days to give it an opportunity to present a proposal.

[82] The application of Enirgi under s. 50.4(11) is dismissed with leave to reapply.

[83] I considered the alternate application of Enirgi to appoint a receiver under section 47.1 of the *BIA*. I note that there is a trustee appointed as part of the notice of intention. He apparently disagreed with Enirgi about what should be in a proof of claim document but for defensible reasons. There is otherwise no evidence that something more than a trustee is warranted at this time.

[84] I remain seized of this matter and any subsequent applications related to the insolvency of Andover. I am available on short notice if there is a need to move expeditiously. Costs will be in the cause.

“Steeves J.”

**TAB 7**

Canada Federal Regulations  
Bankruptcy and Insolvency Act  
Can. Reg. 368 — Bankruptcy and Insolvency General Rules  
General

C.R.C. 1978, c. 368, s. 3

s 3.

Currency

**3.**  
In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

**Amendment History**  
SOR/98-240, s. 1

**Currency**  
Federal English Statutes reflect amendments current to November 13, 2019  
Federal English Regulations are current to Gazette Vol. 153:20 (October 2, 2019)

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Canada Federal Regulations  
Bankruptcy and Insolvency Act  
Can. Reg. 368 — Bankruptcy and Insolvency General Rules  
General

C.R.C. 1978, c. 368, s. 6

s 6.

Currency

6.  
6(1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

6(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

6(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

6(4) The court may, on an *ex parte* application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

**Amendment History**

SOR/98-240, s. 1; SOR/2007-61, ss. 3, 63(b)

**Currency**

Federal English Statutes reflect amendments current to November 13, 2019  
Federal English Regulations are current to Gazette Vol. 153:20 (October 2, 2019)

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**TAB 8**



**Service by electronic method**

**11.21(1)** A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and

- (a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and
- (b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.

**(2)** Service is effected under subrule (1) when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.

**(3)** In this rule, “*electronic*” and “*electronic agent*” have the same meanings as they have in the *Electronic Transactions Act*.

AR 124/2010 s11.21;163/2010

**Information note**

Section 1(1)(a) and (b) of the *Electronic Transactions Act*, which define “*electronic*” and “*electronic agent*”, read as follows:

- (a) “*electronic*” includes created, recorded, transmitted or stored in digital form or in any other intangible form by electronic, magnetic or optical means or by any other means that have similar capabilities for creation, recording, transmission or storage;
- (b) “*electronic agent*” means a computer program or any other electronic means used to initiate an act or to respond to electronic information, records or acts, in whole or in part, without review by an individual at the time of the initiation or response;

Rule 11.21 allows service by fax if the conditions described in the rule are met.

**Recorded mail service**

**11.22(1)** A document, other than a commencement document, may be served on a party by being sent by recorded mail, addressed to the party at the address for service provided in the most recently filed document in the action.

- (2)** Service is effected under this rule on the earlier of
- (a) the date acknowledgment of receipt is signed, and
  - (b) 7 days after the date on which the recorded mail is sent.

AR 124/2010 s11.22;143/2011

**Information note**

See also rule 11.31(3) [*Setting aside service*] for when service under subrule (2) may be set aside.

**Division 6**  
**Validating, Substituting, Dispensing with and**  
**Setting Aside Service**

**Validating service**

**11.27(1)** On application, the Court may make an order validating the service of a document served inside or outside Alberta in a manner that is not specified by these rules if the Court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the person to be served.

(2) On application, the Court may make an order validating the service of a document served inside or outside Alberta if the Court is satisfied that the document would have been served on the person or would have come to the attention of the person if the person had not evaded service.

(3) If service is validated by the Court under this rule, service is effected on the date specified in the order.

(4) Subrules (1) to (3) apply despite

- (a) any previous order that permitted or directed service of the document by a particular method, and
- (b) the fact that the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* applies to service of the document.

AR 124/2010 s11.27;140/2013

**Substitutional service**

**11.28(1)** If service of a document, inside or outside Alberta, is impractical, the Court may, on application, make an order for substitutional service.

(2) The application must be supported by an affidavit

- (a) setting out why service is impractical,
- (b) proposing an alternative method of service, and
- (c) stating why the alternative method of service is likely to bring the document to the attention of the person to be served.

(3) Unless otherwise ordered, an order for substitutional service of a document must be served with the document except when substitutional service is by advertisement, in which case the advertisement must contain a reference to the order.

(4) If a document is served in accordance with an order for substitutional service, service is effected on the date specified in the order.

**Dispensing with service**

**11.29(1)** On application, the Court may make an order dispensing with service, inside or outside Alberta, if service of a document by a method prescribed by these rules is impractical or impossible.

- (2) The application must be supported by an affidavit
- (a) setting out that all reasonable efforts to serve the document have been exhausted or are impractical or impossible,
  - (b) stating why there is no or little likelihood that the issue will be disputed, and
  - (c) stating that no other method of serving the document is or appears to be available.

#### Information note

Rule 2.32(2) [*Automatic termination of lawyer of record and resolving difficulties*] provides that a party may apply to the Court for directions concerning service of documents if a lawyer stops acting for a client.

#### Proving service of documents

**11.30(1)** Service of a document in Alberta and service of documents other than commencement documents outside Alberta may be proved to have been effected

- (a) by an affidavit
  - (i) stating that the person was served,
  - (ii) describing the method of service, and
  - (iii) stating the date and place of service,
- (b) by an acknowledgment or acceptance of service in writing by the person served or by a lawyer on the person's behalf, or
- (c) by an order validating service under rule 11.27 [*Validating service*].

(2) Service of a commencement document outside Alberta may be proved to have been effected

- (a) by an affidavit
  - (i) stating the real and substantial connection between Alberta and the claim,
  - (ii) stating that the person was served,
  - (iii) describing the method of service, and
  - (iv) stating the date and place of service,
- (b) by an acknowledgment or acceptance of service in writing by the person served or by a lawyer on the person's behalf, or
- (c) by an order validating service under rule 11.27 [*Validating service*].

AR 124/2010 s11.30;143/2011

#### Setting aside service

**11.31(1)** A defendant may apply to the Court to set aside

- (a) service of a commencement document,
- (b) an order for substitutional service of a commencement document, or